CONSTITUTIONAL COURT DECISIONS

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Preface

The publication of this volume is aimed at introducing to foreign readers important cases decided from January 1, 2009 to December 31, 2009 by the Korean Constitutional Court.

This volume contains 40 cases, 8 full opinions and 32 summaries.

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

December 24, 2010

Ha Chul-yong
Secretary General
Constitutional Court of Korea

EXPLANATION OF ABBREVIATIONS & CODES

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

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

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I. Full Opinions

1. Restriction on Right to Prosecute Offenders of Traffic Accidents Causing Serious Injury Case

[21-1(A) KCCR 156, 2005Hun-Ma764, 2008Hun-Ma118 (consolidated), February 26, 2009]

Questions Presented

1. Whether the portion of the main sentence of Article 4 Section 1 of the Act on Special Cases Concerning the Settlement of Traffic Accidents which provides that a driver who commits a crime by inflicting bodily injury through negligence in driver's duties or gross negligence in traffic accidents shall not be prosecuted (hereinafter, the "Instant Provision") violates the victim's right to make a statement during proceedings of a trial.

2. Whether the Instant Provision violates the right to equality of traffic accident victims

3. Whether the Instant Provision violates the state's duty to protect people's basic rights of traffic accident victims

4. Whether precedents holding Article 4 Section 1 of the former Act on Special Cases Concerning the Settlement of Traffic Accidents constitutional was overruled

Summary of the Decision

A. 1. In case the traffic accident victim suffers serious injury due to negligence in driver's duties or gross negligence

The Instant Provision, given the increase in the number of cars and self-driving, intends to encourage drivers to subscribe to general insurance and thereby cover the damage of traffic accident victims promptly and adequately as well as to prevent the increase in the number of repeat offenders involved in traffic accidents. This serves

the legitimate purpose and satisfies the suitability of the means

In case the victim's life is endangered, or the victim becomes disabled or develops intractable or incurable diseases resulting from a traffic accident, that is, when there is an infliction of severe injury (refer to Article 258 Sections 1 and 2 of the Criminal Act), various actions such as summary indictment or stay of prosecution other than regular prosecution should be also available depending on the causes of accident, particularity of the victim (elderly, etc.), whether the victim is responsible for negligence and, if so, the degree thereof. However, nevertheless providing unconditional immunity to drivers for having subscribed to general insurance, etc. unless applicable to the Proviso of Article 3 Section 2, Act on Special Cases Concerning the Settlement of Traffic Accidents (hereinafter, "the Proviso") violates the rule of the least restrictive means.

The traffic accident rate in Korea is very high compared to other OECD members, and it is hard to find laws in advanced countries that prevent the filing of prosecution against the drivers responsible for accidents just because their cars are insured. The offenders are likely to think lightly of the violation of traffic regulations and neglect the duty of safe driving. It is also undeniable that, even in traffic accidents involving serious injury, drivers tend to place the responsibility of accident management, such as payment of insurance money, on the insurance company and not take sufficient care for the actual recovery of the damage inflicted on the victim. Given all the above, the fact that a seriously-injured victim is fundamentally prevented from exercising his/her right to make a statement during proceedings of a trial in accordance with the Instant Provision undermines the balance of interests as public interests - prompt management of traffic accidents and prevention of the rise in the number of recidivists - are being upheld at the great expense of the victim's private interests.

Therefore, the Instant Provision violates the rule against excessive restriction and infringes on the right to make a statement of the victim who suffered severe injury in a traffic accident caused by negligence in driver's duties or gross negligence.

2. In case the traffic accident victim suffers non-serious injury due to

negligence in driver's duties or gross negligence

However, with respect to cases where the driver at fault is exempt from prosecution for subscribing to general insurance, etc. in case the traffic accident concerned leads just to non-serious injury as provided by the Instant Provision, there is a great level of balance between the public interest pursued by the provision, herein to foster prompt recovery of traffic accident damages and to promote convenience of the public, and the victim's right to make a statement during proceedings of a trial that is violated by the provision. Also, considering that drivers causing traffic accidents not applicable to the Proviso are mostly not highly likely to be accused for neglect of care and that there is a global tendency for countries around the world not to impose criminal punishment on offenders of small traffic accidents, the Instant Provision serves the legitimate purpose, adequate means, least restrictive means and balance of interests and is thus not in violation of the rule against excessive restriction.

B. 1. In the event of traffic accident victim suffers serious injury due to negligence in driver's duties or gross negligence

The discrimination between the severely-injured victims of traffic accidents inapplicable to the Proviso and the severely-injured victims and dead victims involved in accidents applicable to the Proviso will determine whether the victim's constitutional right to statement can be exercised depending on whether the drivers responsible for traffic accidents are prosecuted. As this discriminatory treatment consequently poses a major restriction to the exercise of basic rights, a strict standard of review shall be applied.

In this case, a severely injured victim of a traffic accident not applicable to the Proviso will not be able to exercise any right to make a statement during criminal proceedings of a trial because of an incidental circumstance that the type of traffic accident he/she was involved in was not applicable to the Proviso. This, in contrast with an also incidental happenstance that a severely-injured victim involved in a traffic accident applicable to the Proviso is entitled to exercise his/her right to make a statement during proceedings of a trial,

amounts to discrimination without reasonable grounds.

Yet, in the case of victims who fall into a vegetative state or have to endure severe disability or incurable diseases for lifetime as a result of serious injury, the resulting illegitimacy would by no means be smaller than that caused by a traffic accident leading to death. Therefore, the restriction of the victim's right to make a statement during proceedings of a trial by not prosecuting the driver responsible for inflicting serious injury is, unlike when the traffic accident results in death, as good as discrimination without reasonable grounds.

Therefore, the distinguished treatment of the exercise of the right to statement depending on whether the type of the traffic accident applies to the Proviso or not would infringe on the equality rights of victims who suffered serious injury from accidents not applicable to the Proviso.

2. In the event of traffic accident victim suffers non-serious injury due to negligence in driver's duties or gross negligence

In case a traffic accident simply results in the victim's minor injury *instead of a serious one by negligence in driver's duties or gross* negligence, there is legitimate reason to differentiate the minor-injury case from one involving serious injury in the exercise of the right to statement as mentioned above. Therefore, such discrimination is not in conflict with the principle of equality in protecting the victims and penalizing the responsible drivers.

C. The state's duty of protection of life and personal safety is fulfilled through a mixture of various preliminary and ex post facto measures, including, in the case of traffic offenders, not only the punishment of violation by negligence related to traffic accidents but also the overhaul of overall traffic regulations such as those related to obtaining driving licenses, continued enlightenment and education for the public, maintenance and expansion of traffic safety facilities and compensation system for traffic accident victims. In this case, criminal punishment is just one of many effective and appropriate measures available to the state but cannot be an ultimate and only way to protect legal interests. Therefore, the Instant Provision does not appear

to violate the principle of prohibition of insufficient protection.

D. The decision of 90Hun-Ma110 etc. (January 16, 1997) that, unlike the ruling of this case, found Article 4 Section 1 of the former Act on Special Cases Concerning the Settlement of Traffic Accidents (later revised by Act No. 3744, Aug. 4, 1984 and Act No. 5480, Aug. 30, 1997) not unconstitutional shall be overruled to the extent that it is contrary to the decision of this case.

Dissenting Opinion of Justice Cho Dae-hyen and Justice Min Hyeong-ki

1. In a precedent to this case, "90Hun-Ka110·136 (consolidated), the Constitutional Court ruled on January 16, 1997 that Article 4 Section 1 of the former Act on Special Traffic Accident Cases is not in violation of the Constitution. This conclusion appears to be legitimate and lack the conditions or necessity for overruling.

2. The legislative purpose of the Instant Provision is to promote prompt recovery of damage caused by traffic accidents and convenience of the public by inducing drivers to subscribe to general insurance, etc. and, as another major objective, to allow the avoidance of criminal punishment in case the responsible driver did not commit gross negligence. It cannot be denied that it is an appropriate means to serve the legislative purpose to prohibit the prosecution of drivers in case they have subscribed to general insurance, etc. unless they violate major duty applicable to the Proviso.

If the scope of punishment through filing of prosecution of the driver responsible for a traffic accident is expanded as the majority opinion holds, it is not unlikely that other big and small consequences such as the victim pressuring the responsible driver to pay more compensation while threatening punishment may occur although the driver, subscribing to general insurance, etc., already has a warranty against the estimated, overall damage. In addition, although a seriously-injured victim of a traffic accident inapplicable to the Proviso is given the right to statement in trial proceedings, this in practice

would hardly guarantee the recovery of damage except for satisfying the victim's grudges. It is better advised to manage prompt recovery of damage from traffic accidents through civil means, particularly through coverage of general insurance, etc., instead of through criminal punishment of responsible drivers. In this sense, it is speculated that the movement to expand the scope of criminal punishment of traffic accident offenders is against the trend of the times that separates criminal and civil responsibilities while stressing the latter.

3. If a driver can be prosecuted for inflicting serious injury even if the traffic accident concerned is not applicable to the Proviso as stated by the majority opinion, it would be difficult to decide clearly whether the degree of injury is severe. Also, because the degree of injury from a traffic accident is not proportionate to the level of the driver's negligence but varies by incidental circumstances such as age, sex, part of injury and physical particularity, it would be difficult to secure the predictability and consistency of law application.

4. The right of the victim to make statements presupposes the filing of prosecution of the offender, so the traffic accident victim who has received an order of non-prosecution for reasons of having general insurance, etc. should be considered as not having the right to statement. Therefore, restricting indictment requirements by preventing the filing of prosecution in case the driver has general insurance, etc. does not necessarily violate the victim's right to make statements.

Parties

Complainants

1. Cho ○-joo (2005Hun-Ma764)
   Court-appointed counsel: Moon Han-shik
2. Song ○-moon and one other (2008Hun-Ma118)

Representative: Sekwang Law Firm
Attorney in charge: Choi Kyu-ho

Holding

The portion of the main sentence of Article 4 Section 1 of the Act on Special Cases Concerning the Settlement of Traffic Accidents (revised by Act No. 6891 on May 29, 2003) which provides that a driver who commits a crime by inflicting bodily injury through negligence in driver's duties or gross negligence in traffic accidents shall not be prosecuted is in violation of the Constitution.

Reasoning

I. Introduction of the Case and Subject Matter of Review

A. Introduction of the Case

1. 2005Hun-Ma764

The complainant is a university student who, while crossing the three-lane road in front of unit E of Tower Palace located in 467 Dogok-Dong, Gangnam-Gu, Seoul on September 5, 2004 at 12:59, was hit by the left front fender and windshield of a car driven by Lee ○ -joo and suffered closed fracture of the cranial vault requiring 12 months of treatment, etc. Since the accident, the complainant has suffered from severe side effects, including hemiparesis and facial paralysis, which eventually led him to quit school as well.

The prosecutor in charge of the accident found on December 13, 2004 that, pursuant to Article 4 Section 1 of the Act on Special Cases Concerning the Settlement of Traffic Accidents, the offender cannot be prosecuted. In response, the complainant filed this constitutional complaint on August 16, 2005, arguing that the said provision violates the principle of prohibition of insufficient protection, right to equality, and the right to make a statement during proceedings of a trial.

2. 2008Hun-Ma118

The complainant Song ○-moon was driving his Sonata along the three-lane road from Chuncheon-Si to Daegu-Si direction at the 271.2 km point of Central Expressway located in Pojeon-Ri, Geumseong-Myeon, Jecheon-Si on December 14, 2007 at around 12:50 p.m. with his wife Hwang ○-hee, his friend who is one of the complainants, Kim ○-kyung, and Kim's wife Jung ○-shin in the car, when the trailing Son ○-won driving a five-ton truck rear-ended the Sonata by drowsy driving. As a result, Hwang ○-hee and Jung ○-shin both died from open mandibular fracture or skull fracture, complainant Song ○-moon suffered from herniated disc in neck, parietal scalp laceration, etc., and complainant Kim ○-kyung suffered from rib fracture, multiple scalp laceration, etc. Since the accident, the complainants have sustained severe aftereffects such as post-traumatic stress syndrome or insomnia.

The prosecutor in charge, according to Article 4 Section 1 of the Act on Special Cases Concerning the Settlement of Traffic Accidents, found on December 28, 2007 that it was impossible to prosecute the responsible driver (arrest and prosecution for causing death was executed on the same day), and the complainants filed the constitutional complaint in this case on January 24, 2008, arguing that the said provision violates the principle of prohibition of insufficient protection, right to equality, and the right to make a statement during proceedings of a trial.

B. Subject Matter of Review

1. The subject matter of review is whether the portion of the main sentence of Article 4 Section 1 of the Act on Special Cases Concerning the Settlement of Traffic Accidents (revised by Act No. 6891, May 29, 2003, hereinafter "Act on Special Traffic Accident Cases") which stipulates that a driver who commits a crime by inflicting bodily injury through driving or gross negligence (excluding the crime prescribed by Article 151, Road Traffic Act) shall not be prosecuted (hereinafter, the "Instant Provision") violates the complainants' basic rights.

2. While explicitly challenging the constitutionality of the entire Instant Provision, the complainants contest that the portion of the provision which stipulates that "a driver who commits a crime by inflicting bodily injury through gross negligence of crimes relating to traffic accidents" is in violation of their basic rights, such as the right to make a statement during proceedings of a trial.

However, Article 268 of the Criminal Act cited in Article 3 Section 1 of the Act on Special Traffic Accident Cases Act provides that "A person who causes the death or injury of another by negligence in driver's duties or gross negligence, shall be punished by imprisonment for not more than five years or by a fine not exceeding twenty million won", which does not distinguish the negligence in driver's duties from gross negligence. In addition, the main sentence of Article 3 Section 2 of the Act on Special Traffic Accident Cases stipulates that "Due to traffic of vehicles, a driver who commits a crime by inflicting bodily injury through negligence in driver's duties or gross negligence of crimes relating to traffic accidents mentioned in Section 1 ····· shall not be prosecuted against the express will of the victim", thereby enumerating the negligence in driver's duties and gross negligence together. Under the regulations of the Criminal Act, it does neither appear that gross negligence is fixed as an aggravated condition to the negligence in driver's duties nor that the degree of the two types of negligence is deemed markedly different. Therefore, the entire Instant Provision that prevents prosecution of drivers inflicting injury by negligence in driver's duties or gross negligence will be subjected to review in this case.

3. The text of subject provision of review and relevant provisions are as follows:

[Subject Provision of Review]

Act On Special Cases Concerning The Settlement Of Traffic Accidents (revised by Act No. 6891, May 29, 2003)

Article 4 (Special Cases concerning Insurance Coverage, etc.)

(1) In case where a vehicle which has caused a traffic accident, is covered by insurance or mutual aid association in accordance with the

provisions of Articles 4 Insurance Business Act and 126 through 128 of the Insurance Business Act, Article 8 of the Land Transportation Promotion Act, or Article 51 of the Trucking Transport Business Act, the driver who commits a crime provided in main sentence of Article 3 (2) shall not be prosecuted: Provided, That this shall not apply in case falling under the Proviso of Article 3 (2), or in cases where the insurer or mutual aid manager is not liable to pay the amount insured or mutual aid money because of the contract of insurance or mutual aid being null and void or rescinded for the future or an exemption clause of the contract.

[Relevant Provisions]

Act on Special Cases Concerning the Settlement of Traffic Accidents (later revised by Act No. 6891, May 29, 2003; Act No. 7545, May 31, 2005)

Article 3 (Special Cases concerning Punishment)

(1) A driver of a vehicle who commits a crime provided in Article 268 of the Criminal Act by reason of a traffic accident shall be punished by imprisonment without prison labor for not more than five years or by a fine not exceeding 20 million won.

(2) Due to traffic of vehicles, a driver who commits a crime by inflicting bodily injury through negligence in driver's duties or gross negligence of crimes relating to traffic accidents mentioned in Section 1 or a crime of Article 151 of the Road Traffic Act shall not be prosecuted against the express will of the victim: Provided, That this shall not apply in cases where a driver of a vehicle who commits a crime of inflicting bodily injury through negligence in driver's duties or gross negligence of crimes relating to traffic accidents mentioned in Section 1, leaves the scene of an accident without taking measures including those necessary to render aid to a victim provided in Article 54 (1) of the Road Traffic Act or leaves the scene of the accident after moving the victim from the site of an accident and abandoning the victim, and in cases where a driver of a vehicle commits such crime caused by an act falling under any of the following subparagraphs:

1. In case of operating a vehicle in violation of signals provided in Article 5 of the Road Traffic Act, signals given by a traffic

policemen or other directions of safety signals for prohibition of traffic or temporary suspension;

2. In case of crossing a median line of the road in violation of the provisions of Article 13 (3) of the Road Traffic Act, or of crossing, making U-turns or driving backward in violation of the provisions of Article 62 of the same Act;

3. In case of operating a vehicle in excess of the speed limit by 20 kilometers or more per hour as provided in Article 17 (1) or (2) of the Road Traffic Act;

4. In case of operating a vehicle in violation of the methods, time of prohibition and location of prohibition of passing or prohibition of intervening as provided in Article 21 (1), Articles 22 and. 23 Article 60 (2) of the Road Traffic Act;

5. In case of operating a vehicle in violation of the method of passing a crossing provided in Article 24 of the Road Traffic Act;

6. In case of operating a vehicle by neglecting to observe the duty of protecting pedestrians on a crosswalk as provided in Article 27 (1) of the Road Traffic Act;

7. In case of operating of a vehicle without obtaining a driver's license or a construction machinery operating license or without holding an international driver's license in violation of the provisions of Article 43 (1) of the Road Traffic Act, Article 26 of the Construction Machinery Management Act, or Article 96 of the Road Traffic Act. In such cases, the case of suspension of a driver's license or a construction machinery operating license or the case of prohibition of operation of a vehicle shall be regarded as not having obtained a driver's license or a construction machinery operating license or not holding an international driver's license;

8. In case of operating a vehicle while under the influence of alcohol in violation of the provisions of Article 44 (1) of the Road Traffic Act or while normal operation is deemed difficult due to influence of drugs in violation of the provisions of Article 45 of the Road Traffic Act;

9. In case of operating a vehicle upon a sidewalk in violation of Article 13 (1) of the Road Traffic Act or in violation of the method of crossing sidewalks as provided in Article 13 (2) of the same Act;

10. In case of operating a vehicle in violation of the obligation on

preventing passengers from falling off as provided in Article 39 (2) of the Road Traffic Act;

Article 258 (Aggravated Bodily Injury on Other or on Lineal Ascendant)

(1) A person who inflicts bodily injury upon another, thereby endangering one's life, shall be punished by imprisonment for not less than one year or more than ten years.

(2) The preceding section shall apply to a person who, in consequence of injuring another, causes one to be crippled or incurably or hopelessly diseased.

Article 268 (Death and Injury by Negligence in Driver's Duties or Gross Negligence)

A person who causes the death or injury of another by negligence in driver's duties or gross negligence, shall be punished by imprisonment for not more than five years or by a fine not exceeding twenty million won.

II. Arguments of Complainants and Relevant Authorities

(Intentionally Omitted)

III. Review on Justiciability Requirements

A. Self-relatedness, Presentness and Directness

The Instant Provision provides that, with the exception of the accident specified in the Proviso of Article 3 Section 2 of the Act on Special Traffic Accident Cases (hereinafter, the "Proviso"), the driver who commits a crime provided in the main sentence of Article 3 Section 2 of the Act shall not be prosecuted in case where a vehicle which has caused a traffic accident is covered by insurance or mutual aid association (hereinafter, "general insurance, etc.") in accordance with the provisions of Articles 4 and 126 through 128 of the Insurance Business Act, Article 8 of the Land Transportation Promotion Act or Article 36 of the Trucking Transport Business Act.

Consequently, the prosecutor's office ordered non-prosecution for the driver at fault, which results from automatic application of the Instant Provision without discretion, and therefore all three requirements for justiciability of the complaint - whether the alleged infringement of a basic right is self-related, indicating the relatedness to ones' own rights, present at the time of the complaint and not merely a potential of future infringement, and whether the infringement is a direct consequence of the challenged provision (hereinafter, "self-relatedness, presentness, and directness") - are fulfilled.

B. Justiciable Interest

1. Article 47 Section 2 of the Constitutional Court Act provides that "Any statute or provision thereof decided as unconstitutional shall lose its effect from the day on which the decision is made: Provided, That the statutes or provisions thereof relating to criminal penalties shall lose their effect retroactively". However, as the Instant Provision provides for exceptional cases exempt from punishment although it concerns criminal penalties, recognizing the retroactive effect of the decision ruling the provision unconstitutional would rather bring criminal disadvantage to those who had previously not been subjected to criminal punishment pursuant to the provision. For this reason, including the exceptional cases of the Proviso also in the application scope of the Proviso of Article 47 Section 2 of the Constitutional Court Act contradicts the purpose of the Proviso as the inclusion greatly harms legal stability and legitimate expectation of the already exempted offenders, which is contrary to the original purpose of the provision.

Since the retroactive effect of the decision that rules the Instant Provision unconstitutional is not acknowledged, the non-prosecution order for offenders cannot be cancelled and they are thus unpunishable. Therefore, the complaint in this case does not meet the subjective justiciable interest.

2. Yet, a constitutional complaint not only functions as a subjective legal remedy for individuals but also as a objective safeguard of the constitutional order. Therefore, even if it does not contribute to the

subjective redemption of rights, the legitimate interest sought from the complaint may be acknowledged as justiciable in case the infringement concerned is likely to repeat itself or the resolution of the dispute concerned is critical to the protection and preservation of the constitutional order and thus involves huge constitutional significance. In that sense, if a constitutional resolution is not made for reasons of lacking subjective justiciable interest even when the Instant Provision appears unconstitutional, traffic accident victims will not be able to file a constitutional complaint in the future, and it is a cause for concern that the disposition of non-prosecution may be ordered repeatedly based on an unconstitutional provision. Therefore, it is necessary to acknowledge exceptional justiciable interest in review of the Instant Provision.

IV. Review on Merits

A. Relevant Basic Rights

The issue of this case is whether the Instant Provision infringes on the complainants' right to make a statement during proceedings of a trial, the right to equality, and the state's duty to protect life and personal safety of citizens. In judging whether each of the basic rights has been infringed, the following two categories will be applied: cases where the victims suffered severe injury in accidents caused by driving or gross negligence and those where the victim did not.

B. Violation of the Right to Make a Statement in Proceedings

1. Cases involving severe injury caused by negligence in driver's duties or gross negligence

Under the current criminal procedure system which fully excludes the possibility of private prosecution, such as those by victims, and gives prosecutors the exclusive right to criminal prosecution, the victim's right to make a statement in the proceedings of a criminal case as prescribed by Article 27 Section 5 of the Constitution offers

the victim an opportunity to make a statement in a criminal case in addition to testifying at a criminal proceeding involving this case, thereby protecting the right to statement as a basic right in order to obtain the procedural adequacy of the criminal justice (*see* 1 KCCR 31, 37, 88Hun-Ma3, Apr. 17, 1989; 5-1 KCCR 121, 129, 92Hun-Ma48, Mar. 11, 1993, etc.).

In case the victim's life is endangered, or the victim becomes disabled or develops intractable or incurable diseases resulting from a traffic accident, that is, when there is an infliction of severe injury (refer to Article 258 Sections 1 and 2 of the Criminal Act), and yet the traffic accident concerned is not applicable to the Proviso, the prosecutor has no choice but to order non-prosecution for the driver at fault as the Instant Provision provides for automatic exclusion of the responsible driver from prosecution. In this case, the victim who suffered serious injury may lose one's normal basis of living, such as losing one's job or quitting one's study, and greatly suffer physically and psychologically for having to live with disability or suffer from diseases during his lifetime, and the mental and financial suffering that the family members and surrounding persons of the victim have to undergo are so enormous as to be comparable to that of the victim's death. Nevertheless, the Instant Provision takes away even the opportunity to make a statement concerning the aforementioned damage at the criminal proceeding.

Therefore, it will be reviewed whether the exemption of the driver from prosecution for the victims' serious injury caused by negligence in driver's duties or gross negligence as provided in the Instant Provision violates the rule against excessive restriction and thus the right to make a statement during proceedings of a trial.

(A) Legitimate purpose and suitable means

The purpose of this Act is to facilitate a prompt recovery of damages caused by traffic accidents and to promote convenience for people's everyday life by providing special cases on criminal punishment for drivers involved in traffic accidents through negligence in driver's duties or gross negligence (Article 1, Act on Special Cases Concerning the Settlement of Traffic Accidents).

In particular, the Instant Provision, given the increase in the number of cars and self-driving, intends to encourage drivers to subscribe to general insurance and thereby cover the damage of traffic accident victims promptly and adequately as well as to prevent the increase in the number of repeat offenders involved in traffic accidents, which serves the legitimate purpose. In addition, considering that the general car insurance subscription rate increased steadily to 87 percent of the total number of registered cars and that the rate of prosecution for traffic accident cases as of 2005 was a mere 34.2 percent, the Instant Provision is found to have served the legislative purpose and therefore also satisfies the suitability of the means.

(B) The least restrictive means and balance of interest

However, even in cases involving serious injury from a traffic accident, various actions such as summary indictment or stay of prosecution other than regular prosecution are also available depending on the causes of accident, particularity of the victim (elderly, etc.), whether the victim is responsible for negligence and, if so, the degree thereof. Also, the victims are entitled to the right to make a statement during proceedings of a trial in case of regular prosecution, but nevertheless providing unconditional immunity to drivers for having subscribed to general insurance, etc. unless applicable to the Proviso is in violation of the rule of the least restrictive means.

Meanwhile, various statistics indicate that the traffic accident rate in Korea is very high even for international standards. As of 2004, among OECD countries, Korea ranked sixth with 459.1 following Japan (745.7), United States (647), Austria (521.8), Canada (437.3), and Belgium (468.2) in the number of traffic accidents per 100,000 population. Korea topped the list in terms of the number of traffic accidents per 100,000 cars with 119.3 and also in terms the rate of death while walking in traffic accidents at 39.3 percent ("Comparison of Traffic Accidents among OECD Countries", Road Traffic Authority, 2006).

Despite such a serious traffic accident rate, offenders of traffic accidents are unconditionally exempt from criminal punishment unless the accident leads to death or is applicable to the Proviso. Yet, it is

hard to find laws in advanced countries that prevent the filing of prosecution against the drivers responsible for accidents just because their cars are insured. In addition, since most of the relevant parties to a traffic accident tend to resolve issues by informing only the insurance companies of the accident and not reporting it to the police, there is a marked gap between the statistics of insurance companies and that of the police, and some still maintain that the number of traffic accidents is rising even as we speak.

Unless in violation of the negligence prescribed by the Proviso, the offender may avoid punishment by subscribing to general insurance, etc. and therefore think lightly of the violation of traffic regulations and neglect the duty of safe driving. It is also undeniable that, even in traffic accidents involving serious injury, drivers tend to place the responsibility of accident management, such as payment of insurance money, on the insurance company and not take sufficient care for the actual recovery of the damage inflicted on the victim.

In that sense, as the victim who suffered serious injury is fundamentally prevented from exercising his/her right to make a statement during proceedings of a trial as prescribed by the Instant Provision, the public interest - prompt management of traffic accidents and prevention of the rise in the number of recidivists - is being upheld at the great expense of the victim's private interest. Therefore, this undermines the balance of interests.

2. Infliction of non-serious injury by negligence in driver's duties or gross negligence

However, with respect to cases where the driver at fault is exempt from prosecution for subscribing to general insurance, etc. in case the traffic accident concerned leads just to non-serious injury as provided by the Instant Provision, there is a great level of balance between the public interest pursued by the provision, herein to foster prompt recovery of traffic accident damages and to promote convenience of the public, and the victim's right to make a statement during proceedings of a trial that is violated by the provision. Also, considering that drivers causing traffic accidents not applicable to the Proviso are mostly not highly likely to be accused for neglect of care

and that there is a global tendency for countries around the world not to impose criminal punishment on offenders of small traffic accidents, the Instant Provision serves the legitimate purpose, adequate means, least restrictive means and balance of interests and is thus not in violation of the rule against excessive restriction or rule of proportionality.

3. Sub-conclusion

Therefore, the Instant Provision is found to have violated the rule against excessive restriction and thus infringed on the right to statement of a severely-injured victim involved in a traffic accident caused by negligence in driver's duties or gross negligence.

C. Infringement of Equality Rights

Discrimination occurs in the exercise of victims' rights to make a statement during proceedings of a trial according to whether the traffic accident concerned lead to death and whether it is applicable to the Proviso, and it is at issue whether such discrimination can be constitutionally justified.

1. Cases involving serious injury caused by negligence in driver's duties or gross negligence

It shall be reviewed whether it is in violation of the equality right to discriminate against those who suffered serious injury in an accident inapplicable to the Proviso in the exercise of the victim's right to make a statement during proceedings of a trial.

(A) Standard of Review

The rational standard is applied in general when judging the legitimacy of the discrimination. However, in cases where the Constitution particularly requires equality or where discriminatory treatment leads to significant restriction on the relevant basic rights, the right to legislation will be reduced and, therefore, a strict standard

of review will be applied (11-2 KCCR 771, 787-789, 98Hun-Ma363, December 23, 1999; 11-2 KCCR 732, 749, 98Hun-Ba33, December 23, 1999; 12-2 KCCR 167, 181, 97Hun-Ka12, August 31, 2000).

As the rational standard only reviews if there are reasonable grounds for discrimination, the review extends no further than finding and confirming the factual differences or legislative purpose (purpose of discrimination) between comparable cases. In case of proportionality review, however, not only the reasonableness but also the correlation between the reason for justifying discrimination and the discrimination itself will be reviewed. In other words, the proportionality review will be focused on whether the adequate level of balance is met between the nature and extent of the factual difference between the comparable cases or the significance and extent of discrimination of the legislative, or discriminatory purpose (13-1 KCCR 386, 403, 2000Hun-Ma25, February 22, 2001)

The people's right to life and personal safety is the premise of all basic rights and immediately relates to the dignity of human beings, so it is appropriate that a stricter review is imposed to see if there is proportionality between the legislative purpose and discrimination, instead of simply identifying whether the discrimination against victims involved in accidents applicable to the Proviso as opposed to accidents inapplicable to the Proviso as well as those leading to death was arbitrary. Also, whether the victim's constitutional right to statement can be exercised is determined by whether the drivers responsible for traffic accidents are prosecuted, which consequently poses a major restriction to the exercise of basic rights. Therefore, in this case, a strict standard of review will be applied with reference to the precedents which have changed since the decisions of cases such as 90Hun-Ma110 (January 16, 1997).

(B) Review

Pursuant to the Instant Provision, even in cases where the victim is seriously injured in a traffic accident, whether the offender will be prosecuted depends on what type of duty the responsible driver violated. In other words, accountable drivers will be prosecuted in the case of traffic accidents applicable to the Proviso and, in the case of

accidents not applicable to the Proviso, will be exempted from prosecution on condition of subscription to general insurance, etc. In this case, a severely injured victim of a traffic accident not applicable to the Proviso will not be able to exercise any right to make a statement during criminal proceedings of a trial merely because of an incidental circumstance that the type of traffic accident he/she was involved in was not applicable to the Proviso. This, in contrast with an also incidental happenstance that a severly-injured victim involved in a traffic accident applicable to the Proviso is entitled to exercise his/her right to make a statement during proceedings of a trial, amounts to discrimination without reasonable grounds.

At the same time, the Act on Special Traffic Accident Cases provides that a person who causes death of another by negligence in driver's duties or gross negligence shall be prosecuted regardless of whether or not the accident is applicable to the Proviso (refer to Article 3 Section 1, Act on Special Traffic Accident Cases and Article 268, Criminal Act), which is due to the huge illegal nature of the invasion of the right to life irrespective of the degree or type of the neglect of duty on the part of those related to the accident. Yet, even the victims who fall into a vegetative state or have to endure severe disability or incurable diseases for lifetime as a result of serious injury do not have their right to life violated but suffer a comparable physical and mental pain.

As normal life consequently becomes impossible, the mental and financial problems of people around them, including their families, would also be inconceivable, and the resulting illegitimacy would by no means be smaller than that caused by an accident leading to death. Therefore, the restriction of the victim's right to make a statement during proceedings of a trial by not prosecuting the driver responsible for inflicting serious injury is, unlike when the traffic accident results in death, as good as discrimination without reasonable grounds.

Also, the discrimination among the severely injured victims and that between the seriously injured and the dead victims as mentioned above tantamount to a distinguished treatment of the exercise of the right to statement depending solely on whether the type of an accident applies to the Proviso irrespective of the extent of duty violation and the resulting degree of illegitimacy. In this sense, even in light of the

legislative purpose of the Instant Provision to promptly recover damages, it is difficult to say that appropriate balance is reached in the degree of discrimination.

2. Cases involving non-serious injury by negligence in driver's duties or gross negligence

In case a traffic accident simply results in the victim's minor injury instead of a serious one by negligence in driver's duties or gross negligence, for the same reason stated in the aforementioned (2) of B, there is legitimate reason to differentiate the minor-injury case from one involving serious injury in the exercise of the right to statement. Therefore, such discrimination is not in conflict with the principle of equality in terms of protecting victims and penalizing the responsible drivers.

3. Sub-conclusion

Distinct treatment in the exercise of the right to statement - discrimination between the victims who suffer from serious injury resulting from accidents not applicable to the Proviso and the severely-injured victims and dead victims involved in accidents applicable to the Proviso - would violate the equality rights of victims suffering from serious injury caused by traffic accidents not applicable to the Proviso.

D. Violation of the Duty to Protect Basic Rights

1. Significance and standard of review

The duty for protection of basic rights refers to the state's duty to protect people's legal interest as part of the basic rights from illegal violation or the risk thereof by private persons entitled to basic rights, and problems mostly stem from the damage done to life or body of individuals by third parties who are mostly private persons. In this case, such a duty for protection of basic rights applies only when legal interests, such as body or life of individuals, become irrelevant

without the state's obligation for protection.

In this case, the issue is whether the state has to employ the ultimate measure of criminal punishment in order to most efficiently protect the right to life and personal liberty of the people despite other protective measures that prevent traffic accidents. If the state abandoned its authority over criminal punishment although it is the only way to most efficiently protect legal interests, the state would have, by violating its duty for protection of basic rights, infringed on major basic rights of the complainants such as the life and personal safety.

Although the state takes responsibility for protecting people's life and personal safety, the issue of how the legislators or their authorized executioners will fulfill their state duty for protection, in principle, falls under the scope of responsibility of legislators who are, according to the principle of separation of powers and democracy, given the democratic legitimacy directly by the people and hold political responsibility for their own decisions. Therefore, the Constitutional Court can review, to just a limited extent, whether the duty of protection by legislators or their designated executioners has been fulfilled (9-1 KCCR 90, 121, 90Hun-Ma110, etc., January 16, 1997; 142 KCCR 1146, 1149, 2006Hun-Ma711, July 31, 2007).

For this reason, when reviewing whether the state fulfilled its duty to protect people's life and personal safety, the Constitutional Court can, according to whether the state at least took the minimum protective measure that is appropriate and efficient - compliance with the rule against excessive restriction - find the state to have violated its protective duty limited to cases in which the state did not take any protective measure despite the need for one to protect people's life and safety or in which the measure taken by the state was entirely inadequate or evidently insufficient for protecting legal interests (9-1 KCCR 90, 122, 90Hun-Ma110, etc., January 16, 1997).

2. Violation of the principle against excessive non-protection

The state's duty of protection of life and personal safety is fulfilled through a mixture of various preliminary and ex post facto measures, including not only the punishment of violation by negligence related

to traffic accidents but also the overhaul of overall traffic regulations such as those related to obtaining driving licenses, continuous enlightenment and education for the public, maintenance and expansion of traffic safety facilities and compensation system for traffic accident victims. In this case, the issue is whether the state has to take the ultimate measure of criminal punishment despite other protective measures that can prevent traffic accidents in order to protect the right to life and personal liberty most efficiently. In case criminal punishment is the most efficient and only way to protect legal interests, the state abandoning its power over criminal punishment would violate its duty of protection.

However, expansion of the scope of the state's authority over criminal punishment of offenders who committed traffic-related negligence does not immediately lead to clear and efficient protection of legal interests. Even when considering the general preventive and deterrence effect of criminal punishment, the effect of criminal punishment to protect the legal interests of life and personal safety is not very clear, and, in this case, criminal punishment is just one of many viable and appropriate means available to the state, not the final and sole means to protect legal interests effectively and appropriately.

3. Therefore, as for the Instant Provision, it is not that the state did not take any measure to appropriately and effectively protect the life and body of the people from the overall danger of road traffic by not exercising the authority over criminal punishment for certain crimes related to traffic accidents, neither that the state evidently violated its duty of protection as its existing measures are clearly inadequate or insufficient.

V. Conclusion

For the aforementioned reasons, the portion of the Instant Provision that prevents prosecution of drivers who inflict serious injury by causing traffic accidents due to negligence in drivers' duties or gross negligence infringes on the complainants' right to make a statement during proceedings of a trial and equality rights, and is thus unconstitutional. In that sense, it shall be ruled as follows: the

decision of 90Hun-Ma110 (January 16, 1997), etc. that, unlike the ruling of this case, found Article 4 Section 1 of the former Act on Special Cases Concerning the Settlement of Traffic Accidents (later amended by Act No. 3744, Aug. 4, 1984 and Act No. 5480, Aug. 30, 1997) not unconstitutional shall be overruled to the extent that it is contrary to the decision of this case, and hence the holding.

This decision was agreed by all Justices other than Justice Cho Dae-hyen and Justice Min Hyeong-ki who stated dissenting opinions holding the Instant Provision constitutional as in the VI. below.

VI. Dissenting Opinion of Justice Cho Dae-hyen and Justice Min Hyeong-ki

We believe that, unlike the majority opinion, the Instant Provision appears not to be in violation of the Constitution and state the following opinion:

A. In a precedent to this case, "90Hun-Ka110 · 136 (consolidated), a constitutional complaint over Article 4, Act on Special Cases Concerning the Settlement of Traffic Accidents, etc., the Constitutional Court ruled on January 16, 1997 that Article 4 Section 1 of the former Act on Special Traffic Accident Cases does not violate the equality right, the right to make a statement during proceedings of a trial and the state's duty to protect basic rights, and therefore that the provision is not in violation of the Constitution. This conclusion appears to be legitimate and lack the conditions or necessity for modification, so the rationale for the decision shall be quoted in this case in its entirety, except that, this aside, the following reasons will be added.

B. The Act on Special Traffic Accident Cases, taking into account that driving is an essential part of daily life, has been enacted with the purpose of promoting prompt recovery of damage caused by traffic accidents and convenience of the public by inducing drivers to subscribe to general insurance, etc. However, the legislative purpose of the Act, although not explicitly specified, includes a secondary yet

important objective - allowing the avoidance of criminal punishment in case the responsible driver did not commit gross negligence, and this is as significant as the recovery of damage since all citizens are potential offenders and victims of traffic accidents.

Of the aforementioned two legislative purposes of the Act, prompt and reliable recovery of damage for traffic accident victims should admittedly be given priority, which means it is not necessary to punish the responsible drivers within the given scope in case there is substantial and sufficient recovery of damage caused by traffic accidents inapplicable to the Proviso of the Act or when the victim does not wish for the responsible driver to be punished. Therefore, as far as the accountable driver does not violate major duty of care equivalent to those specified in the Proviso, preventing the prosecution of drivers subscribing to general insurance, etc. is an appropriate means to achieve the aforementioned legislative purpose.

On the contrary, as the majority opinion holds, if the scope of punishment through filing of prosecution of the driver responsible for a traffic accident is expanded, this may pose strong psychological pressure on the driver and therefore make him/her more committed to the recovery of damage of victims for reduction in punishment. Yet, it cannot be immediately concluded that the recovery of damage is, in general, more smooth and prompt. Rather, it is not unlikely that other big and small consequences may take place, such as the victim pressuring the responsible driver to pay more compensation while threatening punishment although the driver, subscribing to general insurance, etc., already has a warranty against the estimated, overall damage.

Also, even if the seriously-injured victim involved in a traffic accident not applicable to the Proviso is guaranteed the right to make a statement during proceedings of a trial, the statement would consist of a plea for generous order if the victim has received compensation, whereas the victim who has not will mostly complain of such circumstances and appeal for strict punishment. In that sense, the protection of the victim's right to statement in practice would not easily guarantee the recovery of damage except for satisfying the victim's grudges.

Eventually, unless for other special circumstances, it is better

advised to manage prompt recovery of damage from traffic accidents through civil means, particularly through coverage of general insurance, etc., instead of through criminal punishment of responsible drivers that appears to be a separate matter. For prompt and full recovery of damage of victims, it is undoubtedly critical that institutional rearrangement to extend the warranty against the victim's damage take place, such as raise in the insurance premium, remedies to the extra premium system for vehicles involved in traffic accidents and practicalization of the insurance money payment.

Nevertheless, attempting to expand the scope of criminal punishment of traffic accident offenders when there is victim's explicit intention of punishment or by allowing prosecution of offenders despite their subscription to general insurance, etc. in case of serious injury caused by a traffic accident caused by driver's or gross negligence as prescribed by Article 4 Section 1 of the Act on Special Traffic Accident Cases, which is what the majority opinion indicates, is against the aforementioned needs. Therefore, it is speculated that such measure provided in Article 4 Section 1 of the Act on Special Traffic Accident Cases is one that runs counter to the trend of the times that separates criminal and civil responsibilities while stressing the latter.

C. Also, in order to serve the abovementioned legislative purpose of the Act on Special Traffic Accident Cases, the requirements for filing of prosecution should be clear. If a driver can be prosecuted for inflicting serious injury even if the traffic accident concerned is not applicable to the Proviso as stated by the majority opinion, it would be difficult for the driver or the police to decide clearly whether the degree of injury is serious enough to qualify for prosecution when the victim is greatly injured from a traffic accident. Also, because the degree of injury from a traffic accident is not proportionate to the level of the driver's negligence but varies by incidental circumstances such as age, sex, part of injury and physical particularity, the investigation agency will be able to decide whether they will prosecute the offender only after the investigation and doctor's examination on the existence of negligence and its degree, and, even after the filing of the prosecution, legal assessment of the serious injury may eventually differ according to the opinion of judges.

After all, whether the requirement for filing prosecution of responsible drivers has been met will depend on the judgment of the prosecutors in charge and be finalized only after the completion of criminal procedures, and it would thus be difficult to secure the predictability and consistency of law application.

D. A criminal victim can make a statement during proceedings of the relevant case as provided by law (Article 27 Section 5, Constitution); the court has to admit the victim as witness for examination upon receiving a petition by the victim of a crime (Article 294-2 Section 1, Criminal Procedure Act); and the court shall, whenever it examines a victim, give the victim an opportunity to make a statement on the degree and result of damage, his/her opinion concerning punishment of the defendant and other matters relating to the case at bar (Article 294-2 Section 2, Criminal Procedure Act). However, such right of the victim to make statements presupposes the filing of prosecution of the offender, so the traffic accident victim who has received an order of non-prosecution for reasons of having general insurance, etc. should be considered as not having the right to statement, in which case it would be impossible to demand the investigation agency to file prosecution just to guarantee the victim's right to statement.

Therefore, restricting indictment requirements by preventing the filing of prosecution in case the driver has general insurance, etc. does not necessarily violate the victim's right to make statements.

E. Therefore, the Instant Provision is not in violation of the Constitution.

Justice Lee Kang-kook (Presiding Justice), Lee Kong-hyun, Cho Dae-hyen, Kim Hee-ok, Kim Jong-dae, Min Hyeong-ki, Lee Dong-heub, Mok Young-joon, Song Doo-hwan

2. *Case on 50 Times Administrative Penalty Fee for Violators of Public Official Election Act*

[21-1(A) KCCR 337, 2007Hun-ka22, March 26, 2009]

Questions Presented

1. Extension of the subject matter of review into revised Articles

2. Whether Article 261 Section 5 Item 1 of the former Public Official Election Act (revised by Act No. 7189 on March 12, 2004, but before revised by Act No. 8879 on February 29, 2008, hereinafter the "instant former provision") and Article 261 Section 5 Item 1 of the Public Official Election Act (revised by Act No. 8879 on February 29, 2008, hereinafter the "instant revised provision") violates the principle of prohibition against excessive restriction

3. The declaration of incompatibility with the Constitution and order of suspension of the application of the contested provisions until the revision for courts, governmental bodies and municipalities

Summary of the Decision

1. The subject matter of review of this case is the constitutionality of the instant former provision. However, the instant revised provision is identical to the instant former provision in related to the standard and amount of administrative penalty fee ('the amount 50 times worth the received money or the value of food, goods') that raised the constitutionality issue. Because the instant revised provision would reach the same conclusion to the instant former provision, the instant revised provision shall be included into the subject matter of review.

2. The instant former provision and revised provision (hereinafter, "the Provision") state that the administrative penalty fee imposed on any person who received goods from people related to election is uniformly 'the amount 50 times worth the received money or the value of food, goods' with no possibility of reduction. However, in case of 'an action which received goods, food, books, travel etc., and

convenient transportation by violating the regulations prohibiting bribery which is subject to administrative penalty fee, there can be a big difference as to the level of violation according to the motivation and types of the violation, the context and the method of bribery, the relationship between the donator and the violator, the circumstances afterwards etc. However, imposing administrative penalty fees that are uniformly decided just by the standards of the received goods without considering specific and individual situations cannot be restrictions that correspond to levels of responsibility for specific violations. Besides, the instant former provision does not clearly present the specific standard of minor cases that are distinguished from the criminal provision of Article 257 Section 2 of the Public Official Election Law. Thus, in contrast to the original legislative purpose to regulate the small bribery, it would apply to a person who receives expensive goods under the principle of legality and strict interpretation in criminal law, implying that it would not the appropriate sanction under the principle of liability and it may cause obvious inequity between violators.

Moreover, since the amount of administrative penalty fee imposed by such uniform standard is '50 times' the received money or the value of food, goods, the difference in administrative penalty fee may be largely depending on the value of goods. In this regard, an administrative penalty fee of 50 times worth the received goods for average citizens cannot be perceived as a light regulation. The excessiveness of the instant provision is well described with the below consideration. While 5 million won is the ceiling amount of fine stated in Article 257 Section 2 of the Public Official Election Act, 50 million won of administration penalty fee that amounts 10 times than the ceiling amount of fine can be imposed on a lighter case, for example, where the value of received money, food or goods is 1 million won.

Moreover, the legislative purpose that intends to exterminate small briberies for the fairness of election is not necessarily accomplished by the amount of administrative penalty to be '50 times' worth the received money, food or goods. The purpose can be achieved by mitigated legislative means, for an instant, the administrative penalty fee amount 'less than 50 times'.

3. The instant provision should be declared as unconstitutional as reviewed above due to the violation of the Constitution. However, the unconstitutionality of the instant provision is grounded on not the imposition of administrative penalty fee itself, but the standard and amount of the penalty that are standardized to be disproportionate to the principle of liability and excessively heavy. If the instant provision is declared as unconstitutional, being suspended immediately, the confusion and inequity in enforcing law may be arisen from the legal vacuum against violators who are subject to the instant provision, until the legislature revises the instant provision with the correspond to the unconstitutionality reasoning, and it would principally belong to the legislative discretion to mediate unconstitutional elements to be constitutional. With these considerations, we declare the instant provision is incompatible with the Constitution. Nonetheless, until the legislators revise the provision to eliminate unconstitutionality, the courts, governmental bodies and municipalities shall suspend the application of the instant provision that is declared as incompatible with the Constitution and apply the newly revised provision that eliminate the unconstitutionality, when it is revised.

Dissenting Opinion of Justice Lee Kong-hyun and Justice Kim Hee-ok

From the perspective of history, our election culture strongly demands the legislative regulation with regard to bribery of money, goods, or food from candidates to voters. The instant provision that imposes an administrative penalty fee of 50 times the value of the received goods in the case is a quick and effective regulation method that brings the voter's attention, which is the appropriate means to achieve the legislative purpose.

Moreover, the '50 times' fee established by the instant provision is only applied to received goods that are less than 1 million won, and the unbalance between the violating act and the responsibility has been supplemented in that administrative penalty fee would not be imposed on the violation without intents or faults, or the misconceiver of

illegality with just reasons according to the enforcement of the Act on the Regulation of Violations of Public Order. In this regard, the Provision cannot be seen to have deviated from the scope of legislative discretion and therefore, does not violate the Constitution.

Parties

Requesting Court
Busan District Court

Movants at the Requesting Court
Oh ○-tae and seventy three others
(The names of all movants are listed in the Appendix)

Underlying Cases
Busan District Court 2007Ra584 and seventy three others
(The case number of all underling cases are listed in the Appendix)

Holding

1. Article 261 Section 5 Item 1 of the former Public Official Election Act (revised by Act No. 7189 on March 12, 2004, and before revised by Act No. 8879 on February 29, 2008) and Article Section 5 Item 1 of the Public Official Election Act (revised by Act No. 8879 on February 29, 2008) are incompatible with the Constitution.

2. Until the legislators revise the above provisions, the provisions shall be suspended by courts and other governmental bodies.

Reasoning

I. Introduction of the Case

A. Park ○-jun, the member of ○○ Party, purchased 230 boxes of anchovy, 88 boxes of laver and 318 boxes of dried fish, that cost around 9,000 won per box, from ○○ store located in Nampo-Dong, Jung-Gu, Busan on January 24, 2006.

B. On the next day, Park ○-jun, sent each box of dried fish to the movants at the requesting court and other appellants listed on the appendix (hereinafter, the movants at the requesting court and other appellants will be referred as 'petitioners') at Busan post office by post office parcel delivery service, after indicating the sender as 'Oh ○ -don' who was a prospective candidate running for ○○ Party Busan Mayor in the 4th Nationwide Local Elections held on May 31, 2006.

C. Busan Election Commission, assuming each petitioner received the box of dried fish, imposed the administrative penalty fee of 450,000 won (=9,000won×50) on each petitioner according to Article 116 and Article 261 Section 5 Item 5 of the Public Official Election Act on September 14, 2006. The petitioners filed an objection in court, however, Dongbu Branch Court of Busan District Court imposed the administrative penalty fee of 450,000 on the petitioners by summary proceeding. When the petitioners appealed the decision, the court made the formal judgment that imposed the administrative penalty fee of 450,000 won on petitioners, through hearing. Since the petitioners filed the immediate appeal to the requesting court, the case is pending on the appellate trial.

D. The movants at the requesting court filed a motion to request for the constitutional review.

E. Partly upon granting the said motion, partly sua sponte, the requesting court had decided to request the constitutional review of the Article 261 Section 5 Item 1 of the Public Official Election Act on the ground that there were sufficient reasons to find the provision to be unconstitutional on October 23, 2007, and requested this

constitutional review to the Constitutional Court on November 2, 2007.

II. Subject Matter of Review

A. The subject matter of review of this case is the constitutionality of Article 261 Section 5 Item 1 of the former Public Official Election Act (revised by Act No. 7189 on March 12, 2004, but before revised by Act No. 8879 on February 29, 2008; provided that the title of this Act prior to the revision by Act No. 7681 on August 4, 2005 had been 'Act on the Election of Public Officials and the Prevention of Election Malpractices').

B. Article 261 Section 5 Item 1 of the Public Official Election Act revised by Act No. 8879 on February 29, 2008 are substantially identical to the instant former provision in related to the standard and amount of administrative penalty fee ('the amount 50 times worth the received money or the value of food, goods') that raised the constitutionality issue, except the proviso that allows the discretional reduction of administrative penalty fee in case of return or surrender. Because revised Article 261 Section 5 Item 1 of the Public Official Election Act (hereinafter, 'the instant revised provision') would reach the same conclusion to the instant former provision, the instant revised provision shall be included into the subject matter of review (hereinafter, the instant former provision and revised provision will be referred as the 'Instant Provision' altogether).

C. The Instant Provision (*underline added*) and related provisions are followed as below:

[Instant Provisions]

The former Public Official Election Act (revised by Act No. 7189 on March 12, 2004, but before revised by Act No. 8879 on February 29, 2008)

Article 261 (Imposition and Collection of Administrative Penalty for Negligence, etc.)

(5) A person who falls under any of the following items (excluding a person who has been given money, food or articles the value of

which exceeds one million won) by violating the provisions of Article 116 shall be punished by an administrative penalty for negligence equivalent to 50 times (two million won in the case of officiators) of the amount, or the values of food or goods given to him: Provided, That the ceiling on administrative penalty fee shall be set as fifty million won:

1. A person who receives goods, food, books, sight-seeing and other travel conveniences;

The Public Official Election Act (revised by Act No. 8879 on February 29, 2008)

Article 261 (Imposition and Collection of Administrative Penalty for Negligence, etc.)

(5) A person who falls under any of the following items (excluding a person who has been given money, food or articles the value of which exceeds one million won) by violating the provisions of Article 116 shall be punished by a fine for negligence equivalent to 50 times (two million won in the case of officiators) of the amount, or the values of food or goods given to him: Provided, That the person falling under items 1 or 2 has returned the money, food or articles (refers to money equivalent to the value in cases where those that have been given cannot be returned) that have been given to the election commission and has surrendered himself, he may be given a reduction in or be relieved of the fine for negligence as prescribed by National Election Commission Regulations:

1. A person who receives goods, food, books, sight-seeing and other travel conveniences;

[Relevant Provisions]

The Public Official Election Act (revised by Act No. 8879 on February 29, 2008)

Article 116 (Prohibition of Solicitation or Demand for Bribery)

No one shall receive, or solicit or demand briberys from or to a political party (including the preparatory committee for the formation of a political party), the representative of a political party, the head of a political party's election campaign office, a member of the National Assembly, a member of the local council, the head of a local

government, a candidate (including a person who wishes to be a candidate) or his family, an election campaign manager, the chief of an election campaign liaison office, an election campaign worker, an accountant in charge, an election campaign speechmaker, an interviewer, a debater, a company, etc. having relation to the candidate or his family as provided in Article 114 (2), its officer or employee, or a third person as prescribed in Article 115, in connection with any election.

Article 257 (Violation of Prohibition and Restriction on Bribery Act) (2) Any person who instructs, solicits, mediates, demands, or receives any bribery [excluding any person falling under the provisions of Article 261 (5)] to or from a political party (including a preparatory committee for formation of a new political party), the representative of a political party, the head of a political party's electoral office, a National Assembly member, a local council member, the head of a local government, a candidate (including a candidate who wishes to be a candidate; hereafter, the same shall apply in this Article), his spouse, the candidate's or his spouse's lineal ascendant, lineal descendant or siblings, spouse of the candidate's lineal descendant or siblings, election campaign manager, chief of the election campaign liaison office, election campaign worker, accountant in charge, election campaign speechmaker, interviewer or debater, company which is related to the candidate or his family, or its officer or employee, or third person (referring to a counterpart to the act as provided in Article 116), as provided in Article 81 (6), 82 (4), 113, 114 (1) or 115, shall be punished by imprisonment for not more than three years or by a fine not exceeding 5 million won.

III. Reasons for Request for Constitutional Review and Arguments of Relevant Agencies

(*intentionally omitted*)

IV. Review on Merits

A. Legislative history and background of the Instant Provision

1. The instant former provision that imposed administrative penalty, instead of fine, on persons who received money and goods by violating Article 116 (Prohibition of Solicitation or Demand for Bribery) of the Public Official Election Act was created at the time of revision of the former 'Act on the Election of Public Officials and the Prevention of Election Malpractices (the title of this Act has been altered from 'Act on the Election of Public Officials and the Prevention of Election Malpractices' to Public Official Election Act by Act No. 7681 on August 4, 2005)' by Act No. 7189 on March 12, 2004, so that it can impose a fifty times administrative penalty for persons who received small bribes that had been originally fined. It intended to impose administrative penalty through simple proceedings, instead of criminal punishment under Article 257 Section 2 of the Public Official Election Act, on persons who take minor bribes, for the efficacy of punishment, with the consideration of the practices that rarely imposed punishment on the persons who received bribery. Even when a bribery related to election was exposed by Election Commission or Police, Article 257 of the Pubic Official Election Act had rarely applied so that it raised the efficacy problem of punishment because the voters who received bribery were rarely punished, except a few substantial bribes, while candidates who gave bribes were punished: it lead the practice that voters kept demanding goods or food. The legislature intends to eradicate small bribes of several elections effectively and practically; to enhance the sense of election culture of voters; and to rectify the traditional wrongful election culture such as bribes or treats by altering criminal punishment on minor bribes into 50 times administrative penalty.

2. However, at the time of the revision of the instant former provision, the part of 'bribees' of the criminal punishment provision, Article 257 Section 2 of the Public Official Election Act, has been revised to 'bribees [excepting the persons under Article 261 (Imposition and Collection of Administrative Penalty) Section 5]'. In contrast to the legislative purpose of the instant former provision that attempts to exterminate small bribes effectively, the contents of the instant former provision does not specify the standard of minor cases

or the specific scope of the patterns of activities, such as the standard and calculation methodology of value and the cause of acceptance, that are distinguished from the cases of Article 257 Section 2 of the same Act. Under the principle of legality or strict interpretation in criminal law, it implies that the instant former provision regarding administrative penalty, not Article 257 Section 2 of the same Act regarding criminal punishment, shall be applied even to the acceptance of valuable goods that would be never accepted as small amounts (*see* 2006Do8136 of Supreme Court decided on April 27, 2007; 2007Do1720 of Supreme Court decided on May 31, 2007, etc.).

Therefore, the instant revised provision has been revised to impose criminal punishment of Article 257 Section 2 of the same Act, not administrative penalty, on the acceptance of money, food, or goods exceeding 1 million won that violates the provision of prohibition on bribery, by explicitly excluding the persons who received money, food, or goods exceeding 1 million won from the application of the administrative penalty clause.

3. Compared to the instant former provision, the instant revised provision set the limitation of the applicable value of goods as 1 million won, clarifying the amount of administrative penalty fee, which amounts 50 times worth the good, shall be limited into 50 million won; in addition, it repealed the ceiling amount of administrative penalty fee and inserted the proviso that allows discretional deduction in the case of return or surrender.

B. The Principle of Prohibition on Excessive Restriction

1. The Legitimacy of Legislation and Appropriateness of Means (Imposition of Administrative Penalty)

The Instant Provision purposes to eradicate effectively small bribery that is provided by candidates of public official to voters. It accords with the maintenance of social order and public interests of Article 37 Section 2 of the Constitution, thus the purpose of legislation is legitimate.

It would be necessary to impose sanctions on bribees as well as

bribers of bribery in order to stamp from buying voters; and it would be basically within the scope of legislative discretion that considers circumstances in deciding whether violation against administrative law needs to be sanctioned by administrative penalty fee, the administrative sanction, or criminal sanction (6-1 KCCR 281, 303, 91Hun-Ba14, April 28, 1994; 10-1 KCCR 624, 635-636, 96Hun-Ba83, May 28, 1998). Accordingly, it would be the appropriate means for achieving legitimate purpose to impose administrative penalty fee on voters who receive bribery related to public official election.

2. Uniformity and Excessiveness of Sanctions

(A) If the legislature decided to impose administrative penalty that is administrative sanction within the scope of the legislative discretion, the issue of setting the amount of administrative penalty would belong to the legislative discretion unless it is excessive so that the Constitutional Court should concern the issue due to the unreasonable and arbitrary exercise of legislative discretion, such as the violation of principle of equality of the Constitution with regard to other administrative regulation violators by loosing the balance between the violation of duty and the responsibility or the violation of principle of proportionality and principle of prohibition of excessive restriction under Article 37 Section 2 of the Constitution by departing from the necessity to achieve the purpose (10-1 KCCR 624, 636, 96Hun-Ba83, May 28, 1998; 16-1 KCCR 272, 281, 2002Hun-Ba97, February 26, 2004).

(B) However, the Instant Provision uniformly standardizes the amount of administrative penalty fee that will be imposed on the violators as the '50 times worth the received money, food or goods' without any exception. Because the standard of imposing administrative penalty fee binds the administrative penalty fee proceeding in court, the competent court of the administrative penalty case would follow the Instant Provision that set the amount of administrative penalty fee, unless it decides not to impose the sanction. It would not violate the Constitution to stipulate uniformly the imposition standard of administrative penalty in a statute. However, in the case of 'the act

that receives goods, food, book, sightseeing, or transportation violating the prohibition clause of bribery', which is subject to administrative penalty fee by the Instant Provision, the imposition of administrative penalty that is uniformly standardized with the value of received goods, without considering specific and individual circumstances, would not be the appropriate sanction that accords with the responsibility of specific violation because there are significant differences in the degree of illegality, depending on the motivation or types of violation, the context and method of bribery, the relationship between bribers and bribees, and the circumstance afterwards.

Especially, the instant former provision would apply to the bribery of expensive goods that cannot be a small amount, in contrast to the original legislative intent under the principle of legality and strict interpretation in criminal law. As a result, according to the instant former provision, the administrative penalty fee of 50 million won would be imposed on whether the bribery value is 1 million won or 50 million won, and it calculate the flat 50 times administrative penalty fee worth the value of goods without considering the circumstances after the fact such as the violator's return or surrender related to bribery. Such sanction would not correspond to the principle of liability, and it would cause the inequity among violators. Compared to the instant former provision, the instant revised provision clarifies to exempt the money, food, or goods worth more than 1 million won from the application of the provision, and it inserts the special deduction clause that allows discretional deduction in the case of return or surrender. While it relieved the uniform imposition standard that was the unconstitutional element located in the instant former provision, it could not eliminate the unconstitutionality of the instant former provision because it does not consider the specific and individual circumstances such as the motivation and types of violation, context and method of bribery, and relationship between bribers and bribees in imposing the administrative penalty on violators, except return or surrender.

(C) Moreover, the provision automatically calculate the amount of administration penalty fee as '50 times' of the value of received food or goods, which causes significant differences in the administration

penalty fee, depending on the value of received goods and which is not light sanctions for voters.

The burden of administrative penalty under the Instant Provision can be clearly presented when compared with the statutory punishment of criminal fine set in Article 257 Section 2 of the Public Official Election Act. The Instant Provision intends to regulate minor cases, compared to the criminal punishment clause of Article 257 Section 2 of the Public Official Election Act, in order to exterminate small bribery in an effective and practical way. However, while the ceiling amount of fine stated in Article 257 Section 2 of the Public Official Election Act is 5 million won, 50 million won of administration penalty fee that amounts 10 times than the ceiling amount of fine can be imposed on a lighter case, for example, where the value of received money, food or goods is 1 million won. The difference would not be justified, even considering the different nature of criminal punishment and administrative sanction.

(D) Even considering the legislative purpose that intents to exterminate small bribery for eradicating election corruption and enhancing the fairness of election and election culture, the purpose does not require the amount of administrative penalty to be '50 times worth the received money, food or goods'. The purpose can be achieved by mitigated legislative means, for an instance, that may set the amount of administrative penalty fee as 'less than 50 times worth the received money, food or goods'.

3. Sub-conclusion

Therefore, the Instant Provision not only standardizes uniformly the standard and amount of administrative penalty fee that is imposed on violations, unconforming to the principle of liability, but also departs from the legislative purpose by regulating violations excessively, thereby infringing the principle of prohibition of excessive restriction.

C. The Decision of Incompatibility with the Constitution and the Suspension of Application

The Instant Provision should be declared as unconstitutional as reviewed above due to the violation of the Constitution. However, the unconstitutionality of the Instant Provision is grounded on not the imposition of administrative penalty fee itself, but the standard and amount of the penalty that are not only standardized to be disproportionate to the principle of responsibility but excessively heavy. If the Instant Provision is declared as unconstitutional, being suspended immediately, the confusion and inequity in enforcing law may be arisen from the legal vacuum against violators who are subject to the Instant Provision, until the legislature revises the Instant Provision with the correspond to the unconstitutionality reasoning, and it would principally belong to the legislative discretion to mediate unconstitutional elements to be constitutional. With these considerations, we declare the Instant Provision is incompatible with the Constitution. Nonetheless, until the legislators revise the provision to eliminate unconstitutionality, the courts, governmental bodies and municipalities shall suspend the application of the Instant Provision that is declared as incompatible with the Constitution and apply the newly revised provision that eliminate the unconstitutionality, when it is revised.

V. Conclusion

Because the Instant Provision is incompatible with the Constitution, we decided that the Instant Provision is incompatible with the Constitution, holding to suspend the application of the Instant Provision by courts, governmental bodies and municipalities until the legislators revise the provision. All Justices, except Justice Lee Kong-hyun and Justice Kim Hee-ok, reached an agreement in making this decision.

VI. Dissenting Opinion of Justice Lee Kong-hyun and Justice Kim Hee-ok

We believe the Instant Provision does not violate the Constitution as following reasons.

It would belong to the legislative discretion, unless it is 'clearly unreasonable or arbitrary, to decide the type of administrative penalty

for a certain violation against administrative law.

From the perspective of history, our election culture strongly demands the legislative regulation with regard to bribery of money, goods, or food from candidates to voters. The criminal punishment clause had been existed from the National Assemblymen Election Act enacted in 1948 to the enforcement of the Instant Provision in March 2004. However, bribery such as providing money or goods or entertaining with food by candidates had been happened. The actions were conducted in secret and systematical ways, making it hard to be discovered, and even when it was discovered, violators rigged the illegal conducts so that the diluted illegality lead the ineffectiveness in criminal punishment and voters who received bribery were hardly punished.

In considering such circumstances, the legislature revised the sanction to the 50 times administration penalty fee for minor donations, while the existing criminal punishment would be imposed on other large bribes in March 2004, attempting to correct the wrongful election culture of bribes of small money or reception by imposing the speedy, uniform and explicit sanction ('50 times administrative penalty') on minor illegal bribes. As an effective and speedy regulatory means to alert voters, the uniform '50 times administrative penalty fee' has been regarded to succeed in exterminating minor illegal bribes. Therefore, the Instant Provision would be the appropriate and effective means for the legislative purpose.

The majority opinion states 'less than 50 times' administrative penalty, not 'standardized 50 times' administrative penalty, may accomplish the legislative purpose. However, it is doubtful that such mitigated clause would bring such result. From the perspective of voters, the symbolic meaning and effectiveness of the standardized '50 times administrative penalty' would be certainly much larger than 'less than 50 times administrative penalty'. The penalty of 50 times worth the value of received goods would be more effective in preventing crimes generally than the imposition of 'less than 50 times' penalty that would consider individual circumstances. Therefore, the regulation of 'less than 50 times' administrative penalty would not sufficiently achieve the legislative purpose of the Instant Provision that intends to

exterminate election corruption by controlling the expectation for bribes of candidates and voters.

According to the majority opinion, the flat 50 times administrative penalty fee is unconstitutional because it cannot consider individual and specific circumstances such as the motivation and types of violation, the context of the method, the relationship between the briber and bribee, and circumstances afterwards.

The uniform imposition of administrative penalty 50 times worth the value of received goods less than 1 million won may be excessive sanction against voters, depending on the specific circumstances of violation. However, it should be noted that the Instant Provision intends to improve the election culture and reinforce people's alert to election corruption, such bribery had been criminally punished as illegal conducts and the real amount of administrative penalty fee imposed in practice are usually less than 50 million won. The unfairness and corruption of election by small bribes require the simple and effective legislative means to rectify the problem, and the legislature has the discretion to adopt administrative penalty in choosing the means of administrative punishment for the achievement of significant public interests, despite it may sacrifice the specific and individual reasonableness. On the other hand, the Act on the Regulation of Violations of Public Order that took effect on June 2008 impose administrative penalty fee neither on the violation without intents or fault (Article 7) nor the violation caused by the misconceiver of illegality of the conduct with a just reason (Article 8). It would supplement the unbalance between the conduct and responsibility in related to flat '50 times administrative penalty fee'.

Because the Instant Provision can impose administrative penalty fee up to 50 million won, the maximum amount of administrative penalty fee may be excessively expensive when compared to the fine less than 5 million won that are imposed on bribery that has heavier illegality. However, the sanction is applied to a bribery whose value is less than 1 million won, and the ceiling amount of 50 million won is set because the provision intends to regulate bribery less than 1 million won. In practice, the value of bribery subject to the penalty is usually less than 1 million won as the instant case regards the bribery of 9,000 won, that leads the administrative penalty of 450,000 won.

Despite the maximum administrative penalty fee of 50 million won is certainly higher than the maximum fine fee of 5 million won, the maximum amount is grounded on the legislative decision to regulate small bribes that occur frequently than large bribes and needs to be exterminated. Because of the different effect of administrative penalty fee and criminal fine on persons, it alone does not consist of the unreasonable or arbitrary legislative discretion to impose administrative penalty fee of 50 million won.

The majority opinion interprets that the administrative penalty fee of 50 million won would be imposed on even when the value of received goods exceeds 1 million won with regard to the imposition standard of the instant former provision. However, the legislative purpose clearly suggests that the 50 million won is resulted when the value is '1 million won', and the instant former provision specifies the '50 times worth the value', implying that the instant former provision would not apply to the bribery exceeding 1 million won. The interpretation of the majority opinion would eventually ignore the context of law that states to 'impose administrative penalty 50 times worth the value', not making sense of the criminal punishment clause that aims to regulate the bribery exceeding 1 million won. The National Election Commission has applied the Instant Provision to the bribery below 1 million won in practice. Despite the instant revised provision clarifies the point, it was revised not because the instant former provision applied to goods below 50 million won, but because it needs to correct such possible misinterpretation. As a result, in interpreting the instant former provision, the application only to the goods whose value is less than 1 million won has the reasonable grounds, not requiring the 'strict interpretation' that does not correspond to the intent and context of the provision and the system of the Public Official Election Act.

The Instant Provision stipulates the flat administrative penalty fee to respond to the special legislative purpose that intends to regulate our election culture. The scale of '50 times' sanction would not be the obviously wrong legislative means when considering the Instant Provision applies only to the case where a person receives goods whose value is less than 1 million won and it has its own symbolism and effectiveness.

Therefore, the Instant Provision does not violate the Constitution because it does not depart from the scope of the legislative discretion.

Justices Lee Kang-kook (Presiding Justice), Lee Kong-hyun, Cho Dae-hyen, Kim Hee-ok, Kim Jong-dae, Min Hyeong-ki, Lee Dong-heub, Mok Young-joon, Song Doo-hwan

[Attached] The List of requesting petitioners and underlying cases : *(intentionally omitted)*

3. *Reversion of a Public Auction Deposit to the Nation Coffers Case*

[21-2 KCCR 1, 2007Hun-Ka8, April 30, 2009]

QUESTIONS PRESENTED

1. Whether the later part of Article 78 Section 2 of the National Tax Collection Act (hereinafter, the "Instant Provision") that stipulates a deposit to secure the contract shall be reverted to the Nation Coffers if a purchaser, who is authorized to buy the property subject to public auction, fails to pay a purchase price unreasonably discriminates against defaulters and security right holders under the National Tax Collection Act in favor of debtors and security right holders under the Civil Execution Act, thereby violating the principle of equality, grounded on the comparison to civil execution proceedings where a deposit of application for purchase should be distributed as dividends.

2. Decision of incompatibility with the Constitution and order of suspension of the provision

Summary of the Decision

1. With the consideration of the structure and operation system of the relative provisions such as the National Tax Collection Act, a public auction under the National Collection Act can be regarded as a private sale contract between a defaulter and purchaser, but executed by the Office of Disposition on Default as proxy, and deposit can be regarded as a penalty for breach of contract that legalizes the condition of sales, which is substantially identical to the deposit of application for purchase.

The legislative intent of National Tax Collection Act lies on the rapid and fair execution of tax claims. However, the rapidity contributed by deposit does not relate to where the deposit should be finally reverted. The deposit contributes to the rapidity of a proceeding through the enforcement of a payment of a purchaser, subject to the

condition that a deposit may not be returned under some circumstances. Rather, the reversion of deposit to the Nation Coffers may hinder the fair execution of tax claims that initiate the proceeding due to the reduction of dividends. On the other hand, it does not correspond with the legal characteristic of the National Tax Collection Act as a procedural law of compulsory collection in administration to set up the discriminative purpose that resources provided by the third party shall not be devoted to the claim initiating the proceeding, through the differentiation of the system that is equivalent to a penalty for breach of contract.

Under the system of private ownership, principle of private autonomy, and rule against excessive restriction implied by the rule of law, private transactions should be substantially respected, at least in the process of liquidation of the property subject to public auction, when creating the collection procedure of tax delinquency or civil execution procedure that assumes the intervention of the public authority in private transactions in order to collect debts. The self-execution of the Nation on tax claims intends the self-commencement of the collection proceeding and grants the priority in claims by the exchange value of liquidated properties subject to public auction. However, it does not allow the acquisition of additional interests, besides tax claims and proceeding fees, in the liquidation process of the property.

Therefore, the Instant Provision that procedurally differentiates deposit of the National Tax Collection Act from the deposit of application for purchase, which is equivalent to the deposit as a legalized condition of sale, unreasonably discriminates against defaulters and security right holders of public sale proceedings of the National Tax Collection Act in favor of execute debtors and security right holders of public auction proceedings of the Civil Execution Act, in terms of property interests, thereby violating the constitutional principle of equality.

2. The Instant Provision violates the principle of equality since it stipulates deposit shall be reverted to the Nation Coffers; nevertheless, its legalized condition that deposit shall not be returned to a purchaser in case of default of payment as a penalty is not unconstitutional by

itself. On the other hand, it would lie within the legislative discretion whether deposit would be devoted in prior to the tax claim which initiates the collection proceeding or it would be paid according to the priority order of security right holders as in civil execution proceedings, at the process of the distribution of the liquidated property. Article 81 Section 1 of the National Tax Collection Act, regarding the distribution process, does not refer to deposit.

Therefore, this Instant Provision should be decided to be unconstitutional, whereas we declare the incompatibility with the Constitution due to the necessity of perfunctory retention while the revision is recommended to the Legislature and whereas we declare the suspension of the Instant Provision until the enforcement of the revised legislation to prevent further reversion to the Nation Coffers. Government agencies shall execute the current proceeding subject to the custody of deposit that is not returned in case of default; and shall execute the final allocation according to the revised legislation.

Opinion of Partial Unconstitutionality of Justice Cho Dae-hyen

Because deposit that is paid as a part of payment of public auction according to the proceeding of disposition on default would be reverted to sellers (owners of properties subject to public auction) in the case of default of a purchaser as a penalty, it should be regarded as "proceeds from a sale" prescribed in Article 80 Section 1 Item 3 of the National Tax Collection Act if the deposit is forfeited due to the cancellation of decision to sell that is followed by the default of a purchaser. Therefore, it should be applied to the discharge of public auction fees, taxes in arrears and security rights as included into the allocation resources according to Article 81 of the National Tax Collection Act. There are no reasons to revert deposit to the Nation Coffers because any damage from the delay of collection of taxes in arrears would be compensated by additional charges.

Therefore, the part of nationalization of the Instant Provision, stipulating deposit shall be reverted to the Nation Coffers instead of being included into proceeds from sales, violates the Constitution in that it infringes unreasonably the right to property of the person who possess a property subject to a public auction. However, the part of

forfeiture, stipulating deposit shall not be returned to a purchaser, does not suffice to be declared to be unconstitutional. The majority opinion that declares the entire Instant Provision, including both the nationalization part and forfeiture part, to be unconstitutional and to be suspended would exceed the authority of constitutional review in that it declares the constitutional part to be unconstitutional and to be suspended. In addition, there would be no legal vacuum if deposit, forfeited in case of lapse of the nationalization part of the Instant Provision, is understood as proceeds from a sale of Article 80 Section 1 Item 3 of the National Tax Collection Act.

Party

Requesting Court
Seoul Administrative Court

Movants at the Requesting Court
Corporation ○○ Bank
Chief Executive Officer Lee ○-uhn
Manager Chung ○-mok
Represented by Bae, Kim & Lee, LLC
Attorney in Charge: Kwak Tae-chul and three others

Underlying Case
Seoul Administrative Court 2005Ku-hab32828 Cancellation of the Disposition to Distribute the Proceeds from a Public Auction

Holding

1. The later part of Article 78 Section 2 of the National Tax Collection Act (revised by Act No. 6805 on December 26, 2002) is incompatible with the Constitution.

2. The forementioned provision shall lose its effects from January 1, 2010 unless it is revised by December 31, 2009.

Courts, governmental bodies, and municipalities shall suspend the application of the forementioned provision until legislators revise the provision.

Reasoning

I. Introduction of the Case and Subject Matter of Review

A. Introduction of the Case

1. The movant at the requesting court loaned ○○ House Corporation from May 22, 1996 to July 22, 1996, and established the first priority right to collateral security upto 39 billion won against the debtor ○○ House Corporation on the woodland of 61,293㎡, located in San 39-5, Shindang-Dong, Dalseo-Gu, Daegu and owned by Lee ○-ho, to secure the loans. Because Lee ○-ho defaulted aggregate land tax that is 266,854,330 won in total, the Mayor of Dalseo-Gu in Daegu seized the property, requesting Korea Asset Management Corporation (hereinafter, "KAMCO") to execute a public auction by proxy.

2. ○○ Corporation that was authorized to purchase the property subject to the public auction on the first public sale day arranged by KAMCO around on January 6, 2005 failed to pay the rest of the purchase price until the designated time limit, while it paid the deposit of 920,000,000 won. Accordingly, KAMCO annulled the decision to sell and executed a re-auction. The successful bidder of the re-auction, □□ Corporation, completed the payment of the purchase price of 9,661,100,000 won when it was authorized to purchase the property subject to the public auction on April 20, 2005.

3. In allocating the proceeds from the public sale, the movant at the requesting court submitted the bond statement, revealing her loans of 38,041,331,583 won against ○○ House Corporation, to KAMCO on

July 11, 2005. On July 28, 2005, KAMCO distributed the proceeds from the auction to disposition fees for arrears of 30,721,960 won and the instant tax in arrears of 312,882,770 won, after the payment of the deposit paid by ○○ Corporation, which was excepted from dividends, to Dalseo-Gu. KAMCO eventually distributed the remaining 312,882,770 won to the said movant, according to the later part of Article 78 Section 2 of the National Tax Collection Act (hereinafter, referred to as "NTCA") that is applicable to proceedings of local taxes in arrears as stated in Article 28 Section 4 of Local Tax Act.

4. The movant at the requesting court commenced an administrative proceeding on October 20, 2005 to claim the cancellation of the disposition of distribution of proceeds from a public auction, due to the alleged illegality of such disposition, at the same time, the said movant filed a motion to request for the review the constitutionality of the later part of Article 78 Section 2 of the NTCA that stipulates the reversion of the deposit to the Nation Coffers, separating the deposit from dividends. The Seoul Administrative Court requested this constitutional review on January 29, 2007.

B. Subject Matter of Review

The subject mater of this review is the constitutionality of Article 78 Section 2 of the NTCA (revised by Act No. 6805 on December 26, 2002 hereinafter, "Instant Provision"), as following below. The relative provisions are presented in addendum.

[The Instant Provision]
NTCA (revised by Act No. 6805 on December 26, 2002)
Article 78 (Cancellation of Decision to Sell)
(1) Where falling under one of the following items, the director of the tax office shall cancel the decision on sale of attached properties, and notify the purchaser of the said purport:
1. After making a decision on sale under Article 75, in case where any defaulted taxpayer has paid the defaulted amount relating to attachment, and the disposition fee for arrears, by obtaining a consent of the purchaser, before the purchaser pays the purchase price, and

files an application for a cancellation of the decision on sale; and

2. Where the purchaser fails to pay the purchase price not later than the designated time limit, even if a preemptory notice has been made under Article 76.

(2) Where any decision on sale of attached properties is cancelled under Section 1 Item 1, the deposit shall be returned to the purchaser, and where any decision on sale of attached properties is cancelled under Section 1 Item 2, the deposit shall be reverted to the Nation Coffers.

II. The Reason for Request for Constitutional Review and Arguments of Interested Agencies

(Intentionally Omitted)

III. Review on Merits

A. Deposit to secure a contract and issues of this case

1. The Instant Provision states that deposit shall be reverted to the Nation Coffers, not being returned to a purchaser, if the purchaser, who is authorized to buy the property subject to public auction that is a part of the procedure of disposition on default under NTCA, fails to pay a purchase price until the designated time limit, thus the decision to sell being cancelled. It intends to prevent from impairing the appropriateness and efficiency of pubic auction due to the failure of the payment obligation until the designated time limit because of, for example, receiving the expensive decision to sell beyond her finance capability.

2. If a decision to sell is annulled in a public auction proceeding under the NTCA, because a purchaser who is authorized to buy the property subject to public auction fails to make the payment, a re-auction will be executed (Article 74 Section 2 of the NTCA). The payment of the purchase price in the re-auction would be firstly applied to disposition fees for arrears and instant taxes for arrears, and eventually, distributed to the security right holder (Article 80 Section 1

Item 3 and Article 81 of the NTCA). At the allocation process, the deposit paid by the former purchaser would be separately reverted to the Nation Coffers, excluding from the allocation resources. It is applicable to the collection proceeding of local taxes and other utility bills which follow the NTCA, thus the deposit that is not returned to a purchaser would be separately reverted to the competent local government or utility bill collection agency, regardless of the local tax or utility bill of the issue.

On the other hand, in the foreclosure proceeding under Civil Execution Act, if a purchaser authorized to buy the property subject to public auction defaulted the payment within the designated time limit, the deposit for application for purchase paid by the purchaser is included into the allocation resources after the re-auction (Article 147 Section 1 Item 5 of the Civil Execution Act), being allocated to execution creditors and real security right holders along to the priority order and being returned to the owner of the property subject to the public auction, if it is remained, whereas the deposit is not retuned to the purchaser (Article 138 Section 4 of the Civil Execution Act).

In public auction proceedings executed by governmental agencies, in the case that the deposit or the deposit for application for purchase paid by the purchaser is not retuned due to her default in making the payment, the owner of the property subject to the public auction and security right holder in the public auction proceeding under the NTCA may be in more disadvantageous position in terms of property interests, such as dividends, due to the reduction of allocation resources, when compared to ones in the public auction proceeding under the Civil Execution Act. It leads the issue whether such difference in procedural regulation violates the principle of equality of Article 11 Section 1 of the Constitution.

B. Principle of Equality

1. Comparable groups

A 'defaulter or security right holder' in public auction proceedings of the NTCA and an 'debtor or security right holder' in foreclosure proceedings of the Civil Execution Act, who have passive interests in

the proceeding, are differently treated by the law with regard to the scope of the expiration of an obligation and dividends, without any option in a proceeding, separated from a tax creditor or executive creditor initiating each proceeding. Such differences in procedural rules between the two comparative groups raise the issue of equality.

2. Standard of review

In reviewing the violation of the principle of equality, the Constitutional Court applies the strict scrutiny where the Constitution especially demands equality (that is where the Constitution expresses factors that should not be grounds of discrimination or fields that should prohibit any discrimination) and where the related basic rights are substantially infringed by the discrimination, otherwise, the Constitutional Court applies the moderate review standard (*see* 19-1 KCCR 335, 346, 2005Hun-Ma1144, March 29, 2007).

The discrimination by the Instant Provision regards the scope of property interests, which would be occurred by the different formation of dividend resources, depending on the final reversion of deposit paid by a purchaser, not an owner of the property subject to public auction. It is not the case where the Constitution especially demands equality or the related basic rights are substantially infringed. In addition, the extensive legislative discretion is basically recognized in the area of collection of delinquent taxes or civil execution procedure to satisfy bonds. Therefore, the review standard of equality in this case would be not the proportionality standard, but the moderate review standard according to the principle against arbitrariness. The review under the principle against arbitrariness focuses on the discrimination whether naturally equal things are treated differently or naturally different things are treated uniformly and the arbitrariness whether the discrimination lacks objective and reasonable grounds to justify such discrimination (*see* 15-1 KCCR 48, 59, 2001Hub-Ba64, January 31, 2003; 17-2 KCCR 577, 612, 2003Hun-Ka8, December 22, 2005).

3. Review

(A) The legal nature of public auction proceedings and deposits and discrimination between them

A decision to sell properties in a public auction proceeding enters into a sales contract between a defaulter and purchaser offering the highest price (*see* General Rule 75-0···2 of the NTCA). A purchaser can devote the paid deposit for the public auction to the payment of purchase (*see* General Rule 65-0···1 of the NTCA), and the nullification of the decision to sell due to the default of payment of a purchaser leads the cancellation of the contract of sales (*see* Article 74 section 2 of the NTCA). However, the deposit may be returned if the relationship of quasi contract is not established due to the failure of deciding the successful bidder (General Rule 65-0···2) or the decision to sell is cancelled because a defaulter completed the payment of delinquent taxes prior to the payment of the purchaser, that are irrelevant to default of payment of the purchaser.

Under the structure and operation system of the relevant provisions, a public auction of the NTCA has the nature of the private sale contract between a defaulter and purchaser, executed by the Office of Disposition on Default as proxy, and the deposit of the Instant Provision is similar to a penalty for breach of contract that legalizes the condition of sales. Accordingly, the forfeiture of deposit from a purchaser in case of default would be justified, because a purchaser, assuming that deposit will not be returned unless the rest of payment is completed after the decision to sell, participates into the public auction by paying the deposit in prior so that he can receive the decision to sell, entering into a sales contract that has a penalty condition with the defaulter through the Office of Disposition on Default as proxy.

The public auction of Civil Execution Act, generally, also has the nature of a private sale contract, regarding the deposit for purchase as the legalized sale condition. The deposit for purchase has the similar character to the penalty condition in private laws, as does the Instant Provision, on the ground that the legislative purpose that intends to secure the fair and speedy process by preventing the reckless bidding of a purchaser and the structure that regards whether the deposit to be applied to the payment or to be returned. Accordingly, the deposit

under NTCA shall be deemed to be identical to the deposit for purchase under Civil Execution Act.

However, in the case of penalty condition of private sales contract, the forfeiture of the penalty provided by a purchaser due to her default is based on a principle of reversion of the penalty to a seller, in this context, the deposit for purchase under Civil Execution Act is also included into the allocation dividends, assuming to be reverted to an owner of property subject to auction, who is in position of a seller, if the deposit is not returned to a seller for her default of payment. However, the Instant Provision stipulates that the deposit that is penalty provided by a purchaser in characteristic shall be reverted to not a defaulter who owns the property subject to auction, but the Nation Coffers. It treats identical subjects in a different way, raising the issue of whether there are reasonable grounds in this discrimination.

(B) The speedy and fair execution of tax bonds and reasonableness of discrimination

It should be considered whether there are reasonable grounds of the discrimination from the perspective of the legislative purpose of the NTCA that intends the speedy and fair execution of tax claims.

First of all, the rapidity of proceedings, intended by a deposit, does not relate to where the deposit should be finally reverted. A deposit enforces a purchaser to pay the price under the condition that a deposit may not be returned if defaulted. Further, the decrease of dividends by reverting of deposits to the Nation Coffers may obstruct the fair execution of tax credits that commence the proceeding, especially if there are security rights which have priority over the tax bonds.

If the Legislature intends to accomplish thoroughly the specific tax burden of individual tax payers, set by the competent taxation act which is enacted through several policy considerations such as the realization of economic justice by taxation, the taxes in arrear may not be paid by the resources which are not the property of the defaulter, but are provided by a third party of a proceeding. Nonetheless, the NTCA is basically a procedural law intending the speedy and efficient

execution of standardized and large tax bonds; and the Framework Act on National Taxes and other relevant Acts are in charge of the public interests of tax bonds, such as the priority of tax, and the substances reflecting other policy considerations. Further, it is unusual to permit the priority, which is given to tax, to other bonds regulated to be collected according to the NTCA by individual Acts, such as social insurance, allotment, penalty surcharge, clawback, compensation, administrative penalty, fee collection cost, or royalties in addition to the tax bonds such as national tax or local tax. Whether individual Acts stipulate to apply the proceeding of NTCA depends on the self-execution in the proceeding, with the consideration of special circumstances - for example, the public interests, quantity, collectivization of the instant right to claim - and the technical fitness of simplified and rapid collection (*See* 17-2 KCCR 577, 599-600, 608-09, 2003Hun-Ka8, December 22, 2005). Besides, every bond collected according to the NTCA as stipulated in individual Acts is not necessarily related to the economic justice, so is tax. Therefore, it would not coincide with the position of the NTCA as a procedural law regarding the administrative collection to establish the discriminatory purpose that the resources provided by the third party shall never satisfy the bonds initiating the proceeding, by prescribing differently the system with the character of penalty condition.

As a result, the discriminatory treatment of the Instant Provision stipulating the reversion of deposit to the Nation Coffers, instead of a purchaser, lacks reasonable grounds under the legislative purpose of the NTCA intending the speedy and fair execution of tax bonds.

(C) The purpose of self-execution and respecting private transaction

The proceeding of disposition on default under the NTCA permits the self-execution to administrative agencies, differentiating from the proceeding under Civil Execution Act, in order to execute the collection of tax bonds that are usually massive and standardized in a rapid and fair way. Accordingly, the proceeding of disposition on default under the NTCA progresses as an administrative disposition without going through the trial of court. In principle, it grants the attachment the priority in dividends, unlike the real property auction

under Civil Execution Act, discounting the request to dividends of general private creditors.

However, there are few differences between a delinquency disposition proceeding and civil execution proceeding in the basic progress that seizes the property of debtors, liquidates, and allots with the enforcing power of the government authority against the default on monetary obligation. Auction proceedings basically intend the liquidation, securing the exchangeability of the subject property, and the liquidation of the property assumes the private transaction, that is sales contract in our legal system. According to the enactment report, the harmony with the Civil Act and the Civil Procedure Act and the protection of the right to property are the main purpose of the NTCA, which was enacted by Act No. 819 on December 8, 1961 and repealed the former NTCA enacted by Act No. 82 on December 20, 1949. Therefore, under the principles of the protection of private property, party autonomy, and prohibition of excessive restriction according to the rule of law, private transactions should be respected at most, at least in the process of liquidation of the subject property, when creating proceedings of delinquency disposition and civil execution that assume the enforcing power of government authorities for the execution of credits in the area of private transactions.

Under these considerations, the recognition of the self-execution of tax bonds would intend that the Nation can initiate the proceeding and have the priority in collecting claims with the exchange value of liquidated properties, not allowing that a person who initiates a proceeding can acquire additional interest, in addition to the instant bonds and proceeding costs, during the process of foreclosure. Therefore, the Instant Provision that stipulates the reversion of deposit to the Nation Coffers lacks the legitimacy that is required in the creation of the procedure of disposition on default because it abuses the self-execution of the Nation, acquiring the excessive interests.

(D) Sub-conclusion

The Instant Provision differentiates, in procedure, deposit of the NTCA that is the legalized condition of sales as a penalty for breach of contract from the deposit for application for purchase of the Civil

Execution Act despite these are identical in nature. Therefore, it unreasonably discriminates against defaulters and security right holders under the NTCA in favor of execute debtors and security right holders under the Civil Execution Act, from the perspective of property rights, thereby infringing the constitutional principle of equality.

IV. Decision of Incompatibility with the Constitution

A. The Instant Provision violates the principle of equality because it regulates the deposit to be finally reverted to the Nation Coffers. Nevertheless, it is not unconstitutional to stipulate the legal condition that does not allow the return to a purchaser on default as penalty for breach of contract. Besides, the unconstitutionality of the Instant Provision is extracted from the unfair discrimination in the process of creation of resources, which is specifically the liquidation of subject properties during the proceeding of disposition on default. It is within the legislative discretion to decide whether deposit shall be applied to the grounding tax claim in prior or according to the priority order of security right holders as in civil execution proceedings.

Accordingly, if we declare unconstitutionality of the Instant Provision, which shall nullify the effect of the provision, deposit would loose its own substance rules that enforce the obligation of payment of purchasers subject to the condition of forfeiture of some amount as a legalized condition of sales of penalty for breach of contract. In that case, deposit should be returned to a purchaser if the decision to sell is cancelled due to the default of payment. In addition, legal vacuum would be occurred from the perspective of regulations regarding the deposit that is not returned to a purchaser, even though only the part of reversion to the Nation Coffers is declared to be unconstitutional, separated from the part of the forfeiture of deposit from a purchaser. The provision with regard to allocation resources, Article 80 Section 1 of the NTCA, does not regulate deposit; and it is within the discretion of the legislature to decide whether the deposit should be devoted to tax claims or distributed in accordance with the priority of credits with regard to security right holders, which cannot follow the Civil Execution Act.

B. It leads that the Instant Provision includes both the constitutional part and the unconstitutional part in a single phrase, and the Legislators should decide the final distribution priority, assuming the deposit shall be neither retuned to a purchaser nor reverted to the Nation Coffers. Therefore, we declare that this provision is incompatible with the Constitution, urging the Legislature to revise the provision within a certain period due to the unconstitutionality while the perfunctory retention is maintained. Government agencies, courts and municipalities shall suspend the application of the provision until the enforcement of the revised legislation to prevent the further reversion to the Nation Coffers.

Because there are Article 65 Section 1 of the NTCA, stipulating deposit, and the Instant Provision, even though its retention is perfunctory, the deposit paid by a purchaser as required by the procedure of disposition on default would not be retuned in the case of the default of payment. However, the final distribution order is not determined due to the suspension of the Instant Provision. Thus, the procedure would proceed according to the law, while storing the deposit that would be eventually distributed when the law is revised. If the Legislature does not revise the Act within the time designated by the Constitutional Court, the Instant Provision shall loose its effect.

V. Conclusion

With these considerations, we decide that the Instant Provision should be declared to be incompatible with the Constitution due to its unconstitutionality. The Instant Provision shall loose its effect from January 1, 2010 if it is not revised by the legislature until December 31, 2009, and courts, governmental bodies and municipalities shall suspend the application of this provision until the revision by the legislature, as decided in the Holding. Participating Justices reach a consensus in delivering this decision, except the below partial unconstitutional opinion of Justice Cho Dae-hyen.

VI. Opinion of Partial Unconstitutionality of Justice Cho Dae-hyen

The "reversion to the Nation Coffers" prescribed in the Instant

Provision consists of the part of 'forfeiture' stipulating that deposit shall not be returned to a purchaser and the part of 'nationalization' stipulating that deposit shall be reverted to the Nation Coffers. I think the forfeiture part is not unconstitutional, whereas the nationalization part is unconstitutional.

The Office of Disposition on Default exercises the disposition rights as a proxy in the public auction of the procedure of disposition on default under the NTCA, and the decision to sell creates a sales contract between an owner of the subject property and a purchaser. The deposit paid for the subject property during the public auction of the procedure of disposition on default is reverted to the owner of the subject property, not the Office of Disposition on Default. The Office of Disposition on Default is only permitted to devote the payment, which would be reverted to the owner of the property subject to the public auction, to the tax claims in arrears, as a course of seizure.

Article 65 of the NTCA stipulates that more than 10 percentages of the sale price may be returned as deposit in the proceeding of public auction, if it is needed. It intends to promote the effectiveness of public auction by creating the condition of deposit as Article 398 Section 4 of the Civil Act. If a purchaser of a property subject to the public auction in the procedure of disposition on default does not make the payment, it would cause the default of payment of the public auction, hindering the purpose of the procedure of disposition on default (the collection of tax in arrears). This Instant Provision, specifically the part of 'forfeiture', does not allow the return of deposit because it is the sanction for the default of the payment of the purchaser, implying the constitutionality for the effect of the deposit condition to secure the execution of public auction.

However, the Instant Provision further states to revert the deposit, which is not returned to a purchaser, to the Nation Coffers.

Deposit is a part of a proceeding of disposition on default. However, it may be reverted to a seller (owner of properties subject to public auction), in the case of the breach of contract of a purchaser as a penalty of public auction. Therefore, deposit shall be deemed as the "payment" of Article 80 Section 1 Item 3 of the NTCA if it is forfeited because of the default of a purchaser, which cancels the decision to sell. It leads the conclusion that the deposit shall be devoted to public auction fees, tax claims in arrears, and

security rights, as included in the allocation resources of Article 80 Section 1 of the NTCA as a part of public auction, in accordance with Article 81 of the NTCA.

The forfeited deposit should be reverted to an owner of properties subject to public auction, and there are no reasons to be reverted to the Nation Coffers. Even if a purchaser defaults the payment of public auction, causing delay in the collection of tax claims in arrears, the deposit should not be reverted to the Nation Coffers for the delay of the collection of tax claims because additional charges shall be collected for reimbursing the damages from the delay. Therefore, the part of nationalization of the forfeited deposit of the Instant Provision infringes on the property rights of the owner of properties subject to public auction because the provision mandates the deposit to be reverted to the Nation Coffers without reasons despite it should be reverted to the owner of properties subject to public auction.

Therefore, the part of nationalization of the forfeited deposit of the Instant Provision, excluding from the allocation resources of Article 80 Section 1 of the NTCA should be decided to be unconstitutional because it infringes the property rights of the owner of properties subject to the auction without reasons. However, the part of the forfeiture of deposit from a purchaser should not be declared to be unconstitutional because of its constitutionality. The majority opinion that declares the entire Instant Provision, including both the nationalization part and forfeiture part, to be unconstitutional and to be suspended would exceed the scope of constitutional review in that it declares the constitutional part to be unconstitutional and to be suspended. In addition, there would be no legal vacuum if deposit, forfeited in case of lapse of the nationalization part of the Instant Provision, is understood as proceeds from a sale of Article 80 Section 1 Item 3 of the NTCA.

Justices Lee Kang-kook (Presiding Justice), Lee Kong-hyun, Cho Dae-hyen, Kim Hee-ok, Kim Jong-dae (No signature due to the business trip abroad), Min Hyeong-ki, Lee Dong-heub, Mok Young-joon, Song Doo-hwan

[Attachment] (*intentionally omitted*)

4. Wartime Reinforcement Military Practice of 2007 Case

[21-2(B) KCCR 769, 2007Hun-Ma369, May 28, 2009]

Questions Presented

1. Whether, the decision of respondent, President, (hereinafter, the "Instant Decision") to operate the wartime reinforcement practice of 2007 (hereinafter, the "Instant Military Practice"), a Korea-U.S. joint military practice belongs to an executive decision

2. Whether the right to peaceful livelihood is constitutionally guaranteed basic right

3. The precedent in which the right to peaceful livelihood was acknowledged as constitutionally guaranteed basic right was overruled

Summary of the Decision

1. The Korea-U.S. joint military practice has been annually operated since Korea-U.S. joint military headquarter was established in 1978 and subsequently the Memorandum of Understanding on Korea-U.S. Joint Military Practice was exchanged on February 15, 1979. The Instant Military Practice, which was approved by respondent on March of 2007, is the representative join military practice and therefore cannot be regarded as an executive decision which is not subjected to judicial review by being a high-level political decision regarding national defense.

2. Pacifism, as asserted by complainants as the right to peaceful livelihood, is the goal and spirit of the Constitution and therefore is nothing more than absolute concept. Not enumerated in the Constitution as the basic right, the right to peaceful livelihood does not meet the reality as concrete right and therefore cannot be acknowledged as a new right. Therefore, it is not the right guaranteed by the Constitution.

3. Previously, on February 23 2003, the Constitutional Court held that 'the right to peaceful livelihood is the basic right acknowledged under the Article 10 and Article 37 (1) of the Constitution and thus

bestow a citizen the right to request state not to draft to aggressive war and provide peaceful livelihood in 2005Hun-Ma268. The precedent, therefore, will be overruled.

Concurring Opinion of Justice Kim Jong-dae

The basic right cannot be sought without the existence of a state. The existence of a state is threatened in case of war. Our Constitution denies any kind of aggressive war and pursues peace as an important norm. Therefore, it is a natural conclusion that the state's function is aimed to peace not a war under our basic constitutional principle. Here, however, peace does neither mean a state being conquered by another state to avoid a war nor provide any rationale to relinquish military practice to prepare for a possible war. For this reason, the right to peaceful livelihood raised by complainants cannot be regarded as an independent right which may deter the military practice for possible war while it may remain conceptualized under the above explained context.

Concurring Opinion of Justice Cho Dae-hyen, Justice Mok Young-joon, Justice Song Doo-hwan

The basic rights of citizens exist contingent upon the existence of a state and its basic orders of liberal democracy. Even for the citizens' basic rights, it is unavoidable to conduct a war and other military operation to protect land and citizens and to defend liberal democracy. Therefore, a state is allowed to: 1) impose the military duty on its citizens; 2) organize and maintain military force; and 3) conduct military practices for the above mentioned purpose. Yet, a state is not allowed to demand citizens to join a war of aggression which destroys the world peace because it defeats the abovementioned purpose. Drafting people to a war and leaving them under the threat of terror are against the duty of a state prescribed in the Article 10 of the Constitution because the freedom from an aggressive war, terror and military operation is the basic premises to materialize human dignity, value and the right to pursue happiness. Therefore, citizens have the

right to demand peaceful livelihood free from the draft to an aggressive war and the threat of terror. This right, although not enumerated in the Constitution, is a constitutionally guaranteed basic right. It is a concrete right which can be sought in a state.

Nevertheless, we do not find that the Instant Military Practice can possibly infringe upon citizens' right to peaceful livelihood. This complaint fails to state the possibility of violation of basic rights and therefore lacks the justiciability. For this reason, this complaint should be dismissed for lack of justiciability.

Supplementary Opinion to Concurring Opinion of Justice Cho Dae-hyen

To seek happiness, dignity and value, human should be able to live peacefully free from the threat to life and body. As such, "the right and freedom to live peacefully free from the threat to life and body" may be named as the right to peaceful livelihood. Even if the right to freedom of life and body is guaranteed as basic right, in addition, the right to live and the freedom of life should be recognized as basic right.

The right to peaceful livelihood may be restricted for necessary national security and public order. Yet, if a military practice is for aggressive war, it is against the Article 5 (1) of the Constitution which pursues the world peace and denies any aggressive war and therefore cannot be justified as a reason to infringe upon the right to peaceful livelihood.

Parties

Complainant

Lee, ○-jae and 97 others (as shown in appendix)

Represented by Chang Kyung-ook and one other attorney

Donghwa Law Firm, Attorney in Charge: Cho Young-sun

Sanha Law Firm, Attorney in Charge: Kwon Jong-ho

Duksoo Law Firm, Attorney in Charge: Choi Byung-mo and two

others
Hankyul Law Firm, Attorney in Charge: Park Joo-min
Jungpyung Law Firm, Attorney in Charge: Kim Seung-kyo and one other

Respondent
President

Holding

This complaint is dismissed

Reasoning

I. Introduction of the Case and Subject Matter

A. Introduction of the Case

1. On March 6, 2007, Korea-U.S. Joint Military Headquarter announced that it was going to operate a joint military practice named as "RSOI (Reception, Staging, Onward Movement, and Integration) practice of 2007" and a related joint practice named as "FE (Foal Eagles)" from March 25, 2007 to March 31 throughout the Korean territory. According to the Joint Military Headquarter, the joint military practice, as a defense oriented exercise, is aimed to improve the defense capability of Joint Military Headquarter from outer aggression.

2. RSOI practice has been an annual joint/combined command-post exercise. It is the military practice in anticipation of a war to secure movement route and to establish the procedure of the U.S. force's movement from landing in Korean soil to pushing to the frontline as well as the Korean force's support system and mobilization.

Foal Eagles has also been an annual military since 1961. As the theater-wide joint and combined field training exercise, it focuses on military practice in anticipation of the infiltration of the North Korean special force into the South Korean rear line. It also covers army

corps' field practice, transfer line of war supplies and other practices. Since 2002, it has been combined with RSOI and operated under the name of RSOI/FE.

3. The Instant Military Practice has been operated annually pursuant to the Korea-U.S. Mutual Defense Treaty and has been notified to North Korea through U.N Office each year.

4. On March 22, 2007, complainants filed this constitutional complaint. They claim that the Instant Military Practice, as a preemptive attack practice, increases the possibility of war in the Korean peninsula and threatens the peace of North Asia as well as the world and, further, infringes upon complainants' right to peaceful livelihood.

B. Subject Matter of Review

Complainants claim that the following two factors are the exercise of government power which infringes upon their right to peaceful livelihood: 1) Respondent as a commander-in-chief decided to operate the Instant Military Practice; and 2) accordingly, the Minister of the Defense Department conducts and supervises the Instant Military Practice. Yet, the Instant Military Practice, resulting from respondent's exercise of power to command military, is mere a factual act committed pursuant to Korea-U.S. Joint Military. It cannot be regarded as the de facto exercise of governmental power which creates some types of duty and action to complainants by itself.

For this reason, we will limit the subject matter within the issue of whether the Instant Decision infringes upon complainants' right to peaceful livelihood.

II. Arguments of the Complainants and Related Bodies

A. Complainants' argument

The Instant Military Practice is palpably a preemptive attack practice against North Korea under a specific military campaign strategy and

therefore against the Preamble (peaceful reunification, perpetual world peace), the Article 4 (peaceful reunification policy), and the Article 5 (contribution to world peace, denial of aggressive war) of the Constitution.

Further, respondent violates the duty to uphold the Constitution (Article 66 (2)) by exercising the power to command military. Accordingly, the Minister of the Defense Department, the Chairman of the Joint Chiefs of Staff, the Chiefs of the General Staff and the Chief of Marine Corp exercise their power to conduct and supervise. In result, the Korean government participated in the Instant Military Practice. The Instant Military Practice increases the possibility of war in the Korean territory which remains under the armistice. It also threatens the peace of the north-east Asian region as well as the world. It, further, creates a stumbling block to the execution and enforcement of the agreement of February 13 to comply with the Joint Agreement of September 19 made by participating countries in the third conference of the Fifth Six-Party talk. It, therefore, is the exercise of power which aggravates the north-south confrontation and deters the exchange, cooperation and reconciliation of the north and the south. Complainants thereby claim the Instant Military Practice infringes upon their right to peaceful livelihood guaranteed by the Article 10 and 37 (1) of the Constitution.

B. Respondent's Argument

No argument was presented

C. The opinion of the Minister of Defense Department

(*intentionally omitted*)

III. Review on Justiciability

A. Whether the Instant Decision constitutes executive action

The executive action is the high level of political decision which is not subjected to judicial review in general because it should be

respected. Therefore, the executive and legislative decision should rather be respected because they involve the issues with high level of political decision such as those which affect national interest and citizens' interest and therefore should be decided in anticipation of the future (*See* 16-1 KCCR 601, 606, 2003Hun-Ma814, April 29, 2004).

Yet, we do not find that the Instant Decision belongs to executive decision. The Korea-U.S. joint military practice has been annually operated since the Korea-U.S. joint military headquarter was established in 1978 and, subsequently, the Memorandum of Understanding on Korea-U.S. Joint Military Practice was exchanged on February 15, 1979. The Instant Military Practice, which was approved by respondent on March of 2007, is the representative join military practice and, therefore, particularly at this time, cannot be regarded as executive decision which should not be subjected to judicial review by being a high level of political decision regarding national defense.

B. Whether the right to peaceful livelihood is the basic right guaranteed by the Constitution

1. Our Constitution promulgates "the peaceful reunification of a country" and "perpetual world peace" in Preamble, peaceful reunification policy in the Article 4 of the Chapter I, General Provision, contribution to world peace and denial of aggressive war in the Article 5 (1) and respect toward the international law in the Article 6 (1) of the Constitution. Yet, the same Constitution does not prescribe the separate "right to peaceful livelihood" as a basic right in the Chapter II, Rights and Duties of Citizens. Therefore, the issue of whether "right to peaceful livelihood" is constitutionally guaranteed basic right is the issue of whether this right should be acknowledged as constitutional right not enumerated in the Constitution.

2. According to the norm of "peace" in Preamble and the Chapter I, General Provision, our Constitution clearly pursues the ideology and goal that we deny aggressive war, work for the peaceful reunification of a country and make efforts to maintain perpetual peace of the world. Therefore, it is an undeniable duty of a state to provide the

condition under which citizens enjoy the maximum capacity of constitutionally guaranteed basic rights, hold human dignity and value and live peacefully free from war and terror.

Despite pacifism is the goal and spirit of the Constitution, however, it does not directly create citizen's individual right to peaceful livelihood. In order to acknowledge a basic right not enumerated in the Constitution, first, we should find the special need for the right. Additionally, the scope of the right (scope of protection) should be relatively clear so that the right retains the power to demand its contents of concrete substance from the subjected person or entity.

Finally, it should be the concrete right of which legal resort can be sought through court proceeding in case of violation.

If we recognize the right to peaceful livelihood as a basic right, the substance of the right will be found in "subjects regarding aggressive war" because "peace without war no matter whether it is an aggressive war or defensive war" can be achieved not by individual country's effort but global cooperation for peaceful world order. Further, it is because our Constitution denies aggressive war only while prescribing the principle of world peace. Therefore, what may be the substances of the right to peaceful livelihood are: 1) "the right not to be drafted to a war of aggression"; and 2) "the right to seek to cease the exercise of governmental power which creates the grave fear by being used for war preparation such as military practice for a war of aggression, building a military base and manufacturing/importing the weapon of destruction. However, it is difficult to differentiate an aggressive war from a defensive one. In most cases, whether a war is aggressive may be highly a political question which the Judiciary should reserve its power to review (*See* 16-1 KCCR 601, 607, 2003Hun-Ma814, April 29, 2004)

It is hardly difficult to name the ordinary military practice, building military bases, the manufacture and import of arms and the expansion of arms during peace time as the preparation for "aggressive war". Since it is difficult to verify the nature of "aggressive nature" and "grave fear", we cannot see any practical protection by prohibiting the exercise of governmental act under the name of the right to peaceful livelihood. For these reasons, we hold that, not enumerated in the Constitution as the basic right, the right to peaceful livelihood does

not meet the reality as concrete right and therefore cannot be recognized as a new right.

3. The origin of the peaceful livelihood may be traced to "the right to live in peace" in the second paragraph of the Preamble of the Japanese Constitution. Given this language, the academic circle and the lower courts in Japan recognized this right as basic right. Yet, the Supreme Court of Japan did not recognize this right as a basic right despite the fact that the Article 9 of the Japanese Constitution separately prescribes the relinquishment of war and the denial of military power and the denial of the right to fight the war in addition to "the right to live in peace" in Preamble of the Constitution. Thereby, the Supreme Court of Japan denied the potential nature of substantial basic right of the right to peaceful livelihood.

Our Constitution does not have such direct mandates regarding the right to peaceful livelihood as Japan and rather prescribes such languages as "peaceful reunification", "world peace", "global peace" and "denial of aggressive war". Since we held that, not enumerated in the Constitution as the basic right, the right to peaceful livelihood does not meet the reality as concrete right and therefore cannot be recognized as a new right, we cannot easily recognize the right to peaceful livelihood as the constitutionally guaranteed basic right merely based on several languages in Preamble and General Provision of the Constitution as well as the Article 10 and 37 (1) of the Constitution. For the same reason, Germany does not facilitate the discussion on this issue both in academic and practical field although they have stronger provisions regarding peace in their Basic Law than we do in our Constitution.

4. Pacifism, as asserted by complainants in the name of the right to peaceful livelihood, is the goal and spirit of the Constitution and therefore is nothing more than absolute concept which cannot be construed as an individual concrete right creating the right to demand *not to be drafted to an aggressive war and to have a peaceful* livelihood. For this reason, the right to peaceful livelihood is not a constitutionally guaranteed basic right.

C. Sub-conclusion

This complaint premised by the infringement of right to peaceful livelihood is unjustified without the need for the further review.

IV. Conclusion

We dismiss this complaint for lack of justiciability and further hold as follows.

Previously on February 23 2003, the Constitutional Court held that 'the right to peaceful livelihood is the basic right acknowledged under the Article 10 and Article 37 (1) of the Constitution and thus bestow a citizen the right to request government not to draft to an aggressive war and to allow them to enjoy peaceful livelihood in 2005Hun-Ma268. The precedent, therefore, will be overruled.

Concurring Opinion of Justice Kim Jong-dae

As I concur to the majority opinion that the right to peaceful livelihood is not constitutionally guaranteed concrete basic right, I further give my opinion regarding 'war and basic right'.

A. The basic right is created when the Constitution acknowledges a certain legal interest as basic right and thereafter protects the right. The concept of basic right may not remain apart from the Constitution. The Constitution is premised by the existence of a state and therefore the basic right cannot be conceptualized apart from the existence of a state. Therefore, the existence of a state is the basis of the basic right and it is the premise to the guarantee of the basis right.

The existence of a state is threatened when a war erupts. A war is the fight for life against an enemy state (including anti-state organization or de facto state). Depending on the result of a war, the existence of a state and citizens' basic rights may not be promised. Therefore, only the existence of a state by either a victory or an armistice may warrant the Constitution and basic rights. Today, under a complex world order, a war may erupt at a sudden time under the

pretext of a state's interest and subjective justification and therefore makes it difficult whether a war is an aggressive one or a defensive one in its nature.

As such, a war as an emergency situation, once started, determines the existence of a state depending on the result regardless of the origin of the war. Therefore, a state should not be negligent in the preparation of war with continuous military practice. In this regard, President as a commander-in-chief, owing the constitutional duty of independence of preservation of the state's territory, continuation of a state and protection of the Constitution, should reinforce the mental power of the military to the maximum level for defense of a country with ongoing military practice and the expansion of arms in preparation of war which may erupt at any time.

B. The Instant Decision of respondent is aimed to defeat the enemy with ally force in anticipation of a war. When a military practice needs to be operated to protect citizens' life and basic rights from war, it necessarily creates the restriction of basic rights. Yet, this restriction cannot be a legal basis to request the prohibition of the state's military practice based on the complainants' basic right (the right to peaceful livelihood).

Our Constitution denies any kind of aggressive war and pursues peace as an important norm. Therefore, it is a natural conclusion that the state's function is aimed to peace not a war under our basic constitutional principle. Here, however, peace does neither mean a state being conquered by another state to avoid a war nor provide any rationale to relinquish military practice to prepare for a possible war. For this reason, the right to peaceful livelihood raised by complainants cannot be regarded as an independent right which may deter the military practice for possible war while it may remain conceptualized under above mentioned such context.

Those who propose the right to peaceful livelihood understand this right as "the right to request a state to guarantee citizens not to be drafted to an aggressive war and to enjoy peaceful livelihood". Yet, as we pointed out above, it is difficult to distinguish an aggressive war from a defensive one in its nature and, further, such conceptualization is difficult to make. Under the circumstances, those who propose the

right to prohibit preparatory measure in anticipation of war under the ambiguous notion of "aggressive war" clearly ignore the special nature of war which erupts unpredictably and creates devastating inhumane effects unless they propose immediate surrender in any kind of war.

C. Our Constitution promulgates peace as an important notion and denies aggressive war. Therefore, a state's function should be aimed to peace not war. Here, however, peace does neither mean a state being conquered by another state to avoid a war nor provide any rationale to relinquish military practice to prepare for a possible war.

For this reason, the right to peaceful livelihood raised by complainants cannot be regarded as an independent right which may deter the military practice for possible war while it may remain conceptualized under the context.

Concurring Opinion of Justice Cho Dae-hyen, Justice Mok Young-joon, Justice Song Doo-hwan

Unlike the majority opinion, we believe that 'the right to peaceful livelihood' is citizens' constitutional basic right. Therefore, we state a separate concurring opinion as we find that citizens may file constitutional complaint for the infringement of their right to peaceful livelihood.

A. Constitutional Provision

In its Preamble, our Constitution promulgates that " ····· the Republic of Korea ····· pursuant to the obligation for peaceful reunification ····· contributes toward the world peace and the common prosperity of mankind ····· " Further, in the Article 4, the Constitution prescribes that " ····· builds the policy of peaceful reunification pursuant to the principle of freedom and democracy."

In the Article 5 (1), the Constitution enumerates 'peace' to be one of the highest values in our Constitution by prescribing that "the Republic of Korea makes efforts to maintain the global peace and denies aggressive war".

Additionally, the Article 10 of the Constitution prescribes that "all

citizens shall be assured of human value and dignity 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". Hereby, the Constitution guarantees citizens' right to keep human dignity and value and the right to pursue happiness.

Further, the Article 37 (1) of the Constitution prescribes that "freedoms and rights of citizens shall not be neglected on the grounds that they are not enumerated in the Constitution". Hereby, the Constitution promulgates that, with respect to constitutionally protected rights, the Constitution shall protect the basic rights even if they are not enumerated in the Constitution.

B. The meaning of the right to peaceful livelihood

Under the above observed constitutional provisions, citizens have the right to peaceful livelihood free from the threat of aggressive war and terror in order to maintain human dignity and value and to pursue happiness. Therefore, a state owes the duty to protect citizens' life and bodily safety from aggressive war, terror and crime in order to guarantee these rights and further owes the duty to deny and avoid aggressive war which is not unavoidable and beyond control.

Of course, peace without war cannot be achieved only by an individual country's will and efforts and, thus, the right to peaceful livelihood does not mean the right to live without any kind of war and the right to oppose any type of war operation and military practice. The basic rights of citizens exist contingent upon the existence of a state and its basic orders of liberal democracy. Even for the citizens' basic rights, it is unavoidable to conduct a war and other military operation to protect land and citizens and to defend liberal democracy. Therefore, a state is allowed to: 1) impose the military duty on its citizens; 2) organize and maintain military force; and 3) conduct military practices for the above mentioned purpose.

However, a state is not allowed to demand citizens to join a war of aggression which destroys the world peace because it defeats the abovementioned purpose in the Article 5 (1) of the Constitution. Also, since the condition being free from aggressive war, terror and violence is the premise to materialize human dignity and value and the right to

pursue happiness (February 23, 2006, 2005Hun-Ma268, 18-1Sang, KCCR 298, 302-304), the state's act of drafting citizens to an aggressive war and leaving them under the threat of terror is against the duty of a state prescribed in the Article 10 of the Constitution. Therefore, citizens have the right to demand peaceful livelihood free from the draft for an aggressive war and the threat of terror. This right, although not enumerated in the Constitution, is a constitutionally guaranteed basic right. It is a concrete right which can be sought in a state.

C. Executive decision and its effectiveness

The majority opinion finds that it is difficult to distinguish an aggressive war from a defensive one and the decision on whether a state's act belongs to an aggressive war constitutes highly political decision which is rarely subjected to judicial review by being executive decision. Therefore, the majority decision finds that, since a military practice is difficult to verify its aggressive nature, any attempt to prohibit it under the name of the right to peaceful livelihood cannot be protected effectively. Therefore, they conclude that pursuant to the Article 37 (1) of the Constitution, there is no special reason to recognize the right to peaceful livelihood as a new basic right.

However, the issue of whether to acknowledge the right to peaceful livelihood as a basic right of citizens, the issue of whether a state's military act is subject to judicial review by being executive decision and the issue of whether it is difficult to verify the aggressive nature of military practice are totally different issues. As we observed above, citizens' right to peaceful livelihood, though not enumerated in the Constitution, should be protected as basic right inherent in the Constitution. Therefore, the issue of whether a state's military act which possibly infringes upon this right is qualified to be an executive decision and the issue of whether this military act is an aggressive war should be decided through judicial proceeding.

D. Sub-conclusion

In conclusion, we find that citizens have the right to request a state

for peaceful livelihood free from aggressive war and terror and it is against the constitution if the governmental act unreasonably infringes upon this right.

Yet, the Instant Decision was for the annual joint military practice which has been operated since 1994 pursuant to Korean-U.S. Joint Mutual Defense Treaty. The Joint Mutual Defense Treaty is aimed for joint defense against 'the aggression from outside' and the Korea-U.S. joint military practice is required for effective response to emergency situation as far as the U.S. military is stationed in Korea. Under the circumstances, we cannot find that the Instant Military Practice leads this country to an unpredictable aggressive war and thereby infringes upon citizens' right to peaceful livelihood. Since this complaint fails to state the possibility of violation of basic rights, it should be dismissed for lack of justiciability.

Supplementary Opinion to Concurring Opinion of Justice Cho Dae-hyen

The majority opinion does not acknowledge the right to peaceful livelihood because this right is not enumerated in the Constitution and this right is a difficult ideology to materialize. I disagree.

Human dignity and value and the right to pursue happiness are not created and guaranteed by a state. They are inherently embedded into human life prior to the notion of a state and a constitution. All citizens shall be assured of human worth and dignity and have the right to pursue happiness. It shall be the duty of a state to confirm and guarantee the fundamental and inviolable human right of individuals (the Article 10 of the Constitution). Freedoms and right of citizens shall not be neglected on the grounds that they are not enumerated in the Constitution (the Article 37 (1) of the Constitution). Finally, as Preamble of the Constitution promises to warrant the freedom, safety and happiness of us and our descendants forever", the Republic of Korea and the Constitutional Court of Korea exist to warrant citizens' basic rights.

To seek happiness, dignity and value, human should be able to live peacefully free from the threat to life and body. As such, "the right and freedom to live peacefully free from the threat to life and body"

may be named as the right to peaceful livelihood. This right is necessary basic condition for human dignity, value and happiness and therefore should be guaranteed with a priority compared to other basic rights. As the safety of life and body should be protected from violent crime, peaceful livelihood of human should be also protected from war, terror and violence by keeping the domestic and world peace. While the right to freedom of life and body is guaranteed as basic right, in addition, the right to live and the freedom of life should be recognized as basic right as well.

As such, the right to peaceful livelihood without threat to the safety of life and body is inherently embedded into human life. Although the right to peaceful livelihood is not enumerated in our Constitution, it should not be neglected. The right to peaceful livelihood in our Constitution should be construed as the basic right supported by the Article 10 and the Article 37 (1) which prescribes that human dignity, value and the right to pursue happiness should be guaranteed and the non-enumerated rights should be respected as well respectively. Further, a state and the Constitution exist to guarantee the right to peaceful livelihood of citizens. Any attempt to build a state, the government structure, military and police are ultimately in order to guarantee the right to peaceful livelihood.

The state shall endeavor to maintain international peace and shall renounce all aggressive wars (the Article 5 (1) of the Constitution). The Armed Forces shall be charged with the sacred mission of national security and the defense of the land (the Article 5 (2) of the Constitution). All citizens shall have the duty of national defense (the Article 391 (1) of the Constitution). The state shall maintain the public order (the Article 37 (2) of the Constitution) and take actions to protect citizens from war, terror and violence to guarantee their right to peaceful livelihood. Yet, the freedoms and right of citizens may be restricted by law minimally when necessary (the Article 37 (2) of the Constitution). Although the government builds the military power, allows the U.S. force in our land and operates military practice for the safety of citizens' life and body, these governmental acts inevitably restrict citizens' right to peaceful livelihood and therefore should be controlled by the Article 37 (2) of the Constitution if such military practice threatens the safety of citizens' life and body. Also, if

such military practice is for aggressive war, it cannot justify the infringement of the right to peaceful livelihood because it violates the Article 5 (1) of the Constitution which mandates the contribution to the world peace and the denial of aggressive war.

However, the Instant Military Practice is the one designed to defend our country and citizens from the aggressive war from outside and therefore found to be a necessary military practice for national security. I find neither that complainants right to peaceful livelihood are infringed and nor the Instant Military Practice is likely to infringe upon complainants' peaceful livelihood.

Justice Lee Kang-kook (Presiding Justice), Lee Kong-hyun, Cho Dae-hyun, Kim Hee-ok, Kim Jong-dae, Min Hyeong-ki, Lee Dong-heub, Mok Young-joon, Song Doo-hwan

[Appendix] the list of complainants : (*omitted*)

5. Partial Credit on Pretrial Detention Case

[784 KCCR 21-1(B), 2007Hun-Ba25, June 25, 2009]

The Petition for Unconstitutionality of the Article 5 (2) of the Act on Sexual Crime Punishment and the Protection of Victims Thereof Case

Questions Presented

1. Whether "or partial" in the Article 57 (1) of the Criminal Act which regulates pretrial detention credit infringes the bodily freedom by violating the principle of due process and the presumption of innocence

2. A. Whether the principle of proportionality between crime and liability is violated by the provision in the Article 5 (2) Sexual Crimes and Protection of Victims Act (hereinafter, "Sexual Crime Act") which prescribes that if one who committed the crime of the Article 334 of the Criminal Act (aggravated robbery) further commits the crime of the Article 298 of the Criminal Act (sexual assault), then that person shall be sentenced to capital punishment, lifetime or *minimum ten years of imprisonment*

B. Whether above mentioned provision violates the judge's discretion for sentencing

C. whether the above mentioned provision violates the principle of equality by losing the balance under penal system

Summary of the Decision

1. Article 57 (1) of the Criminal Act allows a judge's discretion to give a defendant a partial pretrial detention credit. A judge exercises this discretion in order to prevent intentional and unreasonable delay of a proceeding caused by defendant. The exercise of the discretion is intended to increase the effectiveness of the criminal proceeding and to decrease the caseloads of appellate courts by deterring frivolous appeals. However, it should be noted that a legal proceeding for a defendant in custody is allowed as an exception to the principle of

"out-of-custody investigation" which is stemming from the principle of the presumption of innocence. In this case, however, the partial pretrial credit prescribed in the Article 57 (1) of Criminal Act as "or partial" operates as a special application of the said exception and thus seriously infringes on the bodily freedom which is the most essential basic right.

Further, "pretrial credit provision" cannot be a proper measure to achieve the legislative intent to deter appeals and prevent frivolous appeals if it is applied after the notice of appeal is filed. Instead, it obstructs a criminal defendant's right to trial and appeal under the pretext of preventing frivolous appeals. Additionally, if the law allows the selective application of the pretrial credit in case of the intentional delay of a legal proceeding and the frivolous appeal by a defendant in custody, it violates the principle of due process and the presumption of innocence because it ends up punishing the manner of a litigation which cannot be subject to a criminal penalty.

Under the principle of presumption of innocence, a criminal defendant shall not be treated as a guilty person before a conviction is entered and thus shall not be materially and immaterially disadvantaged in dealing with legal and factual issues. Particularly, pretrial detention is same as serving time in terms of the restriction of freedom of a criminal defendant whose bodily freedom is infringed. Therefore, pretrial credit should be given without exception under the principle of human rights and equality. However, "pretrial credit provision" does not faithfully reflect the nature of pretrial detention and allows a judge to be able to apply only partial pretrial credit. In this regard, pretrial detention credit provision prescribed in the Article 57 (1) of the Criminal Act as "or partial" violates the constitutional principle of the presumption of innocence and due process.

2. A. 'Sexual Crimes and Protection of Victims Act' (hereinafter, "Sexual Crime Act"), Article 5 (2) regulates aggravated robbery and sexual assault in order to prevent and eradicate the sexual crime which infringes on the victim's property and sexual autonomy and further destroys the institution of family. The penalty provision is not found severe in view of the nature of crime, the level of liability and its deterrence effect.

B. Lawmakers enacted this law to block the possibility of the suspension of sentence for the crime of sexual assault during aggravated robbery. This legislative decision does not interfere with court's sentencing power because it is not arbitrary under the circumstances where the suspension of sentence becomes available if the statutory mitigating factors and discretionary mitigating factors are combined.

C. Sexual assault could become a more serious crime than rape by causing more severe damages on victims. Therefore, the offense of a normal sexual assault could be equally or more seriously penalized than a rape depending on motive, circumstances and the protected interest of the victim. When an offender of an aggravated robbery sexually assaults a victim, the offender is to be treated no less seriously than a rapist. Therefore, the penalty provision in the instant case is not found to be an arbitrary legislation and does not violate the principle of equality.

Concurring Opinion of Justice Cho Dae-hyen

If a law does not guarantee the full pretrial credit while restricting a citizen's bodily freedom in exercising a state's power to punish criminals, the law does not comply with the Constitution, Article 37 (2), which prescribes a necessary and minimum amount of basic rights shall be restricted. The instant "pretrial credit provision" does not provide any legal basis to allow partial pretrial credit with a judge's discretion and therefore violates the Constitution, Article 37 (2).

Dissenting Opinion of Justice Lee Dong-heub

Pretrial credit is the area where the Legislature's extensive liberty of lawmaking power exists. Therefore, unless the discretionary power of lawmaking is palpably against reasonableness, the pretrial credit provision shall not be found unconstitutional. For this reason, I do not agree with the assertion that the full credit for pretrial detention warrants human rights. If the Criminal Act, Article 57 (1) does not

allow partial pretrial credit, it cannot draw a distinction between pretrial detention and post-conviction incarceration. Further, it is against criminal justice to allow a full pretrial detention credit because, in some cases, a defendant is responsible for some parts of pretrial detention period. Given mixed nature of pretrial detention, the Criminal Act, Article 57 (1) is reasonable under the maxim of equity as it allows judge's discretion to apply a partial pretrial credit after determining the necessary time frame for a proceeding and the defendant's responsibility for delay.

Because of the reasonableness and justification, the pretrial credit provision prescribed in the Criminal Act, Article 57 (1) as "or partial" does not infringe on the bodily freedom and therefore does not violate the constitutional principle of due process and the presumption of innocence.

Dissenting Opinion of Justice Kim Jong-dae and Mok Young-joon with respect to the Sexual Crime Act, Article 5 (2)

The Sexual Crime Act 5 (2) applies the sentencing guideline of 'capital punishment, lifetime or no less than 10 years of prison time' to both sexual assault and rape only because the sexual assault is combined with aggravated robbery.

Comparably, the Criminal Sexual Act, Article 6 (2) prescribes that sexual offense with a dangerous weapon or by a group is penalized with no less than three years of prison time. Under this Act, the penalty is grossly different depending on whether a sexual offender with a dangerous weapon or by a group has the intention to commit robbery. With respect to the nature of crimes, the sexual offense without the act of robbery is still a serious crime and therefore cannot justify this gross disparity between penalties. Further, the disparity is not reasonable in view of the seriousness of crimes and the level of the infringement of protected interest.

Additionally, when a person makes an offensive physical contact without permission, it constitutes criminal sexual assault which, if combined with aggravated robbery, results in sexual assault during aggravated robbery which is subject to the Criminal Sexual Assault Act, Article 5 (2). We do not believe that "sexual assault during

aggravated robbery" and "rape during aggravated robbery" should be distinguishable in their natures and regulated differently. Therefore, Sexual Crime Act, Article 5 (2) is without justification with its sentencing guideline and further is against the principle of equality guaranteed by the Constitution, Article 11.

Party

Petitioner Shin ○-sung

Court Appointed Counsel, Kim Jung-jin

Underlying Case

Supreme Court 2006Do7882, Battery during robbery (Charges: violation of Act on the Punishment of Sexual Crimes and Protection of Victims), Battery during sexual assault

Holding

1. "Or partial" of the Article 57 (1) of the Criminal Act violates the Constitution

2. The Article 5 (2) of the Act on the Punishment of Sexual Crimes and Protection of Victims (revised by Act No. 5343 on August 22, 1997), which prescribes that if one who committed the crime of the Article 334 of the Criminal Act (aggravated robbery) further commits the crime of the Article 298 of the Criminal Act (sexual assault), then that person shall be sentenced to capital punishment, lifetime or minimum ten years of imprisonment is not against the Constitution.

Reasoning

I. Introduction of the Case and Subject Matter of Review

A. Introduction of the Case

1. On April 11, 2006, at 04:40, petitioner robbed the victim, Kwon ○-soon (37 year-old female) with twenty centimeter-long knife in the street of E-Mart located at Joongang-Dong, Changwon-City. During the commission of robbery, petitioner put the knife on the victim's neck and threatened her by saying "give me what you have or I'll kill you". Eventually, petitioner took 172,000 won of cash and 700,000 won value of PDA mobile phone from the victim and yet continuously touched the victim's breast with his left hand. Finally, the victim managed to push the petitioner away and called for help by yelling "robber". Subsequently, petitioner stabbed the victim on her neck and the left shoulder one time and caused three weeks of hospitalization.

2. On August 23, 2006 at Changwon District Court(2006 Gohap 84), petitioner was sentenced to five years of imprisonment under the 'Act on the Punishment of Sexual Crimes and Protection of Victims' (Hereinafter, 'Sexual Crime Act') Article 5 (2), Criminal Act, Articles 334 (2), 333 and 298. Petitioner's appeal was denied by Busan High Court (2006No557) on October 26, 2006 and, subsequently, by the Supreme Court (2006Do7882) on February 8, 2007. During this process, Busan High Court applied only twenty-eight (28) days of pretrial detention credit out of fifty-eight (58) days of actual detention period and the Supreme Court applied only one hundred (100) days out of actual one hundred and five (105) days based on the Criminal Act, Article 57 (1).

3. Petitioner filed this constitutional complaint with the Constitutional Court pursuant to Art 68 (2) of the Constitutional Court Act after his motion to request for the constitutional review of 'Sexual Crime Act', Article 5 (2) and the Criminal Act, Article 57 (2) had been denied by the Supreme Court.

B. Subject Matter of Review

5. Partial Credit on Pretrial Detention Case

Subject matter of review in this case is whether the Article 5 (2) of the Act on the Punishment of Sexual Crimes and Protection of Victims (revised by Act No. 5343 on August 22, 1997), which prescribes that if one who committed the crime of the Article 334 of the Criminal Act (aggravated robbery) further commits the crime of the Article 298 of the Criminal Act (sexual assault), then that person shall be sentenced to capital punishment, lifetime or minimum ten years of imprisonment and "or partial" of the Article 57 (1) of the Criminal Act violates the Constitution.

The text of subject provisions and related provisions are as follows.

[Subject Provision of Review]

Sexual Crime Act (revised by Act No. 5343 on August 22, 1997), Article 5 (Special Robbery and Rape)

(1) If a person who has committed the crime as prescribed in Article 334 or 342 (limited to attempted crimes of Article 334) of the Criminal Act, commits the crime as prescribed in Article 297 through 299 of the said Act, he shall be punished by capital punishment, or imprisonment for life or not less than ten years.

The Criminal Act, Article 57 (Inclusion of Number of Days of Confinement before Imposition of Sentence)

(1) The number of days of confinement before imposition of sentence shall be included in whole or in part to the period of limited imprisonment, or limited imprisonment without prison labor, or lockup at workhouse in respect to a fine or minor fine, or detention.

[Provisions in Reference]

The Criminal Act

Article 297 (Rape)

A person who, through violence or intimidation, has sexual intercourse with a female, shall be punished by limited imprisonment for not less than three years.

Article 298 (Indecent Act by Compulsion)

A person who, through violence or intimidation, commits an indecent act on another shall be punished by imprisonment for not more than ten years or by a fine not exceeding fifteen million won.

Article 333 (Robbery)

A person who forcibly takes another's property or obtains pecuniary advantage from another or causes a third person to do so through violence or intimidation, shall be punished by limited imprisonment for not less than three years

Article 334 (Special Robbery)

(1) A person who commits the crime as prescribed in Article 333 by trespassing upon a human habitation, managed building, structure, ship or aircraft or occupied room at night, shall be punished by imprisonment for life or not less than five years.

(2) The above section shall apply to a person who commits the crime of the preceding Article, armed with a deadly weapon, or accompanied by one or more persons.

Sexual Crime Act

Article 6 (Special Rape)

(1) Any person who commits the crime as prescribed in Article 297 of the Criminal Act carrying any weapon or dangerous thing, or jointly with two or more persons, shall be punished by imprisonment for life or not less than five years.

(2) Any person who commits the crime as prescribed in by the method as referred to in Section 1, shall be punished by imprisonment for not less than three years.

(3) Any person who commits the crime by the method under Section 1, shall be punished according to the examples as referred to in Section 1 or 2.

Act on special cases concerning expedition, etc. of legal proceedings

Article 24 (Inclusion of Number of Detention Days before Adjudication after Appeal)

Where an appeal by the accused or a person other than the accused, is to be dismissed, and if such appeal is acknowledged as having been filed without reasonable grounds, the number of days from the day on which the period of filing an appeal expires to the day on which the period of submitting a written reason for appeal expires,

among the number of detention days before the declaration of adjudication after filing an appeal, shall not be included in the original penalty.

The Criminal Procedure Act

Article 482 (Calculation in Number of Detention Days, etc. Pending Judgment after Appeal)

(1) The whole number of days of detention pending judgment subsequent to the application for appeal shall be included in the calculation of the regular penalty, in the following cases:

1. In cases where application for appeal has been made by a public prosecutor; and

2. In cases where application for appeal has been made by a person other than a public prosecutor, and the original judgment is quashed.

(2) The whole number of days of detention before final and conclusive judgment during the period for which the application for appeal is filed (excluding the number of days of detention subsequent to the application for appeal) shall be included in the calculation of the regular penalty

(3) Upon dismissing the appeal, the number of days of detention pending the application for appeal during the period for service or immediate appeal shall be entirely included in the sentenced penal term.

(4) In cases of sections (1) through (3), one day in the number of detention days shall be counted as one day of penal term or one day of detention term of fine or minor fine

(5) Detention effected after the court of appeal has quashed the original judgment before final and conclusive judgment shall be included in the calculation following the example of the number of days of detention during the pendency of the appeal.

II. Supreme Court's Reason for Denying Motion to Request for the Constitutional Review and the Arguments of the Petitioner and Other Relevant Bodies

A. The argument of the petitioner

1. Compared to rape, sexual assault varies in its seriousness. It may cause more serious damages than rape and it may involve petty offenses. Yet, under the Article 5 (2) of "Sexual Crime Act", those who committed sexual assault during the commission of aggravated robbery may be sentenced to minimum ten years of imprisonment, lifetime or capital punishment which is equal to the sentences of rape during aggravated robbery. Sexual assault during aggravated robbery and rape during aggravated robbery are same in terms of combined crimes and status crime. However, they are different in detailed criminal acts and therefore should be distinguished by the acts of crimes and criminal liability. Yet, the Article 5 (2) of Sexual Crime Act prescribes the minimum ten years of imprisonment for sexual assault during aggravated robbery. Further, it blocks the possibility of suspension of sentence if proper mitigating factors are not presented and thus infringes upon judge's sentencing discretion. Finally, it violates substantial principle of the rule of law and the rule against excessive restriction stipulated in the Article 10 and Article 37 (2) of the Constitution.

The Criminal Act, Article 297 prescribes minimum three years of imprisonment for rape while the Article 298 prescribes maximum ten years of imprisonment or maximum 15,000,000 won of fine for sexual assault. Similarly, the Sexual Crime Act, Article 6 prescribes minimum five years of imprisonment for rape with dangerous weapon or rape by more than two people while it separately prescribes minimum three years of imprisonment for sexual assault. Yet, the Article 5 (2) of Sexual Crime Act prescribes capital punishment, lifetime or minimum ten years of imprisonment for sexual assault during the commission of aggravated robbery which does not make any distinction in its sentence with rape during the commission of aggravated robbery. Thus, the same sentencing guide line for two different crimes cannot provide any justification for the penal system and also violates the principle of equality.

2. In a criminal proceeding, when a judge applies only a partial credit on pretrial detention pursuant to the Article 57 (1) of the Criminal Act, he or she violates the constitutional principle of the presumption of innocence and due process under the Article 12 (1) of

the Constitution. This also creates the infringement on equal rights and right to fair trial of in-custody criminal defendants in the process of appeal.

B. The Supreme Court's reason for denying petitioner's motion to request for the constitutional review

(*intentionally omitted*)

C. Other relevant bodies' arguments

(*intentionally omitted*)

III. Review on the Article 57 (1) of Criminal Act

A. General theory on pretrial detention credit

1. Nature of pretrial detention credit

The Criminal Act, Article 57 (1) prescribes that "the number of days of pretrial detention before imposition of sentence shall be included in whole or in part to the period of limited imprisonment, or limited imprisonment without prison labor, or lockup at workhouse in respect to a fine or minor fine, or detention". Pretrial detention purports to prevent escape and destruction of evidence and thus increase the efficiency of investigation, trial and sentencing despite the principle of presumption of innocence. Thus, it is an inevitable measure during the pretrial period by forcibly detaining criminal defendants and yet is not regarded as serving the sentence. However, pretrial detention is actually similar with serving the sentence because it deprives liberty and imposes pain. Further, the period of pretrial detention is usually not controlled by a defendant's compliance but by criminal procedural reasons. For this reason, pretrial detention credit should be applied to the defendant's sentence after being found guilty under the principle of equality (12-2 KCCR 17, 26, 99Hun-Ka7, July 20, 2000).

2. Pretrial detention credit in Korea

Pretrial detention credit is regulated under the Criminal Act, Article 57 and the Article 24 of 'Act on Special Cases concerning Expedition of Legal Proceedings'. Pretrial detention credit is usually calculated under the principle of 'legal proceeding days' pursuant to the Article 57 of the Criminal Act and yet it is sometimes calculated under the principle of 'actual days' when those detained days are not caused by the defendant's intentional delay of proceeding. 'Actual days' does not allow judge's discretion in calculating pretrial detention credits and therefore needs not to be decided during the sentencing hearing (Supreme Court, 95Do2263, January 26, 1996). However, 'legal proceeding days' allow judge's discretion in calculating pretrial detention credits.

3. Since pretrial detention is substantially similar to serving the sentence in its effects by depriving liberty and causing pain, there arises an issue whether partial application of pretrial credit by judge violates constitutional principle of due process and the presumption of innocence.

B. Principle of due process and the presumption of innocence

1. Constitutional guarantee of bodily freedom

Bodily freedom is the premise to all the basic rights as the most basic right to realize human dignity and value because no freedom and rights is meaningful without guarantee of bodily freedom. In the history of human freedom and rights, bodily freedom has usually been infringed by government power and leader's forcible repression and, therefore, bodily freedom is focused on the freedom from governmental power. Since bodily freedom may easily be infringed by governmental punishment power, our Constitution specified the limit of punishing power in order to prevent the abuse of state's punishment power.

The Article 12 (1) of the Constitution prescribes "all citizens have bodily freedom" and further prescribes that "no person shall be arrested, detained, searched, seized or interrogated except as provided

by Act, and no person shall be punished, placed under preventive restrictions or subject to involuntary labor except as provided by Act and through lawful procedures". It clearly enumerates the principle of due process in order to guarantee bodily freedom. The Article 12 (3) of the Constitution, further, states that "warrants issued by a judge through due process upon the request of a prosecutor shall be presented in case of arrest, detention, seizure or search", and thereby adopts the principle of the arrest by warrant. Also, the Article 37 (2) of the Constitution states, "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", and thereby provides statutory reservation to the restriction of basic rights. Finally, the Article 27 (4) of the Constitution proclaims the principle of the presumption of innocence by prescribing that "the accused shall be presumed innocent until a judgment of guilt has been pronounced".

2. The principle of due process

The Article 12 Sections 1 and 3 of the Constitution prescribes the constitutional principle of the presumption of innocence. These are the fist application of the western common law's principle of due process to our Constitution by the 9th revision the Article 11 (1) of the former Constitution on October 29, 1987 which states that 'no person shall be punished, placed under preventive restrictions or subject to involuntary labor except as provided by Act'. Historically, the principle of due process is originated from the England's Magna Carta, Article 39, developed into Law of Edward III of England and the Article 4 of the Bill of 1628 and finally settled into the 5th and the14th Amendment of the U.S. Constitution. Since then, this principle became one of the basic principles of the U.S. Constitution governing general rule of state acts. Further, it was transplanted to the civil law countries and settled into the principle of the rule of law and the principle of statutory reservation (4 KCCR 853, 876, 92Hun-Ka8, December 24, 1992).

Despite some differences, it is generally accepted that the principle of due process is independent constitutional principle and, further, it is extended to guarantee substantial due process as well as procedural

one. With respect to criminal procedure, it is applied to the entire process as a basic rule. Given this importance, we should interpret its importance such that any statute restricting bodily freedom should not infringe upon the basic contents of bodily freedom, the rule of proportionality and rule against excessive restriction (4 KCCR 853, 876-878, 92Hun-Ka8, December 24, 1992).

3. The principle of the presumption of innocence

The principle of the presumption of innocence means that the accused and defendants should be presumed innocent until proven guilty and any infringement of rights should be kept minimal. This principle is not limited within the rule of evidence but also applies to the entire criminal process from investigation stage to trial level as a leading rule which minimizes the state of bodily confinement (15-2 (B) KCCR 311, 320, 2002Hun-Ma193, November 27, 2003). Until proven guilty, the principle of presumption of innocence states, the accused and criminal defendants should be presumed innocent during the process of prosecution, trial and execution of sentence and their bodily freedom should not be infringed. This principle is the forcible principle to the criminal punishment process under the constitutional order which guarantees the human dignity as the center of basic rights. This principle, as applied to criminal procedures, created the prosecutor's burden of proof, bail system, bond hearing and preventive measures against detention of body and inappropriate treatment of the accused and defendants (13-2 KCCR 699, 703, 2001Hun-Ba41, November 29, 2001).

C. Review

1. The principle of out-of-custody investigation

Under the principle of presumption of innocence, the investigation and trial should proceed without the confinement of defendant's body. Therefore, pretrial detention should be made as an exceptional measure under the circumstances where the confinement of body is inevitable to achieve the goal of criminal prosecution. Even when the pretrial

detention is inevitable, however, the detention period should be minimized as possible (15-2(B) KCCR 311, 321, 2002Hun-Ma193, November 27, 2003). The bodily freedom under the Article 12 of the Constitution and the principle of presumption of innocence under the Article 27 (4) of the Constitution were later legislated into the Article 198 (1) of Criminal Procedure Act which prescribes that "in principle, investigation of a defendant should be done without confinement of defendant's body".

2. Calculation of pretrial detention credit

Although a criminal defendant is inevitably detained for investigation purpose and trial process, the defendant's detention period should be kept minimal not violating the rule against excessive restriction and essential aspects of the bodily freedom. Otherwise, the confinement of body constitutes the infringement of bodily freedom under the principle of presumption of innocence.

Further, even if a criminal defendant is legally detained for the need of state's criminal prosecution, the pretrial detention period should be properly compensated because it is substantially akin to serving the sentence in terms of the deprivation of bodily freedom. Therefore, if a defendant is found not guilty, monetary compensation may be awarded to the defendant. If a defendant is found guilty, then, pretrial detention credit is applied to the sentence.

3. Discretionary application of pretrial detention credit and its goal

The Article 57 (1) of the Criminal Act allows a judge's discretion to apply 'the entire or a partial pretrial detention credit'. A judge exercises this discretion in order to prevent intentional or unreasonable delay of a proceeding caused by a defendant. The exercise of the discretion is aimed to increase the effectiveness of a criminal proceeding and to decrease of the caseloads of appellate courts by deterring frivolous appeals.

4. The legitimacy of discretionary application of pretrial detention credit

However, as we discuss below, the partial application of pretrial detention credit cannot be found legitimate under the principle of presumption of innocence and due process.

(A) It should be noted that a legal proceeding for a defendant in custody is allowed as an exception to the principle of "out-of-custody investigation" which is stemming from the principle of presumption of innocence. In this case, however, the partial pretrial credit prescribed in the Article 57 (1) of Criminal Act as "or partial" operates as a special application of the said exception and seriously infringes on the bodily freedom which is the most essential basic right.

(B) Pretrial detention is substantially similar with serving sentence in its effects of depriving bodily freedom and causing pain. Further, if we think about possible mental stress and anguish for the future caused to defendant during the pretrial detention period, we do not find it is less restrictive kind of detention than serving the sentence. Although some people argue that pretrial defendants are better treated than convicted prisoners in terms of less restriction of interview times, transfer of detention facilities and no labor, this kind of treatment for pretrial defendants are to be considered natural under the principle of the presumption of innocence. Further, the inequality of treatment between pretrial defendants and convicted prisoners should be resolved from the perspective of the improvement of the treatment for convicted prisoners not vice versa.

(C) Some people argue if a criminal defendant intentionally delays a proceeding, those delayed period should not be applied for the purpose of efficient legal proceeding. Yet, it is not easy to distinguish the exact days of intentionally delayed period. Further, the partial application of pretrial detention credit is nothing but to punish the defendant's legal attitude or manner which is not punishable under criminal law and is against the principle of the presumption of innocence and due process.

(D) In criminal procedure, appeal system is designed to correct

wrong decision and unify the application and interpretation of law. Thus, frivolous appeal should be prevented and controlled because it unnecessarily delays criminal proceeding and prompt criminal administration by increasing workloads of appellate court. Yet, the right to appeal is the legitimate right of criminal defendant and can be restricted only by the principle of proportionality under the Article 37 (2) (8-2 KCCR 258, 270, 95Hun-Ka1, October 4, 1996; 11-2 KCCR 73, 81, 96Hun-Ba19, July 22, 1999). The Article 57 (2) of the Criminal Act cannot be a proper measure to achieve the legislative intent of deterring appeals and preventing frivolous appeals if it is applied after the notice of appeal is filed.

In other words, although a criminal defendant intends to introduce favorable new witness and evidence, he or she, being situated in a weaker position than a prosecutor, may possibly give up an appeal because of the Article 57 (2) of the Criminal Act. Further, the Supreme Court ruled that it is judge's discretion to apply a partial pretrial credit pursuant to the Article 57 (2) of the Criminal Act (Supreme Court, 2005Do4758, October 14, 2005; Supreme Court, 93Do2505, November 26, 1993). With respect to calculation of pretrial detention credit, the appellate court does not have a jurisdiction on the calculation of lower court even if the lower court applied only a partial pretrial detention credit (Supreme Court, 93Do2505, November 26, 1993; Supreme Court, 91Do353, November 26, 1993). Under the circumstances, a criminal defendant may not appeal to avoid the situation where only a partial credit is applied after filing an appeal. After all, this system obstructs a criminal defendant's right to trial and appeal under the pretext of preventing frivolous appeals.

(E) The purpose of pretrial detention is for the efficient criminal proceeding, that is, proper fact finding and securing defendant's court presence and enforcement of sentence. Pretrial detention, therefore, should not be allowed for the purposes other than the above stated. Therefore, any attempt to prevent the delay of legal proceeding and frivolous appeals through pretrial detention purports to achieve administrative efficiency of justice system and yet they are not within the original purposes of pretrial detention system above stated.

(F) Pretrial detention is an exception to the principle of presumption of innocence by seriously restricting bodily freedom. The criminal defendant in custody is already mistreated compared to the out-of-custody defendants by the virtue of being in custody. Under the circumstances, it would be double inequality if a defendant in custody receives only a partial pretrial detention credit while a defendant out of custody serves fully credited time once sentenced.

5. Sub-conclusion

Under the principle of the presumption of innocence, a criminal defendant shall not be mistreated as a guilty person before a conviction is entered and thus shall not be materially and immaterially disadvantaged in dealing with legal and factual issues. Particularly, pretrial detention is substantially same as serving sentence in terms of the restriction of bodily freedom. Therefore, pretrial credit should be applied without exception under the principle of human rights and equality. However, "pretrial credit provision" does not faithfully reflect the nature of pretrial detention and allows a judge to be able to give only partial pretrial credit to a criminal defendant. In this regard, pretrial detention credit provision prescribed in the Article 57 (1) of the Criminal Act as "or partial" violates the constitutional principle of presumption of innocence and due process.

IV. Sexual Crime Act, Article 5 (2)

A. Constitutional Issues

"Sexual assault during aggravated robbery" and "rape during the aggravated robbery" are same in aggravated robbery but different in types of sexual assault. Yet, the Article 5 (2) of Sexual Crime Act treats two crimes in the same way by imposing the same sentencing guide line of "capital punishment, lifetime or minimum ten years of incarceration" and this raises a question whether it violates the principle of proportionality between crime and liability and also violates the principle of equality by losing the balance of penal system due to the excessively harsh punishment for sexual assault

during aggravated robbery in comparison with rape during aggravated robbery.

B. Legislative history of Sexual Crime Act, Article 5 (2)

1. Under the Criminal Act, Article 339, rape by a robber constitutes rape during the robbery and is regulated with minimum ten years of imprisonment or lifetime sentence. This crime is the combination of rape and robbery. It has been committed quite often by robbers when victims cannot resist during the commission of robbery and therefore is considered as aggravated element of robbery. Despite this criminal penalty, rape during robbery has continuously increased since mid 1980's and its motive tends to be the concealment of the crime by humiliating female victims rather than sexual impulse. Thus, the crime tends to be planned and organized and includes sexual perversion. Especially, when the crime occurs in the house at night or under the circumstances where victims cannot resist due to the fear of impending danger by weapon and the number of offenders even in outdoor, it is often committed in front of victim's other family members and thus destroys the entire household as well as the victim's individual legal interest. Nevertheless, the preexisting rape during robbery was not able to deter the rape during robbery which destroys family institution. Further, it was not able to regulate other sexual assaults during robbery because it only regulated rape during robbery thus created a legislative loophole.

2. Under the circumstances, on March 25, 1989, the preexisting law was revised by Act No. 4090, 'the Act on additional punishment for specific crimes', Article 5 (6) (1). The new law additionally punishes sexual assault during aggravated robbery which combines the nighttime house robbery or the robbery with dangerous weapon and by a group of offenders and rape or sexual assault under the charge of 'sexual assault during aggravated robbery'. Later, the Act No. 4090 was revised by Act No. 4702 on January 5, 1994 in order to promote the citizens' human rights and to establish healthy public order by preventing sexual crimes and protecting sexual crime victims. The new law, the Sexual Crime Act separated the combined crime by

aggravated robbery and rape or sexual assault from that by nighttime burglary and rape or sexual assault. By doing this, the new law prescribed separate elements for those crimes and differentiated the sentences. Finally, it was revised on August 22, 1997 by Act No. 5343, the Sexual Crime Act. The Article 5 (2) of the Sexual Crime Act extended its coverage by including the attempted aggravated robbery (13-2 KCCR 570, 577-578, 2001Hun-Ka16, November 29, 2001).

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

1. The issue of how to punish which crimes, that is, the issue of criminal sentences and its coverage, should be decided by lawmakers. Within their extensive legislative discretion and liberty, the lawmakers should consider many issues such as the nature of crime, protected interests, public's legal sentiment and criminal policy for crime prevention. Therefore, we should be careful not to find a certain criminal law unconstitutional unless it is too cruel judging from the nature of crime and the offender's criminal liability and unless it deviates from the principle of balance in penal system and from the law's original goal and function. Further, we should not easily find a specific criminal law's sentence excessively cruel on the basis of existing sentencing guideline when a special criminal law was enacted to additionally punish a certain crime due to existing criminal law's inability to prevent and eradicate crimes (18-1(A) KCCR 478, 484, 2005Hun-Ka2, April 27, 2006,).

2. Under the Article 5 (2) of Sexual Crime Act, the sexual assault during aggravated robbery is defined as the combination of aggravated robbery (Criminal Act, Article 334) and sexual assault (Criminal Act, Article 298). Thus, the sexual assault during aggravated robbery is constituted when a person breaks into a house at night or more than one person robs with dangerous weapon or a person attempted the above mentioned criminal acts and further sexually assaulted victims. The intent to commit sexual assault is often to conceal the offense of robbery and, during this process, the sexually assaulted victim's self

autonomy is seriously devastated without being able to resist under the extremely repressive condition. Given the situation, the nature of the crime, we believe, is horrible and highly accusatory. Furthermore, when the crime is committed in the house at night in front of spouse or other family members, it destroys the entire household as well as the victim's individual property and sexual autonomy. Under the circumstances, the criminal damage is much more devastating than ordinary aggravated robbery and sexual assault. Therefore, we find it necessary that lawmakers enacted a special law with the understanding of practical limitation to prevent and eradicate such a crime with ordinary punishment. Further, we acknowledge the reasonable necessity when the lawmakers, considering criminal policy and other elements, enacted rather serious sentences such as capital punishment, lifetime or minimum ten years of incarceration in addition to the criminal sentence for rape during robbery. Considering all of these, therefore, we do not find that the Article 5 (2) of Sexual Crime Act is excessively cruel in its nature compared to the nature of the crime and offender's criminal liability and thus violated the principle of balance between liability and punishment.

3. With respect to the principle of proportionality, the Article 5 (2) of Sexual Crime Act raises the issue of the excessive restriction of judge's sentencing discretion because it prevents the possibility of suspension of sentence by prescribing the minimum ten years of incarceration.

Sentencing guideline needs to be broad enough that judge may apply aggravating and mitigating factors in sentences unless the judge's discretion is overbroad. Yet, we cannot find a narrowly tailored sentencing law unconstitutional if the law shows substantial reasonability under the principle of proportionality between protected legal interest and the nature of crime even though the lawmakers narrowed the sentencing guideline by law as predicting possible factors to be considered for sentencing (7-1 KCCR, 539, 553, 93Hun-Ba40, April 20, 1995).

The Article 5 (2) of Sexual Crime Act is a legislative determination to block the possibility of the suspension of sentence for sexual assault during aggravated robbery due to the special nature of the

crime unless there is a special circumstance although it allows judge's discretion to reduce the period of incarceration. Such determination of lawmakers shows substantial reasonability. Further, even under the Article 5 (2) of Sexual Crime Act, the possibility of suspension of sentence still remains when statutory mitigating factors and discretionary mitigating factors are combined. The Article 5 (2) of Sexual Crime Act prohibits the possibility of suspension of sentence if only discretionary mitigating factors are shown without statutory mitigating factors. This results in increasing the minimum sentence for the crime, and yet it does not necessarily infringe upon the judge's sentencing power.

D. Whether the principle of equality is violated due to the lack of balance under the penal system

1. A statute is found unconstitutional if it loses balance and legitimacy under the penal system compared to the ordinary criminal punishment although it adds the criminal penalty to a certain crime with a due reason. (*See* 21-2(B) KCCR 438, 2008Hun-Ba9, February 26, 2009)

2. It is practically impossible and not always reasonable to draw mathematical and mechanical proportion between the nature of crime and commensurate punishment. The purpose of criminal punishment is to inflict the suffering to the offenders as well as to invoke preventive measures. Yet, once the seriousness of a crime exceeds a certain degree, the perception of seriousness by the public and the commensurate punishments for preventive measures may be not much distinguishable among different crimes. It is more obvious when a crime becomes more felonious. For instance, when we compare rape and sexual assault and compare aggravated robbery and simple robbery, we know that the rape is more serious than sexual assault and the aggravated robbery than robbery. Yet, when we compare the rape during aggravated robbery and the sexual assault during aggravated robbery, we find the difference of seriousness between two crimes minimized because each crime involves highly offensive natures. In other words, the more felonious crimes become, the more

minimized the difference of the seriousness of crimes.

3. In general, sexual assault involves less felonious offenses because it, in its nature, includes any act, excluding sexual penetration, committed to invoke sexual humiliation and repugnance of victims for offender's sexual desire. Sexual assault includes broad offenses and usually involves less offensive and felonious acts compared to rape. Yet, it may also involve much more serious and offensive acts than rape such as sadistic rape of inserting foreign substance to a victim's sexual organ, anal sex and oral sex. Further, in practice, an ordinary sexual assault may be punished the same as or more seriously than rape by considering the motive, circumstances and the extent of infringement of the protected interests. Therefore, if we mechanically distinguish rape and sexual assault and thus, always treats sexual assault less seriously than rape, we may ironically cause the result of imbalance in penal system (13-2 KCCR 570, 579-580, 2001Hun-Ka16, November 29, 2001). Therefore, we cannot be sure that the sexual assault during aggravated robbery is less felonious than the rape during aggravated robbery. Rather, we believe that sexual assault during aggravated robbery could be punished more harshly than rape based on the concrete nature of individual offense.

4. For these reasons, we do not find that the Article 5 (2) of Sexual Crime is an arbitrary legislation without balance in penal system in prescribing the same sentence for above mentioned two crimes and therefore violates the principle of equality.

E. Sub-conclusion

Although the Article 5 (2) of Sexual Crime prescribes the capital punishment, lifetime or minimum ten years of incarceration for the sexual assault during aggravated robbery the same as the rape during aggravated robbery, it is not too excessive and cruel to violate the principle of liability. Further, it is not an arbitrary legislation which lost the balance in penal system. Therefore, we find that it does not violate the principle of equality, proportionality and the principle of human dignity and value promulgated in the Article 10 of the

Constitution.

V. Conclusion

We find 'or partial' in the Article 57 (1) of the Criminal Act is unconstitutional but the Article 5 (2) of Sexual Crime Act constitutional as stated in Holding.

VI. Dissenting Opinion of Justice Lee Dong-heub's on "or partial" of the Article 57 (1) of the Criminal Act

Unlike the majority opinion, I do not find "or partial" in the Article 57 (1) of the Criminal Act unconstitutional and hereby provide my dissenting opinion.

A. Whether the principle of due process, presumption of innocence and bodily freedom are violated

1. The nature of pretrial detention credit and the principle of due process and presumption of innocence

(A) The majority opinion states that pretrial detention credit, in its nature, restricts the bodily freedom and therefore "or partial" in the Article 57 (1) of the Criminal Act infringes upon the bodily freedom by violating the principle of due process and the presumption of innocence when it allows the partial application of pretrial detention credit to the sentence.

Yet, it should be noted that pretrial detention is the forcible measure exceptionally made for the efficient investigation, trial proceeding and execution of sentence by restricting a person's bodily freedom. Although criminal defendants should face investigation and trial out of custody pursuant to the principle of the presumption of innocence and due process, pretrial detention is exceptionally made with a judge's warrant to allow investigation and trial while restricting a person's bodily freedom within the duration of warrant. Therefore, pretrial detention is executed as the exception to the constitutional recognized

principle of the presumption of innocence and due process and, therefore, it does not violate the principle of the presumption of innocence and due process per se.

(B) Pretrial detention, despite its nature of restriction of bodily freedom, is the inevitable forcible measure to secure a suspect or a defendant's body for the purpose of protection of societal legal interest and creation of legal effects for defendant's return to society during a criminal investigation and proceeding and, therefore, it should be differentiated from post-conviction incarceration which is the deprivation of legal interest by creating legal effects. For this reason, pretrial detention does not involve forced labor and education to reflect such legal nature and does not allow transfer of jail during the detention period without special reasons. In this regard, pretrial detention is different from the execution of sentence and therefore cannot raise legal necessity to apply its credit to the sentence. The issue of pretrial detention credit, therefore, should be discussed from the perspective of equality in terms of how much of credit to be applied under the criminal procedure. It is not related to the issue of trial out-of-custody under the principle of the presumption of innocence and the issue of guarantee of incarcerated defendant's right to defend. There is logical flaw in the argument that pretrial detention infringes the bodily freedom in its nature because, under this premises, constitutionally justified pretrial detention could infringe upon the basic rights unless its credit is wholly applied. The argument, therefore, leads to the conclusion that whole pretrial detention credit may restore infringed basic rights which is build on the confusion and misunderstanding of the nature of pretrial detention and the application of its credit.

2. The application of pretrial detention credit to sentence and its basis

Pretrial detention, although not the execution of sentence, is similar to the execution of sentence in terms of deprivation of liberty and therefore needs to be applied to the sentence pursuant to the equality of criminal justice originated from the principle of due process.

The majority opinion finds that pretrial detention should be compensated properly pursuant to the principle of the presumption of innocence despite its inevitable nature and further it should be wholly applied because a defendant who was found not guilty is monetarily compensated. I disagree. The defendant who was found not guilty is wholly compensated because the detained period cannot be justified and it is treated as sacrifice. Yet, the defendant who was found guilty is different. Further, as discussed above, any suffering incurred by pretrial detention cannot be regarded as sacrifice because it does not infringe upon the bodily freedom as it is executed by law with proper procedure under the Constitution. Therefore, there is no basis for the argument that the entire pretrial detention credit should be applied. The basis for pretrial detention credit is post-remedial measure based on the principle of justice for the bodily suffering incurred on pretrial defendant in order to perfect legal proceeding.

3. Legislative history and trial practice with respect to the application of pretrial detention credit

Basically, the application of pretrial detention credit remains within the legislative power of lawmakers because it is related to the different perspectives regarding pretrial detention and the execution of sentence. It is also related to the issue of the delay of proceeding in connection with the efficiency of proceeding and economy of proceeding. Therefore, it should be studied by considering individual country's criminal procedure and other related issues. Pretrial detention credit may be divided into two different types: legal proceeding days which allows judge's discretion; and actual days which reflects actual days detained. It is widely known that the U.S., the U.K and Germany adopted the actual days while Korea and Japan did legal proceeding days.

Yet, among those countries which adopted legal proceeding days have different practices in actual application of pretrial detention credit due to the absence of statutory regulation regarding the calculation of credit. In general, they apply the entire actual days to the sentence and deduct the days which were caused by defendant's fault (the entire application). They may also apply only those days which are

not caused by defendant's fault while deducting the minimum necessary days for legal proceeding and the days caused by defendant's fault (the partial application). Under the Article 57 (1) of the Criminal Act, Korea practices the entire application of legal proceeding days because judge may exercises the discretion by first applying the actual days of detention to the sentence and later deducting those days caused by defendant's fault and attitude toward the proceeding. Meanwhile, Japan practices the partial application of legal proceeding days by excluding days before arraignment and trial days and only applying those days not caused by defendant's fault such as unavailability of witnesses and the motion to continue by court or prosecutor.

The majority opinion argues that major countries except Korea and Japan adopted the actual-days application of the pretrial detention credit. Yet, even those countries which adopted actual-days application still leave the exception which permits the partial application of pretrial detention credit after evaluating the defendant's demeanor after crime and other relevant factors. For instance, in the U.K, the partial or entire pretrial detention credit may be withdrawn if a frivolous appeal is filed by a defendant. Also, in Germany, a judge may withdraw the partial or entire pretrial detention credit if the judge finds the pretrial detention credit is not appropriate because of the defendant's demeanor. Likewise, even those countries which adopted actual-days application do not necessarily follow the exact actual-days application of the pretrial detention credit without any exception. Therefore, our practice is not far different from other countries which adopted actual-days application.

4. The justification of "or partial" under the Article 57 (1) of the Criminal Act.

(A) The majority opinion argues that pretrial detention is made for the inevitable purpose of investigation and criminal proceeding and therefore only the entire application of pretrial detention credit fulfils the protection of human rights while the partial application does not. I disagree because the type of application belongs to the lawmakers' discretion although pretrial detention credit should be considered from

the perspective of equality. Therefore, unless the exercise of discretion is found to be palpably unreasonable, it should not be found unconstitutional. Further, if we do not leave the possibility of partial application of pretrial detention credit, we end up treating pretrial detention the same as serving time which has different legal natures under the criminal procedure. Pretrial detention may be incurred by many different reasons: typically required days for a legal proceeding; days caused by defendant's fault; and days caused by others. Given these various reasons, if we allow applying those days caused by defendant's fault such as calling unavailable witness repeatedly only to delay the proceeding and continuing the case to settle with victim, it may be against criminal justice. Likewise, if we allow applying those days caused by defendant's abuse of system to delay the proceeding, it may be unreasonable. Therefore, the Article 57 (1) of the Criminal Act is found reasonable because it enables judge to selectively apply the pretrial detention credit based on defendant's fault in delay, defendant's demeanor, necessary required days for proceeding and process of proceeding given the mixed natures of pretrial detention. The Supreme Court of Japan, as adopting the same legal-proceeding days as Korea, held that the days for investigation and trial days should be borne by defendant and only the days exceeding these required days should be applied because there is no practical need to apply the entire pretrial detention credit to the sentence.

(B) The majority opinion says that the Article 57 (1) of the Criminal Act increases the level of infringement of bodily freedom because it allows partial pretrial detention credit and thus sets a special exception to the exception to the out-of-custody investigation embedded in the principle of the presumption of innocence. However, pretrial detention, though creating bodily confinement in its effects, bears different legal nature as forcible measure from the execution of sentence. As I discussed above, it neither violates the principle of the presumption of innocence nor the principle of due process. Further, pretrial detention credit is a correctional measure in order to promote the equality in criminal justice system and to protect human rights. Therefore, the partial application of pretrial detention credit does not necessarily aggravate the infringement of bodily freedom. The

maximum protection of bodily freedom comes from the strict practice of pretrial detention, its interpretation and application, and further from the legislative, executive and judicial endeavor to develop system. Yet, it does not come from the mechanical application of entire pretrial detention credit.

(C) The majority opinion says that it is not easy to distinguish the exact days delayed by defendant and, further, even if defendant intentionally caused the delay, partial application for that reason is nothing but to punish the defendant's legal attitude which is not punishable under criminal law.

Yet, pretrial detention credit should be considered from the perspective of criminal procedure not from whether or not there is defendant's fault. It is true because pretrial detention is a forcible measure to perfect criminal procedure different from the execution of sentence. The issue of pretrial detention credit is not to decide the type of sentence but to decide the extent of pretrial detention credit to satisfy the principle of equality under the circumstances where pretrial detention is allowed for investigation and criminal proceeding. Therefore, it is equitably reasonable to exclude those delayed days caused by defendant's fault. For this reason, the U.K and Germany allow the exclusion of the partial and the entire pretrial detention credit based on defendant's demeanor. So does Japan which adopts legal proceeding days system for the same reason.

Therefore, I do not find that "or partial" in the Article 57 (1) of the Criminal Act implies the punishment of the defendant's legal attitude.

5. Sub-conclusion

The partial or the entire application of pretrial detention credit provision prescribed in the Article 57 (1) of the Criminal Act does neither infringe on bodily freedom nor violate the constitutional principle of due process and the presumption of innocence because it bears the rationality and justification between end and means as it purports to realize the equality of criminal justice and to protect human rights.

As I discussed above, I can never accept the majority's opinion that the partial application of pretrial detention credit in the Article 57 (1) of the Criminal Act should be modified to the entire application of pretrial detention credit in order to realize the equality in criminal justice system and to protect human rights under the principle of due process and the presumption of innocence.

B. Whether the right to trial is infringed

1. The majority opinion holds that "or partial" in the Article 57 (1) of the Criminal Act infringes on defendant's right to trial and the right to appeal because it discourages defendant to appeal and to introduce favorable evidences given the apprehension of the possible deduction of pretrial detention credit. Yet, the legislative purpose of the Article 57 (1) of the Criminal Act is to achieve the equality in criminal justice system and to protect human rights not related to the right to trial because the issue of pretrial detention credit is not to decide the types of sentence but to decide the extent of pretrial detention credit from the perspective of equality under the circumstances where pretrial detention is inevitable to perfect criminal procedure such as investigation and criminal proceeding. Further, "or partial" in the Article 57 (1) of the Criminal Act is not found to prevent the defendant's right to defend, right to introduce favorable evidence for mitigating factors and the right to trial.

The right to appeal is the issue related to the Article 24 of 'Act on Special Cases concerning Expedition of Legal Proceedings', which prescribes that some of pretrial detention credit during the period of appeal may be excluded after the appeal is denied by the reason of frivolousness. For the sake of argument, even if some of pretrial detention credit are not to be applied pursuant to "or partial" of the Article 57 (1) of the Criminal Act, it has no connection with the right to appeal because it is judge's discretionary decision based on defendant's demeanor and fault for the delay of proceeding.

2. Therefore, I do not find that "or partial" in the Article 57 (1) of the Criminal Act infringes on defendant's right to trial.

C. Whether right to equality is infringed

1. The majority opinion finds that "or partial" of the Article 57 (1) of the Criminal Act which allows judge's discretion to allow partial pretrial detention credit discriminates against defendant in custody. Given the comparison between defendant in custody and defendant out of custody with respect to the issue of discrimination, we need to refer to relevant constitutional provisions and the legislative purpose and meaning of the statute at issue (8-2 KCCR, 680, 701, 96Hun-Ka18, December 26, 1996; 13-2 KCCR 714, 727-728, 99Hun-Ma494, November 29, 2001). The provision, "or partial" of the Article 57 (1) of the Criminal Act does not purport to discriminate defendant in custody with defendant out of custody because it is nothing but a regulation to apply pretrial detention credit to sentence in order to rectify the principle of equality under the circumstances where defendant should be inevitably detained for criminal procedure. Therefore, in nature, these two categories of defendants cannot be same to be compared.

2. Therefore, the majority opinion is wrong when they find that there is the discrimination between defendant in custody and defendant out of custody because they treat the naturally different two groups by regarding in the same light.

D. Conclusion

Therefore, I find that "or partial" of the Article 57 (1) of the Criminal Act does not violate the Constitution.

VII. Concurring Opinion of Justice Cho Dae-hyen regarding "or partial" of the Article 57 (1) of the Criminal Act

A state owes the duty to guarantee the fundamental and inviolable human rights of citizens (the Constitution, Article 10). The freedom 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 and even when such restriction is imposed, no essential aspect

of the freedom or right shall be violated. (the Constitution, Article 37 (2)). Especially, bodily freedom is the basis to guarantee the basic rights and human dignity and for that reason it is the most important basic right and should be protected in a stricter manner (the Constitution, Article 12).

If a law does not guarantee a full pretrial credit while restricting a citizen's bodily freedom in exercising a state's power to punish criminals, the law does not comply with the Constitution, Article 37 (2), which prescribes a necessary and minimal amount of basic rights shall be restricted. The instant "pretrial credit provision" does not provide any legal basis to allow partial pretrial credit with a judge's discretion and therefore violates the Constitution, Article 37 (2).

Under the constitutional principle, when a state detains a criminal suspect and restricts his or her bodily freedom in exercising the state's power to punish criminals, the entire or partial pretrial detention credit should be applied to the sentence (the Article 57 of the Criminal Act) and, the state, in case of verdict of not guilty, should award restitution for pretrial detention period (The Criminal Compensation Act, Article 1). Such system allows applying the pretrial detention credit to sentence and awarding restitution in order to minimize the infringement of basic rights even in case of detention of criminal suspect in exercising state's power to punish criminals.

Therefore, if a law does not guarantee a full pretrial credit while restricting a citizen's bodily freedom in exercising a state's power to punish criminals, the law does not comply with the Constitution, Article 37 (2), which prescribes a necessary and minimal amount of basic rights shall be restricted. Indeed, pretrial detention credit, which is aimed to minimize the infringement of bodily freedom, may be restricted by law pursuant to the Article 37 (2) of the Constitution. Yet, even in this case, the restriction should be for more important value than bodily freedom at a minimum amount.

However, the partial pretrial credit in the Article 57 of the Constitution does not provide any legal basis to allow partial pretrial credit with a judge's discretion and therefore violates the Constitution, Article 37 (2).

VIII. Dissenting Opinion of Justice Kim Jong-dae, Justice Mok Young-joon regarding the Article 5 (2) of the Sexual Crime Act

We disagree with the majority opinion on the constitutionality of the Article 5 (2) of the Sexual Crime Act and hereby find it unconstitutional.

A. Limit of punishment

The Constitution, Article 10 promulgates that 'all citizens shall be assured of human worth and dignity 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 citizens'. Therefore, punishment as state action should be exercised within the scope of protection of human dignity and value. For this reason, punishment is bound to the principle of liability which emphasizes 'no punishment without liability' and further it should be exercised as the last and supplementary resort without exceeding actual effectuation.

Although criminal penalty belongs to legislative discretion, such legislative discretion may not infringe the central contents of basic rights as exceeding such limits above explained. Therefore, when a criminal penalty is legislated, it should be done to materialize the principle of the rule of law by following the internal limit prescribed by the Article 10 of the Constitution as well as by following the rule against excessive restriction in the Article 37 (2) of the Constitution. Further, it should comply with the principle of substantial equality under the Article 11 of the Constitution by conforming to the strict proportionality between crime and liability. This is also true when severe punishment is asked under special criminal law (18-1(A) KCCR 491, 497, 2006Hun-Ka5, April 27, 2006).

B. Legitimacy of penal system and violation of the principle of equality

1. Criminal penalty provisions in the Criminal Act reflects unified value system on each protected legal interest which should be

respected unless there is the special change of circumstances occurs. Under the Criminal Act, rape is sentenced to minimum three years of imprisonment (the Criminal Act 297) while sexual harassment to maximum ten years of imprisonment or maximum 15,000,000 won of fine (the Criminal Act 298). The Criminal Act sets the maximum sentence of rape much higher than that of sexual harassment based on the finding that the illegality and accusatory level of rape is much higher than that of sexual harassment according to ordinary citizens' legal sentiment and the criminal justice policy. Yet, the Article 5 (2) of the Criminal Act sets the same criminal penalty for the rape during aggravated robbery and the sexual harassment during aggravated robbery only because aggravated robbery is combined with rape and sexual harassment each of which has different criminal nature and circumstances. Finally, the minimum sentence for each crime is ten years of imprisonment which is excessively high.

2. The Article 5 (2) of Sexual Crime Act sets the criminal penalty of 'capital punishment, lifetime or 10 years of minimum incarceration' for 'sexual assault' during aggravate robbery. Therefore, if a person breaks into a room, house, building, ship or airplane at night or with dangerous weapons or more than one person rob and further sexually assault victim, it is punishable with capital punishment, lifetime or 10 years of minimum incarceration even if the aggravated robbery was an attempt. Meanwhile, the Sexual Crime Act, Article 6 (2) sets minimum three years of imprisonment for the sexual harassment by more than one person or a person with dangerous weapon.

As we observed above, the criminal penalty varies drastically depending on the intent to rob in case of the sexual harassment by more than one person or a person with dangerous weapon. Absent intent to rob, the above mentioned crime may be punished with the suspension of sentence under the statute even without judge's discretion. However, once the intent to rob is found, the same crime may be punished with 'capital punishment or lifetime' even with judge's discretion after statutory consideration of mitigating factors.

The discrepancy of criminal penalty between above mentioned two crimes is gross although they are of the similar natures of crimes. The difference is even slighter when the attempted robbery is involved.

Therefore, the discrepancy of criminal penalty between two crimes is unreasonable.

3. The majority opinion asserts that sexual assault may involve much more serious and offensive acts than rape and ordinary sexual assault may be punished same as or more seriously than rape after considering the motive, circumstances and the extent of infringement of the protected interests. Therefore, the majority opinion finds that the Article 5 (2) of Sexual Crime has the reasonable basis when lawmakers set the same sentence for above mentioned two crimes.

However, the range of a criminal penalty should be set based on the general nature of each crime and its protected interest and, subsequently, judge considers sentencing after reviewing the criminal nature and circumstances and other factors within this range. Therefore, whether a criminal punishment is excessive under the criminal justice system depends on whether the range of sentencing may include the various types of a crime. Additionally, whether the sentence for a certain crime is against the principle of equality by being excessively higher than other crimes depends on the consideration of the general nature of crime and protected interests.

Under the criminal law, sexual harassment is overbroad enough to include various types of a crime from no less felonious acts than rape (anal sex, oral sex and putting foreign substance into victim's sexual organ) to such petty offenses that infringes victim's sexual autonomy at a minimum capacity. To constitute rape, a certain amount of violence and threat is required and yet sexual harassment may be constituted by harassment after violence as well as violence itself as harassment. In the latter case, the violence does not necessarily amounts to overwhelm the victim's resistance but could simply be against victim's will regardless of the level of violence (The Supreme Court, 2001Do2417, April 26, 2002). This wide variety of sexual assault yields to the wide range of sentence for the crime. Criminal penalty for sexual harassment is maximum ten years of imprisonment or 15,000,000 won of fine while that for rape is minimum three years of imprisonment. This shows that sexual harassment may include no less felonious acts than rape (minimum three years and maximum ten years acknowledge the sexual harassment could be as serious as rape)

and yet it may include petty offenses which may be punished with fine.

As a simple offensive physical contact may constitute sexual harassment, sexual harassment during aggravated robbery may be constituted under the Article 5 (2) of the Criminal Act, if the simple offensive physical contact is combined with aggravated robbery. Yet, we do not believe that petty sexual harassment during aggravated robbery should be regulated with the same criminal penalty with rape.

4. It is neither legislatively impossible nor difficult to regulate the rape during aggravated robbery and sexual harassment during aggravated robbery differently. In reality, rape by more than one person or one person with dangerous weapon is punished with lifetime or minimum five years of imprisonment under the Article 6 (1) of the Criminal Act while sexual assault in the above mentioned manner with the minimum three years of imprisonment and thereby lawmakers regulate rape and sexual assault differently.

5. The Article 5 (2) of the Sexual Crime Act is against the principle of substantial equality of 'the equal are to be treated equally and the unequal are unequally' missing the proportionality under the penal system.

C. Sub-conclusion

The Article 5 (2) of the Sexual Crime Act, absent proportionality between the nature of crime and liability, is against just penal system and further against the principle of substantial equality guaranteed by the Constitution, Article 11.

Justice Lee Kang-kook (Presiding Justice), Lee Kong-hyun, Cho Dae-hyen, Kim Hee-ok, Kim Jong-dae, Min Hyeong-ki, Lee Dong-heub, Mok Young-joon, Song Doo-hwan

6. *Joint Punishment on Juridical Person in Connection with Their Employee's Illegal Acts Case*

[21-2(A) KCCR 77, 2008Hun-Ka14, July 30, 2009]

Questions Presented

Whether the part of Article 31 of the Act on Special Cases Concerning Regulation and Punishment of Speculative Acts, Etc (revised by Act No. 7901, Mar. 24, 2006) which states, "If an agent, a servant or any other employee of a juridical person commits an offense as prescribed in Article 30 Section 2 Item 1 (unlicensed speculative business) in connection with the affairs of the juridical person, the juridical person shall also be subject to a fine provided for in the relevant provisions (hereinafter, the "Instant Provision")" violates the principle of liability and the Constitution

Summary of the Decision

The Instant Provision stipulates that, in case an employee commits an offense of violating Article 30 Section 2 Item 1 of the Act on Special Cases Concerning Regulation and Punishment of Speculative Acts, Etc in connection with the affairs of the juridical person, the juridical person is subject to a fine as provided for in the penal provisions concerning the employees without being questioned for its liability in relation to the offense of the employee involved. Although it is strongly required to impose regulations on the corporation itself directly for its anti-social act of violating legal interests, the principle of liability derived from the rule of law and nulla poena sine lege should be observed insofar as the legislator has opted for "criminal punishment". However, the Instant Provision inevitably levies criminal punishment on innocent corporations that fulfilled their duty of appointment and supervision related to the employee's offense, thereby violating the principle of liability derived from nulla poena sine lege. The Instant Provision, therefore, violates the Constitution.

Concurring Opinion of Justice Lee Kong-hyun

The principle of criminal liability under the criminal law implies two rules: "no crime, no punishment", and the principle of proportionality between crime and punishment. The act of an organ or employee entitled to decide corporate management policies and key issues or to manage and supervise the whole corporate work or an agent delegated with full power by the said organ or employee committed within the legitimate scope of power may be identified with that of the corporation, and subjecting the corporation to criminal liability for the offense of a person with the aforementioned status would not contradict the principle of liability. For this reason, the parts of Article 31 of the Special Cases Concerning Regulation and Punishment of Speculative Act, Etc. (revised by Act No. 7901, Mar. 24, 2006) concerning the "representative of the juridical person" and "an agent, a servant or any other employee of a juridical person who commits an offense as prescribed in Article 30 in connection with the affairs of the juridical person" do not violate the Constitution, but the part concerning "an agent, a servant or any other employee" excluding the above violates the principle of liability that indicates "no crime, no punishment". Although the said provision aims to penalize the corporations liable for appointment and supervision of an agent, servant or any other employee, imposing the same statutory punishment on the corporation as that of the principal offender of mens rea would hardly mean a criminal punishment proportional to the liability, which is ultimately in violation of the Constitution.

Dissenting Opinion of Justice Cho Dae-hyen and Justice Lee Dong-heub

The imposition of fine on the corporate employer as well as the employee responsible for unlicensed speculative business as provided in relevant provisions in accordance with the Instant Provision is based on the consideration that, it is hard to clarify where the responsibility lies given the nature of corporate organization and structure, although the corporation is blamable as such offense of the employee is highly likely to occur or be reinforced due to reasons

such as tacit approval or neglect of a corporate internal organ that profits from the offense or, in a broad sense, flawed corporate operation system insufficient to supervise the prevention of offence. In this context, it is appropriate to consider that this measure has reflected the will of legislators to impose strict punishment on corporations for neglecting their duty of appointment and supervision. Therefore, although the "negligence in appointment and supervision of employees or other responsible acts of the corporation" is not specified in the text of the Instant Provision, it can be interpreted that the corporation is punishable only when it is accused of the stated responsible acts which is within the scope of textual interpretation and acceptable according to constitutional law interpretation. In this sense, the Instant Provision does not violate the principle of liability.

Party

Requesting Court
Suwon District Court

Movant at the Requesting Court
YTN
President: Pyo Wan-soo
Representative: Park Hyung-sang

Underlying Case
2007Ko-Jung4280, Suwon District Court (Violation of the Act on Special Cases Concerning Regulation and Punishment of Speculative Acts, Etc.)

Holding

The part of Article 31 of the Act on Special Cases Concerning

Regulation and Punishment of Speculative Acts, Etc. (revised by Act No. 7901, March 24, 2006) which provides that "If the representative of a juridical person, or an agent, a servant or any other employee of a juridical person commits an offense as prescribed in Article 30 in connection with the affairs of the juridical person, not only shall such offender be punished accordingly, but the juridical person shall also be subject to a fine provided for in the relevant provisions" violates the Constitution.

Reasoning

I. Introduction of the Case and Subject Matter of Review

A. Introduction of the Case

1. The defendant of the underlying case is YTN Inc., a cable television broadcaster. YTN was charged for violating the regulation that requires obtaining of permission from the commissioner of the competent local police agency in case of running a business that collects money and other properties by making competitors bet money on the correct answer to a particular question while giving financial gains to all or part of the winners at the expense of the others' financial loss, and for engaging in speculative business - YTN's marketing officer and the other defendant of the underlying case, Mr. Baek ○-beom, ran a quiz show named "YTN News Channel" from April 2003 to March 2007, transmitting captioned advertising that said those who got answers by making charged calls would win prizes by drawing of lots, thus making competitors pay extra call charges of 200 won per 30 seconds under the name of contents fee and acquiring 1,183,533,118 won from 1,310,500 competitors. YTN, along with Baek ○-beom, was prosecuted and received a summary order to pay a fine of 10 million won from the Suwon District Court on November 16, 2007. In response, YTN filed for a trial against the stated summary order with the same Court on December 6, 2007 (2007Ko-Jung4280, Suwon District Court) and filed a motion to request for the constitutional review of Article 31 of the Act on

Special Cases Concerning Regulation and Punishment of Speculative Acts, Etc. (2008Cho-Ki236, Suwon District Court).

2. The said district court granted the aforementioned motion and requested this constitutional review of Article 31 of the Act on May 19, 2008, stating that the provision at issue contradicts the liability rule and thus may be unconstitutional.

B. Subject Matter of Review

The requesting court requested this constitutional review of the entire text of Article 31 of the Act on Special Cases Concerning Regulation and Punishment of Speculative Acts, Etc., which is a joint penal provision, but in this case where the business owners are "juridical persons" and the offender Baek ○-beom is the "agent, servant or any other employee of a juridical person", it is appropriate that the part of the contested provision concerning "representative of a juridical person" be excluded from the review. In addition, the scope of offense provided for in the Act's penal provision of Article 30 shall be limited to the part concerning unlicensed operation of speculative business as in this case, namely Article 30 Section 2 Item 1 of the Act.

Therefore, the subject matter of review in this case will be the constitutionality of the part of Article 31 of the Act on Special Cases Concerning Regulation and Punishment of Speculative Acts, Etc. (revised by Act No. 7901, March 24, 2006), "If the representative of a juridical person, or an agent, a servant or any other employee of a juridical person commits an offense as prescribed in Article 30 in connection with the affairs of the juridical person, not only shall such offender be punished accordingly, but the juridical person shall also be subject to a fine provided for in the relevant provisions (underlined in the following paragraph, hereinafter the "Instant Provision")", which, along with the relevant provisions, is as follows:

[Subject Provision of Review]

Act on Special Cases Concerning Regulation and Punishment of Speculative Acts, Etc. (Revised by Act No. 7901, Mar. 24, 2006)

Article 31 (Joint Penal Provisions)

If the representative of a juridical person, or an agent, a servant or any other employee of a juridical person or an individual commits an offense as prescribed in Article 30 in connection with the affairs of the juridical person or the individual, not only shall such offender be punished accordingly, but the juridical person or the individual shall also be subject to a fine provided for in the relevant provisions.

Article 30 (Penal Provisions)

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

1. The person who operates his business without obtaining the permission under the provisions of Article 4 (1) or 7 (2);

[Relevant Provisions]

Act on Special Cases Concerning Regulation and Punishment of Speculative Acts, Etc. (Revised by Act No. 7901, Mar. 24, 2006)

Article 1 (Purpose)

The purpose of this Act is to prescribe the matters concerning the instruction on and regulation of speculation-related businesses, and the special punishment of persons, etc., who perform speculative acts by using slot machines or speculative gaming implements, besides speculation-related businesses, in order to prevent the furtherance of excessive speculative spirit and to preserve good morals.

Article 2 (Definitions)

(1) For the purpose of this Act,

1. the term "speculative acts" means the acts to provide the profits or losses to properties by collecting goods or benefits on properties from scores of people (hereinafter, referred to as "goods, etc.") and by deciding the benefits or losses under coincidental methods;

2. the term "speculative businesses" means the businesses indicated in each of the following items:

(a) Lottery ticket issuing business: The business which performs the act of collecting goods, etc. from many people by utilizing particular tickets (including the electronic forms under the apparatus having the

electronic disposal abilities, such as computer programs), while giving benefits on properties to the winning persons by the methods such as lot drawing, and giving losses to other participants;

(b) Prize competition business: The business which performs the act of collecting goods, etc. from the subscribers to the specific questions or predictions under the conditions for provision of answers thereto or making a good guess, and giving the profits on properties to whole or part of those who provided correct answers or made a good hit, and causing losses to other participants; and

(c) Other speculative businesses: The business as prescribed by the Presidential Decree which is the business under equipments or methods having concerns over inducing the speculative minds, such as turning a rotary plate, lottery, bonus gift, for the purpose of profit-making in addition to items (a) and (b);

3.~6. (*omitted*)

(2) (*omitted*)

Article 4 (Permission, etc.)

(1) Any person who wishes to operate a speculative business shall prepare the facilities, etc. as referred to in Article 3, and then obtain permission for it from the Commissioner of the Local Police Agency pursuant to the Ordinance of the Ministry of Government Administration and Home Affairs: Provided, That where the scope of business areas covers not less than two Special Metropolitan Cities, Metropolitan Cities or Dos, he shall obtain permission from the Commissioner General of the National Police Agency.

(2)~(3) (*omitted*)

Article 7 (Valid Period of Permission)

(1) The valid period of permission for each business shall be prescribed by the Presidential Decree, but it shall not exceed three years.

(2) The person who wishes to continue his business after the valid period of permission as referred to in paragraph (1) shall obtain a renewed permission pursuant to the Ordinance of the Ministry of Government Administration and Home Affairs. <"Ordinance of the Ministry of Government Administration and Home Affairs" revised to

"Ordinance of the Ministry of Public Administration and Security", pursuant to the revision of Act No. 8552, Feb. 29, 2008>

II. Reason for the Request of Suwon District Court and Arguments of Relevant Bodies

(*intentionally omitted*)

III. Review on Merits

A. History of the Instant Provision

The Act on Special Cases Concerning Regulation and Punishment of Speculative Acts, Etc. originates from the Act on Prohibition of Lottery Ticket Issuance Business, Prize Competition, and Other Speculative Businesses enacted as Act No. 762 on November 1, 1961, and the purpose of this Act is to prescribe the matters concerning the instruction on and regulation of speculation-related businesses, and the special punishment of persons, etc., who perform speculative acts by using slot machines or speculative gaming implements, besides speculation-related businesses, in order to prevent the furtherance of excessive speculative spirit and to preserve good morals (Article 1).

Prize competition and other speculative businesses were permitted since the enactment of the Act on Prohibition of Lottery Ticket Issuance Business, Prize Competition, and Other Speculative Businesses, but penal provisions were newly adopted with the amendment of Act No. 1135 on September 3, 1962. As the penal provisions were wholly revised as a regulatory measure by Act No. 4339 on March 8, 1991, the statutory punishment stipulated by the provisions was, for the purpose of strengthening the overall punishment of speculative business, reinforced to "imprisonment for not more than three years or by a fine not exceeding twenty million won", and, at the same time, joint penal provisions also holding the business owners accountable were newly established. Several revisions took place before today's version, such as the revision of the provisions on August 3, 1994, since when the casino business was excluded from the scope of speculative business, and the revision on

March 24, 2006 that switched the position of the penal provision Article 30 and included the acts using computer programs to the scope of speculative business.

B. Contents of the Instant Provision

The Instant Provision provides that if a servant or any other employee of a juridical person (hereinafter, "employee") commits an offense as prescribed in Article 30 Section 2 Item 1 of the Act on Special Cases Concerning Regulation and Punishment of Speculative Acts, Etc. in connection with the affairs of the juridical person, the juridical person shall be immediately subject to a fine as provided in the relevant provisions that stipulate punishment of its employee. In addition, the Instant Provision does not stipulate that whether the juridical person is involved in the criminal act of its employee or is neglecting its duty to supervise the act of its employee constitute reasons for punishment, nor does it stipulate that the juridical person can be exempt from the liability of its employee.

Although the Instant Provision provides that the act of the employee constitutes a crime if it is "in connection with the affairs of the juridical person", the circumstance in which the employee committed an offense related to the affairs of the business owner is merely a circumstance of the "act of the employee", not that of the business owner him/herself.

In other words, the Instant Provision stipulates that if a certain act of an employee takes place, the juridical person or the business owner of the employee shall be punished along with the employee immediately without being questioned as to what wrongdoing the business owner is responsible for in relation to the employee's offense.

C. Principle of Liability Related to Criminal Punishment

Criminal punishment is regulation of crime, which, in essence, is an accusation of actions negatively received by legal order. In general, crime can be described as actions accused by legal order, namely "illegal act", and the resulting negative consequence, namely "the result of the illegal act". In this case, the core element that constitutes

crime and the matter subject to censure through criminal punishment is "the act accused by legal order", or "illegal act".

Even if a consequence accused by legal order occurs, the occurrence alone cannot suffice for imposition of criminal punishment if no one is responsible for the consequence. Admittedly, there is a possibility that, based on the notion of fairness, an innocent individual or a group irrelevant to the happening may receive civil or administrative disadvantage for the purpose of removing the consequence and returning to the original state. However, those who did not commit any actions subject to censure by legal order cannot be put on criminal punishment. This is because the essence of criminal punishment is accusability, since it is self-evident that censure against those not accountable for reprehensible acts cannot be justified.

The principle of liability concerning criminal punishment, which indicates "no crime, no punishment", is a basic principle of the Criminal Act. It is a principle inherent in the rule of law under the Constitution and one that is derived from the idea of Article 10 of the Constitution, which provides that all citizens be assured of human dignity and value and that they act on their decisions under their own responsibilities (19-2 KCCR 520, 527, 2005Hun-Ka10, November 29, 2007).

D. The Need for regulation of juridical persons and principle of liability

1. The Need for regulation of juridical persons

The principal actors of offense have been traditionally perceived as human beings, so those subjected to criminal punishment for offenses were only natural persons. In today's increasingly complex and diverse society, however, juridical persons, separate from natural persons, are socially relevant and active as separate organization and institutions. Also, the increase in the social activity of such juridical persons has resulted in quite a few incidents of their anti-social acts of violating legal interests.

With respect to such anti-social acts of violating legal interests committed by juridical persons, not only the individuals who are

immediate actors but also the juridical persons themselves are accused by the society, and now a legal means is required as an effective countermeasure to regulate the juridical person itself. As a result, it has become a global trend to impose regulation on juridical persons themselves for their anti-social acts of violating legal interests, except that the regulative means chosen or the conditions for application of the regulation may vary.

The legislators have decided to allow criminal punishment, the strictest means of regulation, of juridical persons which violate legal interests, based on the demand for policy measures to cope with the anti-social activities of legal interest violation committed by the newly-emerging actors of crime in the modern society, namely juridical persons. The Instant Provision, as a form of the said criminal punishment, stipulates criminal punishment of the responsible employee for his/her offense and also imposes a fine, which is also a criminal punishment, on the juridical person as business owner.

2. Criminal punishment of juridical persons and principle of liability

In general, criminal liability implies "ethical censure of one's will to act on his/her decision involving illegality despite one's possibility to do otherwise", and this traditional notion of liability presupposes natural persons. Therefore, it could be questioned whether such principle of liability that indicates "no crime, no punishment" could be applied to juridical persons, which are beings endowed with character merely in the legal sense.

Yet, criminal liability is a legal responsibility for violating state regulations, not purely ethical censure. In this sense, it is not necessary to apply the same stated notion of individual liability to juridical persons and, furthermore, since the juridical person's act is realized through acts resulting from the decision-making of its representing natural person, the representative entity, it is neither impossible to judge whether the juridical person is responsible or not according to the natural person's decision-making and acts. Moreover, the power of punishment is the strongest means of regulation exercised by the state, which means the authority should be used solely for the purpose of protecting important social values. Insofar as

legislators have opted for the strictest means of regulation, that is the criminal punishment, as the countermeasure for particular anti-social activities of juridical persons, the principle of liability that originates from the rule of law and "nulla poena sine lege" - constitutional principles concerning criminal punishment - should be respected in applying the regulation.

Ultimately, the juridical persons will have to be subjected to the principle of liability as much as the natural persons are.

E. Unconstitutionality of the Instant Provision

1. The Instant Provision involves joint punishment of the liable employee and his/her employer, which stipulates immediate imposition of fines on the juridical person, or the business owner, without confirming what kind of fault the juridical person is responsible for in relation to the offense of its employee. In other words, the Instant Provision provides that the juridical person, as the business owner, shall be punished automatically if the offense of its employee takes place, totally irrespective of the following: whether the juridical person committed reprehensible acts in connection with the offense of its employee in case the employee engaged in unlicensed speculative business related to affairs of the juridical person, such as whether the juridical person ordered or practically assisted with the offense of the employee; or whether the juridical person neglected its duty as the business owner to guide or supervise the behaviors of its employee related to its own affairs.

Meanwhile, it would be of issue whether the Instant Provision could be interpreted that "business owners are punished only when responsible for acts such as violating their duty related to appointment and supervision of its employee", so that it can be in agreement with the principle of liability as interpretation of constitutional law. However, interpretation of constitutional law presupposes one within the plausible boundary given the text and purpose of the provision. In this sense, the above interpretation should be considered impermissible as it exceeds the acceptable limit of textual interpretation (19-2 KCCR 520, 2005Hun-Ka10, November 29, 2007).

As a result, the Instant Provision imposes punishment also on the

innocent juridical person that has fulfilled its duty of appointment and supervision in connection with its employee's offense.

2. The Instant Provision levies criminal punishment on the juridical person simply because the employee committed offense in connection with the affairs of the juridical person, without defining any independent responsibility of juridical persons in their decision-making and action that provides basis for the reprehensible offense of the employee. This is as good as penalizing a non-responsible person for others' offense, which is in conflict with the principle of liability.

F. Sub-conclusion

Ultimately, the Instant Provision imposes punishment on juridical persons for offense other than their own without questioning their relevant liability, which contradicts the principle of liability derived from the rule of law and "nulla poena sine lege".

IV. Conclusion

The Instant Provision consequently violates the Constitution, and hence the holding stands as it is. The decision of this case was concurred by Justices except for a separate concurring opinion of Justice Lee Kong-hyun and dissenting opinions of Justice Cho Dae-hyen and Justice Lee Dong-heub.

V. Concurring Opinion of Justice Lee Kong-hyun

A. Principle of liability

The principle of liability, a basic principle of criminal law involving punishment, has two meanings. One is a justification for the imposition of punishment itself, which indicates that punishment can be imposed only if there is liability (no crime, no punishment), and the other is that the level of punishment cannot exceed the degree of liability (principle of proportionality)".

Therefore, in order for the Instant Provision stipulating the

imposition of punishment to be justified, the attributable cause of offense, or liability, must be acknowledged, and the statutory punishment thereof should be stipulated in law in proportion to the degree of liability.

The fact that only those with liability can be penalized is inherent in the principle of the rule of law and is derived from Article 10 of the Constitution, which guarantees human dignity, value and free act. In addition, the call for punishment proportional to the degree of liability is derived from Article 37 Section 2 of the Constitution, which sets forth the rule against excessive restriction.

B. About the constitutionality of punishment of those without fault

1. With industrialization, juridical persons have become leading economic actors in the sectors of industry, shipping and commerce, where it has become increasingly possible for juridical persons to jeopardize public interests, such as public health and safety. Also, as economic influence of juridical persons has grown stronger than ever, it is more likely that unregulated offense committed by juridical persons will cause enormous damage to the society.

Therefore, if liability is seen as social and legal censure of anti-social act of violating legal interest, it would not be in violation of the principle of liability to hold the juridical person criminally responsible for its act involving the risk of harming the public interest or likelihood to cause huge damage to the society through exercise of unjustifiable economic power. In practice, the movement towards punishing such acts of juridical persons is prominent in Western Europe, where corporate criminal liability is denied in accordance with the principle of societas delinquere non potest - "a legal entity cannot be blameworthy" - and good example is that the Council of Europe and the European Union are recommending the members to provide a legal system that imposes criminal liability on juridical persons for certain types of crime. The Council of Europe, through the Convention on the Protection of the Environment through Criminal Law, punishes corporations which illegally distribute toxic materials to the air, land and water and manufacture, transport and store them illegally, and the EU, following in the footsteps of the Council, adopted a resolution

banning corporations from the same illegal acts. In 1999, the Council of Europe also adopted the Criminal Law Convention on Corruption, which imposes criminal punishment on corporations that actively engage in the receipt of bribes, illegitimate influence peddling, and money laundering. The European Union Commission levies strict administrative penalties equivalent to criminal punishment for violation of competition law, and this attitude has greatly impacted some of its member countries to introduce systems that allow criminal punishment of corporations that violate competition law. The Commission also adopted a recommendation urging member countries to penalize corporations for fraud, active corruption, or money laundering that harm the finance of the EU. In other words, there is a movement across Europe to prevent health risks of Europeans stemming from environmental pollution inherent in industrial activities and to take a criminal approach in aggressively responding to corporate acts that can disrupt the sound transaction order or have enormous negative impact on the European economy through illegitimate exercise of economic power. This trend is in line with that in Denmark, Finland, France, the Netherlands, and Switzerland, where they have made it into law to adopt a comprehensive system to impose criminal responsibility on corporations.

As juridical persons, however, are legally-formed virtual entities which act through their employees, it must be possible that the problematic act of the responsible employee is considered as that of the juridical person in order to impose criminal responsibility on corporations for risks of harming public interest or causing huge damage to the society through illegitimate exercise of economic power. Still, it would be in violation of the liability principle to hold an innocent juridical person criminally responsible for its employee's act which is inconceivable as its own although it is not liable for engagement in the problematic act or negligence in appointment and supervision of the employee. Therefore, it is at issue to which hierarchical level of employee shall be subjected to the consideration that his/her act is equivalent to a corporate act, and the act committed by an institution or employee whose status allows him/her to decide management policies or major issues, as well as manage and supervise work, or an agent delegated with full power of the status equivalent

to the stated institution or employee committed within the scope of given authority could be identified with the act of the corporation concerned. This system through which corporations take the criminal responsibility of employees who can be identified with the corporation is also found in comparative law. In the United Kingdom, in the case DPP v. Kent and Sussex Contractors{[1944] KB 146}, where the doctrine of identification that allows for the possibility of identifying the act, mens rea, and negligence of high-level executive in a corporation with those of the corporation itself was incorporated into the criminal law and, in practice, was employed in resolving the issue of corporate criminal liability. As a result, the doctrine currently works as one of the established legal principles. This doctrine was adopted by the U.S. Model Penal Code, which restricts corporate liability to cases where "the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment (§2.07(1)(c))", and defines that a "high managerial agent" is an officer or agent "having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation (§2.07(4)(c))".

Article 121-2 (1) of the French Penal Code stipulates that "juridical persons, with the exception of the State, are criminally liable for the offenses committed on their account by their organs or representatives, according to the distinctions set out in articles 121-4 and 121-7 (person who commits the criminally prohibited act, person who attempts to commit a felony or a misdemeanor, punishment of accomplice, definition of accomplice)". In this provision, "organ" refers to organizations within the corporation officially authorized by the French corporate law, such as shareholders who act through the board of directors or shareholders' meetings, and "representatives" indicate high-level executives or proxies or employees who are delegated with the executives' power.

At the same time, as is also confirmed through comparative law observations, it should be considered that the person whose act can be identified with the corporate act must include not only the legally-registered representative but also the organ or employee capable

of deciding the corporate management policies and major issues or of managing and supervising all corporate work. In particular, not considering the act of a de-facto representative as a corporate act due to a merely formal reason that the representative is not legally registered is as good as totally disregarding the current economic reality in which corporations are, in many cases, operated by a de-facto representative and industrial structures are formed around corporate groups that are in fact a single decision-making body led by the owners of business conglomerate.

2. The majority opinion holding the Instant Provision unconstitutional limits the unconstitutionality to the part of Article 31 that concerns an agent, servant or any other employee but excluding the representative of a juridical person, although the requesting court challenged the constitutionality of the entire text of Article 31. In the underlying case, however, the defendant ○○ Korea was indicted for violating Article 31 as its actual representative and joint defendant Kang ○-tae operated a speculative business, and whether Kang ○-tae is the substantial agent of the corporation is a matter of fact-finding under full power of the court while the pending issue is the punishment of the corporation. It is appropriate that the subject matter of review be, unlike the majority opinion, the part of Article 31 concerning the juridical person (hereinafter, "subject provision of review").

If legislators consider certain profit-making activities to be socially harmful and thus ban the activities in principle with exceptions where public interest is served, this results in the scarcity of opportunities for such profit-making activities. Free distribution of the limited profit-making opportunities as permitted by legislation may ignore the legislators' intention to ban, in principle, the acts detrimental to the society, so it is necessary to give administration the discretion of control and ensure that the permission for such profit-making activities is confined to a small number. Legislators regulate gambling and opening of a gambling place through criminal punishment (Articles 246 and 247, Criminal Act) for the purpose of establishing sound moral principles related to economy by punishing property acquisition through ways other than legitimate work. This way, gambling and opening of gambling places are banned, in principle, for being socially

harmful, yet speculative businesses equivalent to opening of gambling places are exceptionally permitted in cases where they are deemed particularly necessary to promote public welfare, sales advertising, tourism and attraction of tourists (Article 5 Section 1, Act on Special Cases Concerning Regulation and Punishment of Speculative Acts, Etc.). Therefore, as unlicensed speculative businesses are likely to undermine the sound moral principles of the economy, imposing criminal liability as a form of social and legal censure on corporations responsible for running such businesses without permission would not contradict the principle of liability.

In addition, an institution or employee whose status allows him/her to decide management policies or major issues as well as manage and supervise corporate work, or an agent delegated with full power of the status equivalent to the institution or employee is entitled to declare the corporate intention officially and manage and supervise the entire work of the corporation. Therefore, the act of those with the stated status can be considered as that of the corporation, which means the principle of liability would not be violated even if criminal liability is imposed on the corporation for the act of those with the said status. Therefore, the part of the subject provision of review concerning the representative of the corporation and those with the aforementioned status among an agent, a servant or any other employee of a juridical person in the provision would not be in violation of the Constitution.

Meanwhile, the part of the subject provision of review excluding the agent, servant or any other employee in the abovementioned status, as in the majority opinion, does not define the conditions that constitute a liability, such as the corporate intervention in the individual's unlicensed speculative business or negligence in appointment and supervision, and automatically punishes corporations along with the responsible individual once he/she is accused. As this amounts to imposing criminal punishment on the innocent corporation, the principle of liability appears to have been violated.

C. Violation of Principle of Proportionality

In case an individual whose act can be identified with that of the corporation, such as a corporate representative, commits an offense

that leads to the punishment of the corporation, or when a corporation is punished according to the principle of accomplice liability for conspiring with its employee or encouraging or tolerating the offense, same statutory punishment for the offender and the corporation could suit the principle of proportionality between crime and punishment.

Although the act of the offender and the corporation would have resulted in the same consequence, it is possible that equal punishment of the offender and the corporation may run counter to the proportionality principle depending on the protectable legal interests and gravity of the crime of different types of acts. For instance, the degree of liability should be differentiated between intentional acts and negligences in accordance with the principle of proportionality, so even if the part of the subject provision of review concerning the agent, servant or any other employee who are not in the status of deciding corporate management policies and major issues or managing and supervising the entire corporate work, unlike the servant or any other employee in such a status or an agent delegated with full power, is considered as a regulation of corporations responsible for negligence in appointment and supervision, imposing the same punishment on the corporation which is only liable for negligence as the intentional principal offender would hardly be seen as a punishment proportional to the respective liabilities.

D. Then, of the subject provision of review, the part concerning the representative of a juridical person and that concerning a servant or any other employee whose status allows him/her to decide management policies or major issues, as well as manage and supervise work, or an agent delegated with full power of the servant or employee in the said status does not violate the Constitution, whereas the part concerning the remainder of the agent, servant or any other employee exclusive of those in the aforementioned status is unconstitutional.

VI. Dissenting Opinions of Justice Cho Dae-hyen and Justice Lee Dong-heub

We believe that the Instant Provision does not contradict the principle of liability that indicates "no crime, no punishment" and is

therefore not in violation of the Constitution for the following reasons:

The activities and social influence of corporations are increasing as the industrial society becomes highly organized, and stronger sanctions are required to regulate the increasing anti-social acts of legal interest violation. However, it is difficult to expect a crime deterrent solely from punishing the employee when the practical offender is the corporation, and it is necessary to come up with a direct means to regulate the corporation in addition to the liable employee as the corporation is socially accused for being the one that ultimately stands to gain profit from the employee's offense. Although the offense is committed mostly for the purpose of gaining corporate interest or is attributable to tacit order, toleration or neglect of middle managers or negligent appointment and supervision of the responsible employee, rather than due to the pursuit of personal interest or lack of ethics of the responsible employee, it is difficult to clarify where the responsibility lies given the complex and dispersed work structure of corporations. It is also possible that, in the broad sense, such offense may stem from the deficiency in corporate operation system incapable of supervising such acts or loopholes in the decision-making structures. Therefore, it is appropriate that the corporation also takes the criminal responsibility.

Considering the particularity of corporate crimes and the need to punish corporations, some have argued recently that corporate criminal liability should be imposed independently from the individual offender or that effective means of regulation of corporations, aside from fines, should be diversified. In the United States, which has a long history of criminal punishment for corporate crimes, the mainstream rulings of precedents have imposed criminal punishment directly on corporations according to the doctrine of "respondeat superior" in case a) an employee of a corporation commits an intentional or negligent offense, b) the offense is committed within the scope of corporate affairs and c) the act aimed to achieve corporate interests.

The reason why the Instant Provision imposes fines on the juridical person in addition to the employee responsible for the unlicensed speculative business is to enhance the effectiveness of the prevention and punishment of acts likely to jeopardize the major legal interest, that is the prevention of encouraging people's speculative spirit and

preservation of good customs, given the difficulty in clearly identifying where the responsibility lies although the juridical person is highly blamable since such an offense of the employee is highly likely to occur or be reinforced due to tacit approval or neglect of a corporate internal organ or, in a broad sense, deficiencies in the corporate operation system unequipped to supervise the prevention of offense. It is appropriate to consider that this measure has reflected the will of legislators to impose strict punishment on corporations for neglecting their duty of appointment and supervision.

Meanwhile, the rulings of the Supreme Court on the joint penal provisions for corporations or individual business owners and the principle of liability are as follows: "Joint punishment of business owners for their employees' violation of administrative laws is grounded on the business owner's liability for neglect of his/her duty of appointment and supervision (87Do1213, November 10, 1987, Supreme Court), "The punishment of business owners according to joint penal provisions is not subjected to that of the employee who committed the offense but is imposed independently for reasons of negligence in appointment and supervision of the employee on the part of the business owner ····· (2005Do7673, February 24, 2006, Supreme Court)", " ····· in case the business owner is an individual, presuming that the business owner is responsible for neglecting his/her duty of appointment, supervision and other necessary care to prevent violation of the offender and penalizing him/her for that responsibility when his/her agent, servant or any other employee commits an offense, the business owner is not immune from the criminal liability unless proven otherwise (82Do777, June 22, 1982, Supreme Court)", or " ····· the purpose lies with reinforcing the presumption of negligence by imposing the burden of proof, if not liability without fault, on the juridical person ····· (2001Do5595, January 25, 2002, Supreme Court)". Comprehensive review of all the stated Supreme Court rulings in relation to the joint punishment of corporations or individual business owners indicates that the Supreme Court consistently questions the liability of business owners on grounds of their violation of duty of appointment and supervision, or liability without fault, except that the business owner is presumed to be liable for negligence in appointment and supervision associated with the employee's offense.

In Japan where the Special Criminal Law stipulates joint penal provisions for punishment of business owners, the general view and the position of the Supreme Court of Japan related to the joint penal provisions of corporate business owners is, "Business owners are presumed to be liable for negligence in appointment, supervision and other care to prevent offense of an agent, servant or other employees, and corporations are not immune from criminal liability unless they prove themselves to have fulfilled their duty as business owners".

The Instant Provision specifies that, "If an agent, a servant or any other employee of a juridical person commits an offense as prescribed in Article 30 in connection with the affairs of the juridical person, the juridical person shall be subject to a fine provided in the same Article". As, even in this text, the scope of corporations which constitute elements of crime does not include those unrelated to the employee's "offense" but is limited to those whose employees commit an "offense" in connection with their "affairs", the "corporate business owner's negligence in appointment and supervision of employees" can be inferred as a subjective factor that links the "affairs" of the corporation and the "offense" of employees, and this subjective element of crime can be interpreted as the above although not specified in the text. Based on this interpretation, the Instant Provision does not contradict the principle of criminal liability.

Therefore, interpreting that the liability of corporation is limited to reasons such as negligence in appointment and supervision of employees although it is not specified as such in the Instant Provision would be acceptable within the scope of law interpretation in accordance with the constitutional interpretation of law.

Therefore, the Instant Provision does not violate the "no crime, no punishment" principle, or the principle of liability.

Justice Lee Kang-kook (Presiding Justice), Lee Kong-hyun, Cho Dae-hyen, Kim Hee-ok, Kim Jong-dae, Min Hyeong-ki, Lee Dong-heub, Mok Young-joon, Song Doo-hwan

7. Nighttime Outdoor Assembly Ban Case

[156 KCCG 1633, 2008Hun-Ka25, September 24, 2009]

Questions Presented

1. Whether the provision of 'outdoor assembly' in the Article 10 of the Assembly and Demonstration Act (Amended to Act 8424 on May 11, 2007) which enables the general prohibition and the district police chief's exceptional permission of the outdoor assembly scheduled before sunrise and after sunset; and the provision of 'outdoor assembly of the Article 10' in the Article 23 (1) of the Assembly and Demonstration Act which prescribes a penalty provision for the violation of the above mentioned provision of the Article 10 infringes upon the freedom of assembly in violation of the Constitution (Unconstitutional)

2. The form of the holding in case of five unconstitutional opinions and two incompatibility opinions; and the issue of overturning the precedent.

Summary of the Decision

I. A. Justice Lee Kang-kook, Justice Lee Kong-hyun, Justice Cho Dae-hyen, Justice Kim Jong-dae and Justice Song Doo-hwan's Majority Opinion: Unconstitutionality

Under the Constitution, Article 21 Section 2, the permit system for assembly is prohibited. This principle is the constitutional value-consensus and the decision of the people who possess the power to amend the Constitution. Under this provision, the Constitution sets a clear limitation in restricting basic rights and, therefore, this provision should be the standard of review with a higher priority than the Constitution, Article 37 Section 2 which is the provision regarding statutory reservation.

The 'permit' prohibited by the Article 21 Section 2 of the Constitution means a permit system under which an administrative

authority may permit assemblies in certain cases by reviewing the contents, the time and the place of reported assemblies. In other words, it is the system under which all unpermitted assemblies are banned.

The Assembly and Demonstration Act (hereinafter, "ADA"), Article 10 prescribes that, the head of a competent police department, as an administrative authority, may ban an outdoor assembly scheduled either before sunrise or after sunset (hereinafter, "nighttime") as a general rule with an exception that the authority may decide not to ban it based on the review of the contents of an assembly in advance. Evidently, the Article 10 prescribes a permit system for nighttime outdoor assembly and we cannot read it otherwise. Therefore, it is against the Article 21 Section 2 of the Constitution and the entire Article 23 Item 1 of "ADA" based on it is against the Constitution as well.

B. Justice Cho Dae-hyen and Justice Song Doo-hwan's Supplementary Concurring Opinion

If we hold the provisions at issue against the Article 21 Section 2 of the Constitution, we can solve the constitutional issue by letting lawmakers to delete the exception provision of the Article 10 of "ADA" because, in that way, the administrative authority loses the power to permit nighttime outdoor assemblies in a selective basis. Yet, we still face the issue of substantial infringement of the freedom of assembly without reasonable basis as we allow the general and complete ban of nighttime outdoor assembly under the Article 10 of "ADA". For this reason, we should hold the entire part of the Article 10 against the Article 37 Section 2 of the Constitution.

C. Justice Min Hyeong-ki and Justice Mok Young-joon's Opinion: Incompatibility with the Constitution

1. When lawmakers enact a law to restrict the freedom of assembly, such action of lawmakers does not fall into the advance permit system which is prohibited under the Article 21 Section 2 of the Constitution. In general, lawmakers may restrict outdoor assembly in terms of time,

place and manner. The main text of the Article 10 of "ADA" regulates lawmakers' restriction on time of outdoor assembly while the proviso relieves the severity of the restriction. The contested provision is the time restriction of outdoor assembly and thus not against the principle of "the prohibition of advance permit" promulgated by the Constitution, Article 21 Section 2.

2. "ADA" Article 10 was enacted to restrict nighttime outdoor assembly in principle after considering the nature and the distinctiveness of nighttime outdoor assembly from the perspective of the difficulty in maintaining the public order. The legitimacy of legislative goal and the appropriateness of means are thereby approved. Yet, the contested provision bans outdoor assembly in a wide range of timeframe and, in result, makes the freedom of assembly nominal by virtually blocking daytime workers' and students' access to assembly. Further, in a city oriented and industrialized modern society, the nature and the distinctiveness of nighttime in terms of difficulty in maintaining a public order is focused on late night. Since "ADA" prescribes various measures to protect citizen's life and privacy and public order, the legislative goal could be achieved without difficulty even if the prohibited timeframe is not such wide as in the provisions at issue. Nevertheless, the contested provision imposes an excessive restriction to achieve the goal and delegates the power of permission, which was enacted to relieve the excessive restriction as an exception, to an administrative authority. However, such a delegation cannot be found to be an appropriate measure to relieve excessive restriction and, for this reason, the Article 10 of "ADA" violates the principle of the prohibition of excessive restriction and infringes on the freedom of assembly. This finding also applies to the Article 23 Item 1 of "ADA" which is based on the Article 10 of "ADA".

3. The unconstitutionality of the Article 10 of "ADA" is not found in the restriction of nighttime outdoor assembly itself. In the provisions at issue, the constitutionality and the unconstitutionality are mixed and, therefore, it should be left to lawmakers to decide what nighttime frame shall be restricted to guarantee the freedom of assembly in the least restrictive manner. For this reason, we hold the

provisions at issue incompatible with the Constitution and yet maintain its validity through June 30, 2010 until which time lawmakers may revise it. If lawmakers do not revise it until the above said date, it will become invalid as of July 1, 2010.

D. Justice Kim Hee-ok and Justice Lee Dong-heub's Dissenting Opinion: Constitutionality

1. The content-neural restriction on time and place in the freedom of assembly does not fall into the "permit" system prohibited by the Constitution, Article 21 Section 2 as far as it is enforced with a concrete and clear standard. Whether the Article 10 of "ADA" constitutes the assembly permit prohibited by the Constitution, Article 21 Section 2 should be decided after reviewing the standard of the restriction: whether the standard, as a content-neutral one, is concrete and clear. In restricting the freedom of assembly, the provisions at issue adopt a time standard which is content-neutral, concrete and clear. For this reason, the contested provision does not constitute the "permit" prohibited by the Constitution, Article 21 Section 2.

2. The Article 10 of "ADA", with a legitimate legislative goal, was enacted to guarantee the freedom of assembly and demonstration and, concurrently, to maintain the public order in a harmonious manner. Since, nighttime outdoor assembly has a high probability to violate the public order by the virtue of 'nighttime' and 'outdoor assembly'. Therefore, the contested provision, which bans nighttime outdoor assembly as a general rule, is found to be an appropriate means to achieve the legislative goal. It is practically difficult to restrict nighttime outdoor assembly by subdividing the restricted time and places more into details. Essential nighttime outdoor assemblies are selectively permitted under the contested provision. Further, alternative channels for communication and public opinion are available. For these reasons, we hold that the Article 10 of "ADA" does not infringe on the freedom of assembly and not violate the Constitution. It is same with the "ADA", Article 23 Item 1 which is based on the contested provision.

E. Type of Decision and the Relation to the Precedent

Five Justices held the provisions at issue unconstitutional while two Justices incompatible with the Constitution. This number satisfies the required number of votes (6) to hold a statute unconstitutional under the Constitutional Court Act, Article 23 Section 2 Item 1. Subsequently, this Court holds the contested provisions unconstitutional and yet maintain their validities through June 30, 2010 until which time lawmakers may revise the unconstitutional portion of the law because the provisions at isue have the mixed portions of constitutionality and unconstitutionality. If lawmakers do not revise this provisions until the above said date, the provisions will become invalid as of July 1, 2010.

Previously, in 91 Hun-Ba14 (April 28, 1994), the Constitutional Court held the former Article 10 of "ADA (wholly revised to Act No. 4095 on March 29, 1989)" constitutional. The decision of 91 Hun-Ba14 shall be overruled as to the conflicted portion with this decision.

F. Justice Cho Dae-hyen's Non-Applicability Order Opinion

The Article 10 and 23 Item 1 of "ADA" is a criminal statute. If this Court allows the validity of the contested provisions in which the unconstitutional portion is embedded until revision, this Court's decision is deemed to be deviated from the spirit of constitutional review of statute and further against the Constitutional Court Act, 47 Section 2. The application of the provisions at issue should be suspended until revision.

Party

Requesting Court
Seoul Central District Court (2008Cho-Ki2418)

Movant at the Requestiong Court
Ahn ○-gul
Representative:
1. Wemin Law Firm
Attorney in Charge: Kim Nam-gun and three others
2. Hankyul Law Firm
Attorney in Charge: Park Joo-min

Underlying Case
Seoul Central District Court 2008Ko-Dan3949 Violation of Assembly and Demonstration Act, etc.

Holding

'Outdoor Assembly' at Assembly and Demonstration Act (revised by Act No. 8424 on May 11, 2007), Article 10 and 'Outdoor Assembly of Article 10' of Article 23, Item 1 are incompatible with the Constitution. These provisions shall be continuously applied until the legislators revise them by June 30, 2010.

Reasoning

I. Introduction of the Case and Subject Matter of Review

A. Introduction of the Case

1. Movant at the Requesting Court was charged with the violation of "Assembly and Demonstration Act" by allegedly organizing an outdoor assembly from 19:35 to 21:47 on May 9, 2008 (Seoul Central District Court, 2008Go-Dan3949). The said movant filed a motion to request for the constitutional review of 'Assembly and Demonstration Act, Article 10 and Article 23 Item 1' claiming that these provisions allow the advance permit for assembly which is prohibited by the

Constitution (Seoul Central District Court, 2008Cho-Gi2418).

2. The said district court granted the motion and requested this constitutional review of the statute on October 13, 2008.

B. Subject Matter of Review and related provision

Subject Matter of Review in this case is whether 'Outdoor Assembly' in the Article 10 of the Assembly and Demonstration Act (revised by Act No. 8424 on May 11, 2007) and the 'Outdoor Assembly of the Article 10' and the Article 23 Item 1 are against the Constitution. Although the requesting court asked for the review of the entire Article 10 and the Article 23 Item 1, we limit the subject matter to those parts of 'Outdoor Assembly' in the Article 10 and the Article 23 Item 1 (hereinafter, referred to those parts as "Instant Provision") because those parts of the provisions applies to the movant in the underlying case.

The text of those provisions of the subject matter are as follows:

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

Article 10 (Hours Prohibited for Outdoor Assembly and Demonstration)

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

Article 23 (Penal Provisions)

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

1. The organizer shall be punished by imprisonment for not more

than one year, or by a fine not exceeding one million won;

[Related Provisions]

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

Article 2 (Definitions)

For the purposes of this Act, the definitions of terms shall be as follows:

1. The term "outdoor assembly" means an assembly in a place that has no roof or covering or is in an open space with none of its four sides closed;

2. The term "demonstration" means an act of a group of persons associated under common objectives parading along, or displaying their will or vigorous determination in, public places available for the free movement of the general public, such as roads, plazas, parks, etc., with the aim of exerting influence on the opinions of a large number of unspecified persons or overwhelming them;

3.~6. (*Omitted*)

Article 6 (Report, etc. on Outdoor Assembly or Demonstration)

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

2.~5. (*Omitted*)

II. Reason for this Request of Seoul Central District Court and Arguments of Related Bodies

A. Reason for this request for the constitutional review of the said court

1. The Article 10 of Assembly and Demonstration Act (hereinafter as "ADA") bans nighttime outdoor assembly with the exception that a district police chief may permit on a selective basis. It constitutes the advance permit system for assembly which is absolutely prohibited by the Constitution, Article 21 (2) and further violates the freedom of assembly.

2. The prohibited timeframe of outdoor assembly under the Article 10 of "ADA" is overbroad as it covers the half of a day from sunset to sunrise. Further, under the circumstances that many citizens study and work during daytime, the freedom of assembly as political basic rights could become nominal if nighttime outdoor assembly is banned. "ADA" prescribes the advance report system for assembly ("ADA", Articles 6, 7, 8 & 9), the prohibition of illegal assembly which will directly affect the public peace and order ("ADA" Article 5), the prohibition of assembly place ("ADA" Article 11), the restriction of assembly for traffic control ("ADA" Article 12) and the restriction of the use of bullhorn. Given these regulations, we could properly reign in assembly if we enforce above mentioned regulations in an efficient way. Nevertheless, "ADA" Article 10 violates the rule against excessive restriction prescribed by the Article 37 (2) of the Constitution because it banns nighttime outdoor assembly as a general rule.

B. The Argument of the Minister of Justice

(*intentionally omitted*)

C. The Argument of the Chief of National Police Agency

(*intentionally omitted*)

III. Issues of this Case

A. Constitutional and Statutory Provision regarding Outdoor Assembly

Since the beginning, the Constitution has guaranteed the freedom of assembly as a basic right and, on the issue of outdoor assembly and permit system for assembly, it has been revised as shown in the chart (1) below:

[Chart (1)] Constitutional and Statutory Provision regarding the freedom of assembly, outdoor assembly and permit system for assembly

The First Constitution	Article 13: The citizens' freedom of speech, the press, assembly and association shall not be restricted unless pursuant to the law
June15, 1960 Revised Constitution	Article 13: The citizens' freedom of speech, the press, assembly and association shall not be restricted unless pursuant to the law. Article 28 ②: Citizens' freedom and rights may be restricted when it is deemed necessary for the public order and welfare under the law. However, the restriction shall not harm the essence of the freedom and rights and it shall not regulate the permit and pre-censorship of speech, the press, assembly and association.
December 26, 1962 Revised Constitution	Article 18 ①: All citizens shall enjoy freedom of speech, the press, assembly and association. ② Permit and pre-censorship of speech, the press, assembly and association shall not be allowed. Yet, the pre-censorship of movie and entertainment may be allowed for the purpose of the public morals and societal ethics. ③ (*omitted*) ④ The time and place of outdoor assembly may be regulated by law.
December 27, 1972 Revised Constitution	Article 18: Citizens' freedom of speech, the press, assembly and association shall not be restricted unless pursuant to law.

October 27, 1980 Revised Constitution	Article 20 ① All citizens shall enjoy freedom of speech, the press, assembly and association.
October 29, 1987 Revised Constitution	Article 21 ① All citizens shall enjoy freedom of speech, the press, assembly and association. ② Permit and pre-censorship of speech, the press, assembly and association shall not be allowed.

※ When no change was made on the freedom of assembly, outdoor assembly and permit of assembly after each revision, they were intentionally omitted in this chart.

While the Article 18 (4) of the Constitution revised on December 26, 1962 allowed the regulation on the time and place of outdoor assembly, the Article 6 of "ADA" enacted on December 31, 1962 banned outdoor assembly after sunset and before sunrise (under the current "ADA", it was revised to 'before sun rises and after sun sets') with a penalty provision under the article 15.

The Article 10 of revised "ADA" of March 29, 1989 continued to ban nighttime outdoor assembly with a proviso. So did the revised "ADA" of May 11, 2007. The changes are as shown in the chart (2) below.

[Chart (2)] Changes on nighttime outdoor assembly of "ADA"

December 31, 1962 Revised "ADA"	Article 6 (timeframe of banned outdoor assembly and demonstration) No person shall not be engaged in outdoor assembly and demonstration before sunrise and after sunset. Violators of the Article 15 (6) will be penalized as follows: 1. Organizers are subject to no more than 3 years of incarceration or no more than 60,000 won of fine.

March 29, 1989 Revised "ADA"	Article 10 (time frame of banned outdoor assembly and demonstration): No person shall not be engaged in outdoor assembly and demonstration before sunrise and after sunset. However, if an assembly should be held at nighttime due to its nature, the head of district police department may allow it before sunrise and after sunset as long as the report of the assembly is made in advance after securing a person in charge of keeping the public order. Article 20 (penalty): Violators of the Article 10 are subject to penalty pursuant to the following subsection 1. Organizers are penalized with no more than one year of incarceration or no more than 1,000,000 won of fine.
May 11, 2007 Revised "ADA"	Article 10 time frame of banned outdoor assembly and demonstration): No person shall not be engaged in outdoor assembly and demonstration before sunrise and after sunset. However, if an assembly should be held at nighttime due to its nature, the head of district police department may allow it before sunrise and after sunset as long as the report of the assembly is made in advance after securing a person in charge of keeping the public order. Article 23 (penalty): Violators of the Article 10 are subject to penalty pursuant to the following subsection 1. Organizers are penalized with no more than one year of incarceration or no more than 1,000,000 won of fine.

B. Summary of Issues

Since the provisions in the instant case are about the restriction of the freedom of assembly guaranteed by the Constitution, we will

review whether these provisions violate the Constitution, Article 2 which prohibits the permit of assembly and further whether they violate the Constitution Article 37 (2) by excessively restricting the freedom of assembly.

IV. Review on Merits

A. Unconstitutionality Opinion of Justice Lee Kang-kook, Justice Lee Kong-hyun, Justice Cho Dae-hyen, Justice Kim Jong-dae, Justice Song Doo-hwan

1. The meaning and the role of the Freedom of Assembly in modern representative democracy

(A) The Constitution, Article 21 (1) prescribes that "all citizens shall enjoy the freedom of speech, the press, assembly and demonstration" and thus guarantees the freedom of assembly as citizens' basic right along with the freedom of speech and the press by acknowledging it as a part of the freedom of expression. Under the Constitution, the freedom of assembly has the nature of a subjective right which expels governmental interference as well as an objective right which is essential for a societal community to materialize liberal democracy.

(B) Under our constitutional order, free self-realization is regarded as the highest value in order to guarantee human dignity and value. There, the freedom of assembly accelerates citizens' assimilating process by enabling them to contact each other, to exchange information and to make a unified expression. Further, it contributes to political stability by bringing sociopolitical critics to the surface and consolidating them to a society. Additionally, it delivers the opinions of voters to representatives between elections and also functions as the medium of expression for minorities. For these reasons, it is an essential component for a representative liberal democratic state along with the freedom of speech and press (152 KCCG, 1125, 2007Hun-Ba22, May 28, 2009). It is the Constitutional determination to establish a pluralistic 'open society' based on various opinions to support the norm that the Constitution should guarantee the freedom

of assembly (15-2(B) KCCR 41, 53, 2000 Hun-Ba67, October 30, 2003)

2. 'Prohibition of Permit for Assembly' as a limit in restricting the freedom of assembly

(A) The object and the meaning of the Article 21 (2) of the Constitution

1) The Article 21 (2) (hereinafter as "Instant Constitutional Provision") prescribes that "the permit and pre-censorship of speech and the press, and the licensing of assembly and association shall not be allowed". This clearly shows the constitutional determination not to allow the restriction in the form of 'permit'. The freedom of assembly is distinguishable from other basic rights as the Constitution enumerates the prohibition of permit and precensorship of speech and the press and the prohibition of the permit for assembly.

When we review the constitutional history, we find that the prohibition of the permit for assembly is, first, prescribed in the proviso of Article 28 (2) of the revised Constitution of June 15, 1960 as shown in the chart (1). It remained intact as the Article 18 (2) of the revised Constitution of December 26, 1962. Later, it was deleted in the revised Constitution of December 27, 1972. Finally, it appears again in the revised Constitution of October 29, 1987 again.

When we review this history, we need to consider historical, cultural and socio-political background under which the deleted provisions governing the prohibition of the permit and pre-censorship of speech and the press, and the permit for assembly under the so-called Yoosin Constitution were later revived. This review is also based on: a) the rehabilitative reflection that, in the past, the freedom of speech, the press and assembly retrogressed to nominal accessory to basic rights; and b) the democratic constitutional order cannot progress unless the freedom of assembly is not practically guaranteed. Upon this review, we find that the revised Instant Constitutional Provision should be understood as people's consensus and the constitutional determination for the absolute prohibition of the permit for assembly due to the fact that the permit for assembly is no more than the pre-censorship of

assembly. It is because the permit for assembly is decided by an administrative body's one-sided and advance decision.

2) From the perspective of the comparative constitutional law, it should be noted that Korea and Germany are probably the only countries with constitutional provisions prohibiting the permit for assembly. This, again, shows the constitutional determination to guarantee the freedom of assembly based on the critical reflection of the past constitutional history.

3) Therefore, the Instant Constitutional Provision should be the preceding standard of review for unconstitutionality to the statutory reservation provision of the Article 37 (2) of the Constitution because it is the direct and clear constitutional statement about the limitation on the restriction of the freedom of assembly.

Therefore, although a statute restricts the freedom of assembly pursuant to the Article 37 (2) of the Constitution, it violates the Constitution if it features a permit system.

(B) The meaning of the permit for 'assembly' which is prohibited by the Instant Constitutional Provision

1) It is clear to prohibit any permit for indoor assembly. With respect to outdoor assembly, the current Constitution has special meanings. As shown in the chart (1), the Article 18 (2) of the revised Constitution of December 26, 1962 prescribes a statutory reservation under the article 18 (4) that "with respect to outdoor assembly, the time and place may be regulated by law" while it prohibits the permit for assembly in general. However, the revised Constitution of October 27, 1980 abolished the statutory reservation provision and so did the current Constitution while retaining the provision on the prohibition of permit for assembly. The abolition of statutory reservation provision on the issue of the time and place of outdoor assembly reflects people's constitutional choice and determination. Therefore, we need to take a consideration of the historical background of the Constitution on this issue when we review the issue of the restriction on the time and place of outdoor assembly.

2) As we discussed above, the current Constitution does not retain a separate statutory reservation on the time and place of outdoor assembly. Further, the freedom of assembly is set to guarantee the right to determine the time, place, method and purpose of assembly including the preparation, organization, participation, place and time of assembly (15-2(B) KCCR 41, 53-54, 2000Hun-Ba67 (consolidated), October 30, 2003).

After all, the purpose of the Instant Constitutional Provision which prohibits the permit for the freedom of assembly is to prohibit the permit for assembly on the time, place and method of assembly as well as the contents of assembly. Therefore, any kind of permit for assembly violates the Instant Constitutional Provision no matter whether it is for indoor, outdoor, daytime or nighttime. Two Justices' dissenting opinion distinguishes the restriction of assembly on contents from that on time and place and subsequently finds that the permit of assembly on time and place are value-neutral and therefore does not fall into a kind of restriction prohibited by the Constitution. Further, the dissenting opinion asserts that its opinion is consistent with this Court's precedent on the prohibition of the restriction of permit and pre-censorhip for speech and the press. We disagree because the dissenting opinion fails to reflect the review of the facial and historical interpretation of "Instant Constitutional Provision". In the case of the prohibition of permit and pre-censorship for speech, the contents of the expression is the subject of review (13-1 KCCR 1167, 1179, 2000Hun-Ma43, May 31, 2001) and yet, the freedom of assembly, *without pre-consideration of the contents of assembly*, is to protect the act of gathering at a certain place for a common objective (152 KCCG 1125, 1130, 2007Hun-Ba22, May 28, 2009). Therefore, the dissenting opinion does not consider the difference between the natures of two different freedoms: the freedom of speech and the press is of the nature of expression; and the freedom of assembly is of the nature of act of expression where time and place is as important as the contents of assembly (15-2(B) KCCR 41, 54, 2000Hun-Ba67 · 83 (consolidated), October 30, 2003).

(C) The meaning of 'permit' which is prohibited by the Instant

Constitutional Provision

'Permit' prohibited by "Instant Constitutional Provision" is an administrative body's preventive measure to pre-screen the contents, time and place and to allow assembly on a selective basis by releasing a general restriction, that is, to prohibit the unpermitted assembly (13-1 KCCR 1167, 1179, 2000Hun-Ma43, May 31, 2001; 20-1(B) KCCR 397, 410, 2005Hun-Ma506, June 26, 2008). Therefore, 'permit' prohibited by the Instant Constitutional Provision sets the principle of general ban on the freedom of assembly with exceptional allowance by administrative agency's 'permit'. This approach is different from the report system for assembly where the freedom of assembly is a principle and the ban is an exception [this court found constitutional the "ADA", Article 6 (1) which mandates the report for assembly in [152 KCCG 1125, 2007Hun-Ba22, May 28, 2009]. For this reason, the Instant Constitutional Provision retains people's value-consensus and constitutional determination to prohibit permit for assembly as long as the freedom of assembly is decided by administrative body's pre-decision because, if so, it is same as the permit and pre-censorhip for speech and the press. Although the allowance of assembly belongs to administrative power, it is people's determination to prohibit it with the power of the Constitution.

3. Whether the Article 10 of "ADA" violates the Instant Constitutional Provision

(A) The Article 10 of "ADA" prescribes that "no person shall be engaged in outdoor assembly and demonstration before sunrise and after sunset". It banns 'nighttime outdoor assembly' as a general principle and yet has a proviso that "if an assembly should be held at nighttime due to its nature, the head of district police department may allow it before sunrise and after sunset as long as the report of the assembly is made in advance upon securing a person in charge of keeping the public order". Under this provision, nighttime outdoor assembly is generally banned with an exception that it may be allowed by the district police chief's pre-decision based on the consideration of the nature of assembly. After all, the Article 10 of

"ADA" which prescribes the general ban on nighttime outdoor assembly and the proviso which prescribes the exceptional allowance by a district police chief are nothing but the 'permit' for nighttime outdoor assembly and therefore violate the Instant Constitutional Provision.

(B) Although the Articles 11 and 14 of "ADA" restrict the freedom of assembly by regulating the place and method of assembly, these provisions restrict the freedom of assembly by a statute not by an advance permit issued by an administrative body and therefore not against the Constitution. Further, when the Article 11 (4) of "ADA" was revised to have a proviso after this Court's finding of unconstitutionality [2000Hun-Ba67 · 83 (consolidated), December 20, 2003], it adopted the way of restriction by statute not by an administrative body's advance permit and therefore should be distinguishable from the Article 10 of "ADA". (with respect to 'ordinary courts' of the Article 11 (1) of "ADA", this Court found it constitutional in 17-2 KCCR 360, 2004Hun-Ka17, November 24, 2005).

(C) Compared to other countries, Korea and Germany are the only countries to prohibit 'permit' for assembly under the Constitution. Yet, the U.K, Germany, Japan and Austria do not have any provision to ban nighttime outdoor assembly and restrict it with an administrative body's 'permit'. France bans assembly after 11:00 pm and Russia does so from 11:00 pm to 7:00 am. The U.S. regulates assembly not with federal laws but with state laws and city ordinances and, for this reason, we find it difficult to compare the U.S,' cases with this case.

There are only few countries which ban nighttime assembly and restrict it by means of 'permit' and this fact should be taken into consideration when we review the issue of constitutionality of the Article 10 of "ADA".

(D) Although this Court has previously decided that the Article 10 of "ADA" is not against the Constitution (6-1 KCCR 281, 302, 91Hun-Ba14, April 28, 1994), we find that the precedent lacks the serious consideration of the modern value and function of the freedom of assembly and people's constitutional determination embedded to the

Instant Constitutional Provision. Lacking this consideration, the precedent was made focusing only on the violation of the Article 37 of the Constitution which is a mere statutory reservation. For this reason, the precedent should be overruled.

4. Sub-conclusion

(A) 'Outdoor assembly' in the Article 10 of "ADA" prescribes permit system prohibited by the Constitution and therefore violates the Constitution. Consequently, "ADA", Article 23 Item 1, the penalty provision of the violation of 'outdoor assembly' in the Article 10 of "ADA" violates the Constitution as well.

(B) The freedom of assembly is such a basic right to be seriously protected because it is an essential element for a democratic community under representative democracy. On the other hand, the freedom of assembly is highly likely to create a conflict with public order and legal peace because it accompanies the mass expression of opinion. Therefore, it is inevitable to draw a certain limitation in the freedom of expression. In doing so, however, the restriction should be imposed under a comparative arrangement of different laws in order to accomplish different legal interests without adopting the permit system. It is emphasized that only 'peaceful' and 'non-violent' assembly is protected by the freedom of assembly under our Constitution [15-2(B) KCCR 41, 53, 2000Hun-Ba67·83 (consolidated), October 30, 2003]. Since violent and illegal acts under the guise of the freedom of assembly is beyond the scope of the constitutional protection, they are subject to the restriction under 'ADA', criminal law, national security law, 'criminal law of battery', 'traffic law' with criminal and civil liability.

B. The Supplementary Concurring Opinion to Uunconstitutionality of Justice, Cho Dae-hyen and Justice Song Doo-hwan

1. We find the statutory provisions in the instant case against the Article 21 (2) of the Constitution and, further, find the Article 10 of "ADA" which bans nighttime outdoor assembly generally and entirely

is also against the Article 37 (2) of the Constitution. If we hold the Instant Provision against the Article 21 (2) of the Constitution only, we can solve the constitutional issue by letting lawmakers to delete the exception proviso of the Article 10 of "ADA" because, in that way, the administrative authority loses the power to permit nighttime outdoor assemblies on a selective basis. Yet, we still face the issue of substantial infringement of the freedom of assembly without reasonable basis as we allow the general and complete ban of nighttime outdoor assembly under the Article 10 of "ADA". For this reason, we should hold the entire Article 10 against the Article 37 (2) of the Constitution. Therefore, we need to hold that the statutory provisions in the instant case violates the Article 21 (2) of the Constitution and, further, hold the Article 10 of "ADA" which bans nighttime outdoor assembly generally and completely is also against the Article 37 (2) of the Constitution.

2. The Article 10 of "ADA" is against the Article 37 (2) of the Constitution for following reasons.

The Article 10 of "ADA" bans nighttime outdoor assembly in general because nighttime outdoor assembly in the form of collective action is highly likely to violate public order and others' legal interests and therefore its potential dangers should be prevented.

Yet, the Constitution and "ADA" protects peaceful assembly only. Any act of violation of public order and others' legal interests are subject to penalty under criminal law and other laws. Therefore, there is no need to prohibit assembly for the reason of potential dangers to public order and others' legal interests. "ADA" bans any assembly which will obviously threat the public order by group violence, threat, destruction, arson (Article 5); mandates report for any outdoor assembly 48 hours in advance (Article 6); if necessary, may set a public order line for reported assemblies in order to maintain public order (Article 13); and prohibits organizers and participants from making loud noise which may create nuisance and allow the chief of district police department to prohibit the use of bullhorn and to take other necessary measures (Article 14). Given these provisions, we believe that there is no need to ban nighttime outdoor assembly completely in order to prevent the danger to public order and others'

legal interests.

Further, the freedom of assembly is an important basic right which is the basis of individual's social life, public opinion, democracy and enables minorities to express their group opinions. Therefore, it cannot be restricted based on the likelihood of illegal acts. If illegal acts occur in assembly, they are to be restricted at the time of occurrence. But, the freedom of assembly cannot be restricted in anticipation of illegal acts before the acts are actually committed.

There is no evidence that nighttime outdoor assembly has a higher probability for violence than daytime outdoor assembly. The main reason for violence during nighttime outdoor assembly is that police treats nighttime outdoor assembly as illegal and clash with protesters in the process of break-up. If nighttime outdoor assembly is recognized and protected, it is difficult to anticipate the violence to occur because of the nature of nighttime outdoor assembly. We cannot ban assembly completely only because it is nighttime outdoor assembly.

Although nighttime outdoor assembly may infringe upon other people's legal interest and public order, it depends on time and place. Therefore, we could prevent the danger with proper measures by selecting cases with high probability of infringement instead of banning all nighttime outdoor assemblies under the notion of probability of infringement of legal interest.

Although nighttime has a feature of concealment, the complete ban of nighttime outdoor assembly has little rationale to the restriction of the freedom of assembly since modern city life is a part of a normal and everyday life provided with sufficient lightings.

Further, the complete ban of outdoor assembly from sunset to sunrise makes the freedom of assembly arbitrary for those who either work or study during daytime.

After all, the general and complete ban on nighttime outdoor assembly under Article 10 of "ADA" substantially deprives people of the freedom of assembly without reasonable basis and therefore violates the Constitution, Article 37 (2). The conclusion is same even if the Article 10 of ADA is deleted and permit system for assembly disappears.

Therefore, we should find that the main provision and the proviso

of Article 10 of ADA violate the Constitution. Article 21 (2) and further the main provision of the Article 10, even without the proviso, violates the Constitution.

C. Incompatibility Opinion of Justice Min Hyeong-ki and Justice Mok Young-joon

1. The violation of the Constitution, Article 21 (2)

(A) 'Prohibition of advance permit for assembly' under the Constitution, Article 21 (2)

The Article 21 (2) of the Constitution prohibits advance permit for assembly by prescribing that " ····· the permit for assembly is not allowed". The 'permit' in Article 21 (2) of the Constitution is 'the administrative action to permit for assembly in advance'. Administrative permit for assembly in advance is prohibited by the Constitution and yet legislative restriction of assembly does not fall into 'prohibition of advance permit' under the Constitution. Five Justices' unconstitutionality opinion admit this(13-1 KCCR 1167, 1179 2000Hun-Ba43, May 31, 2001).

Lawmakers, by law, may restrict the time, place and manner of assembly in general. In this regard, ADA, in addition to the time restriction under the Instant Provision, restricts the place and manner such as certain places like National Assembly building (Article 11), traffic control purpose (Article 12) and prohibition of bullhorn (Article 14). This sort of restriction falls into advance permit prohibited by the Constitution if it is the prohibition of outdoor assembly which did not acquire permit from administrative agency. If not, then, the issue is about the violation of the Article 37 (2) of the Constitution, not the violation of Article 21 (2)

(B) The Article 10 of ADA

The Article 10 of "ADA" restricts the time of outdoor assembly by prescribing that "no person shall be engaged in outdoor assembly and demonstration before sunrise and after sunset". Yet, it has the proviso

that "if an assembly should be held at nighttime due to its nature, the head of district police department may allow the assembly scheduled before sunrise and after sunset as long as the report for the assembly is made in advance upon securing a person in charge of keeping the public order".

Five Justices' unconstitutionality opinion has logical contradiction. The Article 10 of ADA should be reviewed under the rule against excessive restriction while the review is unnecessary because it has a proviso. Justice Cho Dae-hyen and Justice Song Doo-hwan have correctly pointed out this contradiction (if the Article 10 of ADA is to be found in violation of the Article 21 (2) of the Constitution only, then, its unconstitutionality may be cured by deleting the proviso and for that reason, it should be found in violation of the Article 37 (2) of the Constitution as well).

(C) Sub-conclusion

For this reason, regardless of the proviso, the Article 10 of ADA does not violate the Article 21 (2) of the Constitution.

2. Whether it violates the Article 37 (2) of the Constitution

The freedom of assembly may be restricted by law for national security, public order and public welfare (the Article 37 (2) of the Constitution). The restriction, however, should be made in minimal not to infringe upon the essence of the freedom. In this regard, we review whether the Instant Provision complies with the principle of proportionality.

(A) Legitimacy of the legislative purpose and appropriateness of means

Outdoor assembly is held at an open place without ceiling (ADA, Article 2 (1)) and involves collective actions. Therefore, it, in its nature, has the high probability to disturb other people's peace, public order and legal peace. Especially, nighttime is the time period to require quietness and peace for residents near assembly place. Further,

during nighttime, assembly participants may easily become agitated than daytime. Finally, administrative authorities in charge of supervising outdoor assembly have more difficulty to regulate and identify violators during nighttime.

For this reason, the article 19 of ADA has justified goal and appropriate means.

(B) Rule of the least restrictive means and the balance of interest

The freedom of assembly includes the freedom to decide when and where to hold assembly in what manner (15-2(B) KCCR 41, 53, 2000Hun-Ba67, October 30, 2003). Nighttime outdoor assembly, therefore, should be protected under this principle and, any restriction of this freedom should be for the purpose of protection of citizen's living and privacy by the least restrictive measures.

Today, most of workers and students work from eight or nine in the morning to five or six in the evening and, therefore, these people cannot participate in any assembly unless it is scheduled after five or six in the evening. If banned, the nighttime assembly cannot guarantee the freedom of assembly because workers and students cannot participate in the assembly during summer time which gives shorter daytime.

Further, in a city oriented and industrialized modern society, activities usually continue from daytime to nighttime without much change. Therefore, traditional concept of nighttime, that is, 'after sunset and before sunrise' loses its distinctive identity. Under the current citizens' life style, the danger from nighttime comes from late night instead of nighttime. Nevertheless, the Article 10 of ADA banns outdoor assembly during the overbroad and variable time frame, that is, 'after sunset and before sunrise'. This constitutes excessive restriction unnecessary to achieve the goal.

Further, ADA prescribes that district police chief may ban an assembly if the assembly is most likely to violate the privacy of others, to incur damages on others' property and equipment and to disturbs others' right to study near school zone upon request of residents and managers of equipment (ADA, Articles 8 (3), (1) and (2)). It also banns the use of bullhorns by organizers and participants

if the use of bullhorn seriously disturbs other people and allows the district police chief to leash necessary measures to ban the use of bullhorns (ADA, Article 14). The police chief may ban the assembly at the major streets of cities for the purpose of traffic control (ADA, Article 12 (1)). As reviewed, ADA has alternative provisions to warrant citizens' life, privacy and public order. Therefore, the legislative goal may be satisfied without the Article 10 of ADA which prescribes such a broad time frame for nighttime.

Further, the Article 10's proviso delegates the power of permission, which was enacted to relive the excessive restriction as an exception, to an administrative authority. However, such a delegation cannot be found to be an appropriate measure to relieve excessive restriction because the administrative authority has the decisional power.

Therefore, the Article 10 of ADA is against the rule of the least restrictive means and does not have the balance of legal interests because the infringement of assembly participants' rights are no less than the achievement of the public interest.

(C) Sub-conclusion

The provision about 'outdoor assembly' of the Article 10 of "ADA" violates the principle of the prohibition of excessive restriction and infringes the freedom of assembly. This finding also applies to the Article 23 Item 1 of "ADA" which is based on the Article 10 of "ADA".

(3) Decision of incompatibility with the Constitution

As we discussed, the unconstitutionality of the Instant Provision is not the restriction of nighttime outdoor assembly in itself but the excessive restriction of nighttime outdoor assembly during a overbroad and variable time frame such as 'after sunset and before sunrise' to protect citizens' life and privacy and public order. In the Instant Provision, the constitutionality and the unconstitutionality are mixed.

Therefore, it should be left to lawmakers to decide what nighttime frame shall be restricted to guarantee the freedom of assembly in the least restrictive manner. By doing this, we could delete the

unconstitutional portion of the Instant Provision and respect the Legislature's discretion because the Legislature may restrict the prohibited time frame for outdoor assembly by considering the time frame of 'late night' which requires citizens' privacy under the current lifestyle of citizens and the current aspects of nighttime outdoor assembly (For reference, France banns assembly after 11:00 pm and Russia does so from 11:00 pm to 7:00 am. The U.S. regulates assembly not by the federal law but by the state law and local government ordinance. The time frame in the U.S. varies from 8 pm, 9 pm and 10 pm).

For this reason, we hold the Instant Provision incompatible with the Constitution and yet maintain its validity through June 30, 2010 until which time lawmakers may amend it. If lawmakers do not revise it until the above said date, it will become invalid as of July 1, 2010.

D. Dissenting Opinion of Constitutionality of Justice Kim Hee-ok and Justice Lee Dong-heub

1. Whether the Article 10 of ADA violates the Article 21 (2) of the Constitution

(A) The intent of the Article 21 (2) of the Constitution – Prohibition of the permit for assembly

Our Constitutions, from the 1st Constitution to the current one, have continuously promulgated that constitutionally guaranteed freedom of assembly and association may be restricted by the law. Among them, the revised Constitution of June 1960, November 1960, December 1962 and October 1969 prohibited the permit for assembly and association. The current Constitution follows this tradition by 'not allowing the permit for assembly and association' as well.

The principle is also practiced in Germany in the form of written provisions for the prohibition of assembly (German Constitution, Article 8 (1) says 'all German citizens have the rights to hold assemblies without report and permit if they are held peacefully without weapons). Absent written provisions, the U.S. and Japan practices the principle in the form of constitutional principle ('Congress

shall not make the law to restrict the right to peaceful assembly' in the First Amendment to the U.S. Constitution and the principle of the prohibition of the censorship of assembly under the Article 21 (1) of the Japanese Constitution).

Therefore, we should respect the Constitutional spirit to prohibit the permit system for assembly when restricting the freedom of assembly under the general principle. Further, any pre-censorship through general permit system for assembly is against the goal of the Article 21 (2) of the Constitution and therefore should not be allowed.

(B) The prohibition of the permit for assembly and the regulation of time, place and manner of assembly

The freedom of assembly is an important basic right to build the public's political and social opinion along with the freedom of press. However, it does not mean that anybody may hold assemblies at anytime at any place. Further, given the nature of assembly involving collective action, assembly may more likely collide with the public order and legal peace than individual action (*See* 6-1 KCCR 281, 300 91Hun-Ba14, April 28, 1994).

Therefore, pursuant to the Article 37 (2) of the Constitution, government, which owes the duty to guarantee the freedom of all citizens, may reasonably restrict the freedom of assembly as an advance deterrence measure in order to prevent the deprivation of freedom itself caused by chaotic disorder. However, the advance restriction should be based on a clear and concrete standard such as content-neutral the time, place and manner and, thus, this kind of restrictions do not fall into the permit system prohibited by the Article 21 (2) of the Constitution.

It is also true both in Japan and the U.S. The U.S. Supreme Court held that the restriction of the freedom of assembly is not against the First Amendment if the discretionary permit is based on a clear and concrete standard such as the time, place and manner while advance permit system for assembly without a concrete standard is against the First Amendment (Shuttlesworth v. Birmingham, 394 U.S. 147 (1969); Forsyth Country, Georgia v. The National Movement, 505 U.S 123 (1992)). The Supreme Court of Japan also held that advance permit

for assembly based on reasonable and clear standard to regulate specific places and manner is not against the Article 21 of the Constitution while general permit system for group action is against the Constitution (the Supreme Court of Japan, Sohwa 29, 11. 24, Criminal Case Report 8, 11. 1886).

Likewise, the German Constitution prescribes that 'outdoor assembly may be restricted by law' under the Article 8 (2) of the Federal Constitution although the Article 8 (1) of the Constitution prohibits the permit system for assembly. That is why, in Germany, there are many federal and state regulations which restrict the freedom of outdoor assembly in advance based on the time, place and manner (Assembly Act, Article 16 (1), (2) and Article 17 (1), (3), Act on Prohibited Assembly Place for Constitutional Institution, Articles 2 and 3, Holiday Act of Bayern State, Article 8).

As above observed, there is no constitutional principle in the world which allows, under no circumstances, the permit for assembly. The U.S., Japan and Germany, despite some differences, are in no different positions as they find that the reasonable restriction of outdoor assembly based on the time and place are not unconstitutional.

The majority opinion finds that advance regulation of time and place of an assembly is the kind of permit prohibited by the Article 21 (2) of the Constitution because the current Constitution prohibits the permit for assembly and association without prescribing the separate statutory reservation on the time and place of outdoor assembly although the revised Constitution of 1962 and 1969 prescribes the separate statutory reservation on the outdoor assembly in addition to the prohibition of permit for assembly and association. This finding is further based on the notion that the freedom of assembly includes the right to decide the time and place of assembly. The revised Constitution of 1962 and 1969 prescribes the separate statutory reservation on the regulation of the time and place of outdoor assembly in order to make it clear that the regulation on the time and place of outdoor assembly may be possible by law even without the application of separate statutory reservation. Therefore, even under the current Constitution, which does not prescribe the separate statutory reservation, the regulation on the time and place of outdoor assembly is possible by the general statutory reservation of the Article 37 (2) of

the Constitution. (In Germany's case, since the German Constitution does not have the general statutory reservation, it should have the separate statutory reservation to regulate the time and place of outdoor assembly). Further, the majority opinion's argument is wrong because their proposition that the freedom of assembly includes the right to decide the time and place of assembly simply means that the time and place of assembly is subject to regulation. It does not mean that advance regulation on time and place of assembly is the kind of permit prohibited by the Constitution. According to the majority opinion, the issue of the prohibition of the permit for assembly and association is determined by the fact whether the Constitution prescribes the separate statutory reservation regarding the time and place of outdoor assembly (revised Constitution of 1962 and 1969) or not (revised Constitution of June 1960 & November 1960 and the current Constitution). This determination should not be possible if we carefully observe the history of current Constitution and compare with the U.S., the German and the Japanese constitution.

(C) The prohibition of the permit and censorship for the press and assembly

The content-neural restriction on the time and place in the freedom of assembly does not fall into the "permit" system prohibited by the Constitution, Article 21 (2) as far as it is enforced with a concrete and clear standard. And, this interpretation is compatible with this Court's interpretation of prohibition of permit and censorship of the press. Since the Article 21 (2) of the Constitution prescribes the prohibition of the permit and the censorship for the press as well as the prohibition of the permit for assembly, these two prohibitions are in the same line of the prohibited pre-regulation.

With respect to the meaning of the permit and censorship of the press, this Court has found that 'permit' and 'censor' are inherently same in terms of disallowed advance restriction on contents of the press and, further, the prohibition of permit and censorship of the press is to prohibit the government's pre-block of the free flow and the exposure of certain expressions based on their contents. Therefore, this Court made it clear that if a regulation is not for the contents

and does not create the similar effects, it does not fall into 'permit' prohibited by the Constitution (4 KCCR 300, 307, 90Hun-Ka23, June 26, 1992; 13-1 KCCR1167, 1179, 2000Hun-Ba43, May 31, 2001). Likewise, this Court' interpretation of the permit and censorship of the press may apply to the permit for the freedom of assembly and, under the interpretation, unless it is entire pre-restriction based on contents but a restriction based on the time, place and manner which does not create restrictive effects to contents, the provision does not fall into the 'permit' prohibited by the Constitution. Yet, even if the regulation is about the time, place and manner of outdoor assembly, it is nothing but the permit unless it is enforced with a concrete and clear standard.

The majority opinion is based on the finding that since the permit and the censorship of the press presuppose the result of the expression, the content is the subject matter of review and, yet, since the freedom of assembly protects the act of collective gathering itself at a certain place without presupposition of the contents of the expression, it should not be considered same as the permit and censorship of the press. However, it should be noted that the freedom of assembly is part of the freedom of expression along with the freedom of the press. As the majority opinion stated, the freedom of assembly as part of the freedom of expression is a necessary component for the liberal democracy along with the freedom of the press. The pre-restriction of the freedom of expression includes both the area of the press and the area of assembly and association as far as it provides content-neutral regulation. In case of assembly, if an assembly is made with people's coincident and temporary gathering without any goal, it is regarded as a mere 'gathering' which is not protected by the Constitution. Even if concrete opinions of assembly participants were not yet formed, pre-regulation of assembly may still be possible (under the Article 6 (1) of ADA prescribes the 'goal' of outdoor assembly to be the first item to be reported). The majority opinion is difficult to understand because it distinguishes the freedom of assembly from the freedom of the press and ignores the preconceived goal and contents of assembly as it notes that the freedom of the press and the freedom of assembly are important features for liberal democracy.

(D) ADA provisions on the regulation of the freedom of assembly and its system

It is clear that the lawmakers enacted ADA's regulatory provisions as they made it sure that those content-neutral provisions on the time, place and manner are not against the Article 21 (2) of the Constitution.

The Article 5 of ADA (assembly and demonstration ban) prescribes the kinds of assembly and demonstration which are not protected by the Constitution. The Article 10 (prohibited time for nighttime outdoor assembly) prescribes a timeframe for banned assembly. The Article 8 (notice of ban and restriction of assembly and demonstration), the Article 3 & the Article 11 (banned place for outdoor assembly and demonstration) and the Article 12 (restriction for traffic control) regulate the place of assembly. The Article 14 (bullhorn use restriction) regulates the manner of assembly. These provisions were made based on the notion that the government may regulate the time, place and manner even for constitutionally protected assembly (under the Article 5 of ADA).

Among ADA's regulatory provisions on the time, place and manner, some are subject to absolute ban (Article 11 (1), (3)), and others to subjective ban with proviso (Article 10 and 11 (4)). The Article 10 of ADA (Banned time for outdoor assembly and demonstration) was first introduced when ADA was revised into Act 4095 in 1989. The legislative intent was to even further promote the freedom of assembly and demonstration as people's basic rights. Further, the Article 11 (4) of ADA was introduced as the Act 7123 in 2004 with a proviso to the provision that outdoor assembly is entirely banned near foreign embassy buildings. The new law was made after this Court rendered a opinion of unconstitutionality for the former ADA, Article 11 (1) by saying that "the lawmakers may generally ban assembly near this area with the determination that there is high probability of conflict of legal interest from assembly near foreign embassy, and yet, there is need for a proviso to mitigate the danger of excessive restriction of basic rights by general and abstract legal provisions. In other words, when there does not exist concrete danger to protected legal interest

under this provision, there should be a provision to allow assembly on a selective basis in order to satisfy the principle of proportionality. (15-2 KCCR 41, 58-59, 2000 Hun-Ba67, October 30, 2003).

Therefore, we find that the provision in the Articles 10 and 11 (4) of ADA was made to satisfy the principle of proportionality. As the majority opinion finds that the proviso is a new form of permit in terms of 'ban in principle with the exceptional allowance by administrative agency', it lacks the correct understanding of the meaning of the constitutionally prohibited permit and the history and legislative intent of the proviso.

(E) Whether the Article 10 of ADA is the permit prohibited by the Constitution

Whether the Article 10 of ADA is the permit prohibited by the Constitution depends on whether the standard is content-neutral. The Article 10 has a concrete and clear standard of 'after sunset and before sunrise', which is content-neutral. Therefore, we find that the Article 10 of ADA does not violate the Article 21 (2) of the Constitution. The proviso is made to mitigate the restriction of basic rights by enabling selective allowance of assembly by district police chief within his or her inherent discretion. Previously, this Court found that "the Article 10 of ADA is a special and exceptional regulation on outdoor assembly and demonstration under the circumstances of outdoor assembly and demonstration after sunset (in other words, exceptional ban on outdoor assembly and demonstration or 'banned time for outdoor assembly and demonstration') and therefore is not against the Article 21 (2) of the Constitution (6-1 KCCR 281, 302, 91Hun-Ba14, April 28, 1994). Additionally, this Court found constitutional the Article 11 (1) of ADA which regulates place of outdoor assembly by not adopting the regulation on place as an issue to be reviewed (17-2 KCCR 360-377, 2004Hun-Ka17, November 24, 2005) and allowing a proviso(15-2(B) KCCR 41, 58, 2000 Hun-Ba67, October 30, 2003).

It seems that the majority opinion takes an issue out of the fact that this provision allows an administrative agency to exercise exceptional discretion through proviso. The majority opinion's finding

is contradictory because it should find the Instant Provision constitutional if the proviso does not exist in the absence of any permit system prohibited by the Constitution. It is obvious that the majority opinion's finding is not compatible with the goal of the proviso of the Article 10 of ADA and the Article 21 (2) of the Constitution which is aimed to further guarantee the freedom of assembly. After all, the majority opinion ignores the legislative history and intent of the Instant Provision by focusing on 'ban in principle with the exceptional allowance by administrative agency' only.

(F) Sub-conclusion

The Article 10 of ADA is not the kind of permit prohibited by the Constitution and, therefore, it is not against the Article 21 (2) of the Constitution.

2. Whether the Article 10 of ADA violates the rule against excessive restriction

(A) Need to restrict the freedom of assembly and demonstration

The freedom of assembly and demonstration under the Article 21 (2) of the Constitution is very important basic right because it promotes the public good and the public opinion through public expression in a liberal democratic state. However, unlike the freedom of the press, there is a high probability to create conflict with public order and peace because it involves collective act. Therefore, this right inevitably accompanies greater need for restriction for the purpose of national security, public order and public wellbeing (6-1 KCCR 281, 302, 91Hun-Ba14, April 28, 1994).

(B) Legitimacy of legislative goal and the appropriateness of its means

The Article 1 of ADA prescribes that "this Act is aimed to harmonize the protection of the right to assembly and demonstration and the public order and wellbeing by guaranteeing legal assembly

and demonstration in its maximum and protecting citizens from illegal demonstration". The Instant Provision was enacted to achieve the above stated goal and, therefore, its legislative goal is legitimate.

The nighttime outdoor assembly has a high probability to invade the public wellbeing more than daytime outdoor assembly due to its nature of 'nighttime' and 'outdoor assembly'. Further, the ban on nighttime outdoor assembly in principle is understood in realistic sense (6-1 KCCR 281, 300-301, 91Hun-Ba14, April 28, 1994) and therefore, the mean is appropriate to achieve the legislative goal.

(C) The minimum restriction and balance of legal interests

Although the regulation on the time of nighttime outdoor assembly does not fall into the permit prescribed by the Article 21 (2) of the Constitution, it may violate the principle of minimum restriction and the balance of legal interests if it is too broad and thus make the freedom of assembly nominal. However, as we review, the Instant Provision does not violate the principle of minimum restriction and the balance of legal interests.

First, due to the special nature of nighttime, the need to pre-regulate outdoor assembly increases. In general, it is more difficult to maintain public order in nighttime outdoor assembly than daytime outdoor assembly. Further, during the nighttime, people tend to be more sensitive which may confuse the goal of assembly and turns it into a violent one. Finally, ill-willed outsiders may infiltrate in nighttime outdoor assembly. This is why the criminal law and 'the Act on violence and its punishment' regulate the act in 'nighttime' more seriously (6-1 KCCR 281, 301, 91Hun-Ba14, April 28, 1994; 115 KCCG 638, 641, 2005Hun-Ba38, April 27, 2006). In addition, once a nighttime outdoor assembly turns into a violent one, it is more difficult to control because police force is more difficult to mobilize compared to daytime. It, further, may cause the vacuum of police force in other areas. Therefore, the preventive measure for nighttime outdoor assembly is inevitable. Finally, the government still owes a duty to protect citizens' right to sleep, travel and do business during nighttime. In this regard, the U.S. Supreme Court held that the ban on parade after 8 pm is constitutional because the regulation on the

reasonable time, place and manner surpasses the right to parade based on traditional notion that nighttime is the time to rest and it is more difficult to prevent crime and maintain public safety during nighttime (Arbernathy v. Conroy 429 F.2d 1170).

Second, it is practically impossible to subdivide the regulated timeframe of outdoor assembly. Since, in the big cities of Korea, the traffic situation is bad after sunset, at late night and early in the morning, the goal of assembly in terms of the mass expression is impossible and unnecessary. Given this situation, lawmakers inevitably decided to ban nighttime outdoor assembly between sunset and sunrise. The sun sets at 19:57 in Seoul in summer 2008 and yet at 17:14 in winter. Given this discrepancy, it could be a arbitrary standard if we specify numeric timeframe for ban. After all, 'after sunset' may be a reasonable standard to restrict nighttime outdoor assembly. In Tupelo case, the U.S. Supreme Court held that the ban on parade at 6 pm, which is still daytime, is unconstitutional by saying that "the 6 p. m. cut off may be reasonable during the winter months, but is unreasonable in the summer when the sun sets as late as 8:30 p. m. As written, this section of the ordinance is unconstitutionally overbroad because it extends beyond the bounds of legitimate regulation". (Joan Beckerman v. City of Tupelo, 664 F.2d 502).

Third, it is impossible to subdivide the regulated nighttime outdoor assembly in place and space. In Korea, commercial zone and residential zone are closely connected and the commercial zone is usually busy until late night without sufficient space for public events. For this reason, it is difficult to permit nighttime outdoor assembly by dividing residential zone and others. In New York City's case, the city does not permit demonstration held in commercial zone or in the middle of traffic flow although it allows demonstration on an exceptional basis on holidays or after business hours in commercial zone.

Fourth, if a nighttime outdoor assembly should be allowed, it should be done under certain conditions. According to the proviso of the Instant Provision, the district police chief may allow pre-reported nighttime outdoor assembly with the condition that the organizers will assign order maintenance personnel. Further, if the allowance under the proviso is made within district police chief's overbroad arbitrary

discretion, it could be unconstitutional. However, under the constitutional spirit, district police chief's discretion is interpreted as inherent power not arbitrary power (6-1 KCCR 281, 301, 91Hun-Ba14, April 28, 1994). In reality, 77% of reported assembly was allowed and also the law provides the right to contest for disallowed assemblies.

Fifth, the scope of regulation for nighttime outdoor assembly is limited and there exists alternative communication channel for public opinion. The assembly for the purpose of study, art, sports, religion, ritual, social gathering are not subject to this Instant Provision. Further, even at nighttime, indoor assembly is generally allowed. Since people work five days a week, they also may participate in the assembly during the weekend. Even without assembly, people may build public opinion through internet nowadays.

To achieve the legislative goal to harmonize the freedom of assembly and the public wellbeing, the legislature has the ultimate power to decide how much of time restriction is necessary based on the maturity of demonstration pattern and people's level of legal obedience. In this regard, the restriction of assembly 'before sunrise and after sunset' is a reasonable standard considering the special nature of nighttime outdoor assembly. We find no less restrictive alternative mean and, therefore, find the Instant Provision is not against the principle of minimum restriction. Further, we find that the Instant Provision, pursuing the public interest to harmonize the freedom of assembly and public wellbeing, does not violate the principle of balance of legal interests.

Two Justices, in their supplementary opinion to unconstitutionality, argue that the legislative goal of the Instant Provision may be achieved through ADA, Articles 5, 6, 13 &14 and further find that the potential violence and danger from nighttime outdoor assembly are not yet proven. However, the ADA Article 5 to ban violent assembly regardless of daytime and nighttime and indoor and outdoor and the Article 6 to prescribe report system cannot substitute the Instant Provision which was enacted to regulate banned time for nighttime outdoor assembly under the special circumstances of nighttime. Nighttime is likely to deteriorate assembly and turn it into a violent one deviated from the assembly's original objective and plan. It is also

true that policing is more difficult at night based on our experience.

Two other Justices, in their opinion of incompatibility with the Constitution, argue that nighttime is too overbroad and variable to be a reasonable standard during the winter time and further find that the danger of nighttime outdoor assembly should be found different between nighttime and late night. However, sunset is a reasonable cut-off time in this country with variable sunset time in different seasons for the purpose of legislative goal. Also, nighttime before late night is still a time zone to regulate outdoor assembly. To achieve the legislative goal to harmonize the freedom of assembly and the public wellbeing, the legislature, within its discretion, has ultimate power to decide how much of time restriction is necessary based on the maturity of demonstration pattern and people's level of respect toward law and order. In this regard, we do not find that the Instant Provision is beyond the legislature's discretion by infringing upon the nature of the freedom of assembly.

(D) Sub-conclusion

The Instant Provision does not violate the rule against excessive restriction. Furthermore, we do not find any precedent from other countries that time- based regulation on outdoor assembly after sunset is unconstitutional. It is because that there is the state's interest to protect and respect other people's basic rights in addition to the necessity and reasonableness of time-based regulation for nighttime outdoor assembly.

3. Conclusion

The Article 10 of "ADA" does not violate the Article 21 (2) of the Constitution because it is a content-neutral, concrete and clear pre-restriction. Further, it does not violate the principle of minimum restriction and the rule against excessive restriction. Therefore, the Instant Provision is not against the Constitution.

V. Conclusion

Five Justices held the Instant Provision unconstitutional while two Justices incompatible with the Constitution. This number satisfies the required number of votes (6) to hold a statute unconstitutional under the Constitutional Court Act, Article 23 (2), (1). Subsequently, this Court holds the Instant Provisions unconstitutional and yet maintains their validities through June 30, 2010 until which time lawmakers may revise the unconstitutional portion of the law because the Instant Provisions have the mixed portions of constitutionality and unconstitutionality. If lawmakers do not revise the Instant Provision until the above said date, the provisions will become invalid as of July 1, 2010.

Previously, in 91Hun-Ba14 (April 28, 1994), the Constitutional Court held the former Article 10 of "ADA (revised by Act No. 4095 on Marcy 29, 1989)" constitutional. The precedent shall be revised as to the conflicted portion with the decision of this case.

VI. Justice Cho Dae-hyen's Non-Applicability Opinion

A. The effect of constitutional adjudication – eradication of unconstitutional statute

The goal for constitutional review of statute is to secure the supremacy of the Constitution by eradicating unconstitutional statute. Once the Constitutional Court holds a statute unconstitutional, the statute should lose its legal effects under the Constitutional Court Act, Article 47 (2). Therefore, this Court does not have to declare the loss of legal effects for the unconstitutional statute. Nor has this Court any power to delay the loss of legal effects

B. Specified object for finding unconstitutional

Since a statute loses its legal effects once found constitutional by the Constitutional Court, the unconstitutional portion should be specified. If only a part of a statute is found constitutional, then, the portion should be clearly specified so that only that portion should lose its legal effects. That is the reason we need the decision of limited constitutionality and the decision of partial unconstitutionality.

Even if it is difficult to specify the unconstitutional portion in a statute, it should not be allowed to declare the entire statute unconstitutional. If then, it results in infringement of the legislature power.

C. Need for the incompatibility decision and its scope

When some parts of a statute are unconstitutional and the others constitutional, the constitutional portion should remain intact. Yet, if it is difficult to divide the constitutional and unconstitutional portion of a statute, or if it is reasonable to let the legislature to divide the constitutional and unconstitutional portion under the principle of the separation of power, then the Constitutional Court may not specify the unconstitutional portion of a statute. If the court holds the entire statute unconstitutional in this case, it will result in infringing the legislative power and creating the status of legal vacuum. Yet, if the court leaves the entire statute intact because of difficulty to divide the two conflicting portions, then, it will result in abandoning the court's duty of constitutional review of a statute. For this reason, in this kind of situation, the Court should find the entire statute incompatible with the Constitution and let the legislature to sort out the unconstitutional portion of a statute by amending it.

This kind of incompatibility decision is made when the Constitutional Court is not able to specify the unconstitutional portion of a statute and therefore leaves the work with the legislative power. Yet, when the Court is able to specify the unconstitutional portion, the Court should not render the incompatibility decision because it is the Court's duty to invalidate the law. Although the precedent shows that the incompatibility decision may be rendered when an unconstitutionality decision in violation of the principle of equality may unreasonable deprive the pre-existing beneficiary's interest[1] and it may create the

1) If a certain group of people benefit from a law and some people do not benefit from the same law while they belong to the class of benefited group, then the law should be found constitutional and the non-act of government should be found unconstitutional in violation of the principle of equality. The law should not be found incompatible with the Constitution either. The unconstitutionality of non-act

status of legal vacuum, the work of dividing the unconstitutional and constitutional portions of a law, even in this kind of case, should remain in the legislative power.

D. Constitutional legitimacy of the incompatibility decision

The incompatibility decision is also called as modified decision because the Constitutional Court lets the legislature divide the constitutional and unconstitutional portions of a statute. This is the best way to satisfy the separation of power and constitutional adjudication prescribed by the Constitution. The incompatibility decision is a necessary form of decision under our constitutional order which emphasizes the constitutional review of statute and the separation of power.

E. Removal of unconstitutionality in unconstitutional statute- revision

Once the Constitutional Court renders an incompatibility decision, the legislature should amend the statute by removing the unconstitutional portion. This is true even if the Constitutional Court does not demand the amendment by the legislature because the legislature owes a duty to amend the statute following the incompatibility decision under the constitutional order which regulates the constitutional review of statute and the separation of power. Accordingly, the incompatibility decision also binds the legislature under the Constitutional Court Act, Article 47 (1).

The National Assembly divides and specifies the constitutional and unconstitutional portion of the statute which was found incompatible with the Constitution. Subsequently, the constitutional portion is incorporated into the revised statute while the unconstitutional portion is removed.

F. Loss of effects for the unconstitutional portion

Once the Constitutional Court renders an incompatibility decision,

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of government is to be removed by the legislative work.

the legislature removes the unconstitutional portion pursuant to the Constitutional Court Act, Article 47 (2), and the constitutional portion remains incorporated into the revised statute. Even if the incompatibility decision is a kind of unconstitutionality decision, the constitutional portion does not lose its legal effects and validity because the constitutional portion remains intact. Although this kind of result may be considered same as retroactive application of the revised statute, the revised statute is applied retroactively in substitution of the former statute.

The removed portion of a statute loses its legal effects pursuant to the Constitutional Court Act, Article 47 (2). If the incompatible statute is a criminal law, then, the unconstitutional portion of the statute applies retroactively (Constitutional Court Act, Article (2)), and those punished by the unconstitutional portion of the statute may duly request retrial (Constitutional Court Act, Article 47 (3)).

If the unconstitutional statute is not a criminal law, the statute loses its legal effects as of the date of the decision. In the incompatibility decision's case, some people argue that the unconstitutional portion of a statute loses its legal effects when the revised statute is enacted by the National Assembly because the unconstitutional portion is specified by the National Assembly by the act of amendment. This argument, however, ignores the important feature of the review of the unconstitutional statute by recognizing the legal effects of an unconstitutional statute until the day of amendment. Therefore, even if the unconstitutional portion of a statute is specified by the national assembly on the day of amendment, the legal effect should be recognized from the day of the decision.

G. Suspension of the applicability of the constitutionally incompatible statute

The constitutionally incompatible statute includes the portion against the Constitution. Therefore, if we continue applying the incompatible statute, it does not satisfy the constitutional review system which is aimed to stop the legal effects of a statute which violates the constitutional supremacy. The legal effects of the incompatibility decision is derived from the Constitutional Court Act, Article 47 (2)

and the legislative intent of the constitutional review system even in absence of the order to halt the applicability of a statute by the Constitutional Court. Therefore, the incompatibility decision should stop to be applied until the constitutional portion and unconstitutional portion are clearly specified by an revised statute.

The halt of the applicability of the constitutionally incompatible statute lasts temporarily until the unconstitutional portion of a statute is specified. Once the amendment is completed, then, the halt of applicability is no longer required and the incompatibility decision is finalized. In other words, the unconstitutional portion of a statute becomes invalid pursuant to the Constitutional Court Act, Article 47 (2), and the constitutional portion continues to be applied because it does not lose its validity and legal effects.

However, if the National Assembly does not amend the statute, the constitutional portion also stops to be applied because the unconstitutional portion is not removed. For this reason, when the incompatibility decision is rendered, the deadline for amendment is also provided. If the National Assembly does not amend the statute until the deadline, the entire statute becomes invalid by losing its legal effects. Some may argue that this is problematic because it also makes the constitutional portion invalid. However, this is an inevitable measure to prevent the unconstitutional condition of a statute.

E. Suspension of the applicability of the Instant Provision

The Article 10 and 23 (1) of "ADA" is a criminal statute. If the incompatible statute is a criminal law, then, the unconstitutional portion of the statute loses its validity and it applies retroactively (Constitutional Court Act, Article (2)). If this court allows the validity of the Instant Provisions in which the unconstitutional portion is embedded until amendment, this court's decision is deemed to be deviated from the spirit of constitutional review of statute and further against the Constitutional Court Act, 47 (2).

If we continue to apply the Instant Provision even after the incompatibility decision, it means nothing but to say that the violators should be punished under this provision first and later seek retrials after the amendment even if the Constitutional Court decided that the

unconstitutional portion is included in the Instant Provision and the Instant Provision will become eventually invalid by the amendment of the National Assembly. If this irony is allowed, it means that we allow criminal punishment with unconstitutional law and abandon the duty of constitutional review of statute which is aimed to remove the unconstitutional statute's control under the concrete norm control system. Therefore, it is not allowed under our Constitution.

The incompatibility decision is a kind of partial unconstitutionality decision and therefore the incompatible statute should not be applied from the date of decision because it includes the unconstitutional portion. If constitutional court allows continuing application of an incompatible statute, they have to do that after a special Justices' Conference and consensus. The instant case shows five votes for unconstitutionality and two votes for incompatibility with the Constitution. The five votes for unconstitutionality is considered to support a proposition that the Instant Provision at its entirety should be applied retroactively after amendment. Although the simple unconstitutional opinions lack a vote for this Court's official decision for unconstitutionality and therefore the incompatibility decision becomes the official decision, the unconstitutionality decision does not support the position that the Instant Provision should continue to be applied. It should not be the case that two Justices for the incompatibility decision decided whether to continue to apply the Instant Provision. The Instant Provision should not be applied until the amendment.

Justice Lee Kang-kook (Presiding Justice), Lee Kong-hyun, Cho Dae-hyun, Kim Hee-ok, Kim Jong-dae, Min Hyeong-ki, Lee Dong-heub (In absentia due to official foreign travel), Mok Young-joon, Song Doo-hwan

8. Restriction on Prisoner's Right to Vote Case

[21-1(B) KCCR 327, 2007Hun-Ma1462, October 29, 2009]

Questions Presented

1. Whether the former part of Article 18, Section 1, Item 2 of the Public Official Election Act (hereinafter, the 'Instant Provision') which stipulates that a person who is sentenced to imprisonment without prison labor or a heavier punishment, but whose sentence execution has not been terminated (hereinafter, the 'prisoner') shall be disfranchised is unconstitutional as it infringes upon the basic rights of the complainant, who is a prisoner, including the right to vote, in violation of the rule against Excessive Restriction

2. A case in which filing of constitutional complaint was denied for the reason of failing to reach a quorum for rendering a decision of unconstitutionality although majority of Justices, five Justices in this case, uphold this complaint

Summary of the Decision

1. A. Unconstitutionality Opinion of Justice Kim Hee-ok, Justice Kim Jong-dae, Justice Min Hyeong-ki, Justice Mok Young-joon, and Justice Song Doo-hwan

(1) Filing Period Issue

The Instant Provision limits the right to vote of 'a person who is sentenced to imprisonment without prison labor or a heavier punishment, but whose sentence execution has not been terminated as of the election day'. Therefore, the basic rights including the right to vote would be considered as being infringed by the Instant Provision only when a specific cause of action for such violation arises. And in this case, the specific cause of action arises from the Election Day.

(2) Violation of the Rule against Excessive Restriction, etc.

(Level of scrutiny)

Given the importance of the right to vote as a pivotal means to realize popular sovereignty and representative democracy in a democratic nation, the question as to whether the right to vote is excessively restricted should be scrutinized under the strict review of proportionality pursuant to Article 37, Section 2 of the Constitution, from the viewpoint of the principle of universal suffrage and its limitation.

(Legitimacy of purpose and appropriateness of means)

The deprivation of the right to vote by the Instant Provision, as one of the criminal sanctions imposed on a criminal offender, functions as retribution to the crime committed by the offender. Moreover, such deprivation by the Instant Provision, apart from the imposition of life sentence or prison sentence, can help citizens including the prisoners themselves to cultivate responsibility as a citizen and improve respect to the rule of law. Such purposes of the Instant Provision are legitimate and imposing restriction on the prisoner's right to vote is one of the effective and appropriate means to achieve the purposes.

(The rule of the least restrictive means)

The Instant Provision imposes overall and uniform restriction on the right to vote of a person who is sentenced to imprisonment without prison labor or a heavier punishment, but whose sentence execution has not been terminated. In other words, such restriction extends to those who negligently commit a crime without knowledge or intention to undermine law and order of the community. Also, the right to vote of a parolee, who is released from the prison and returns to the society prior to the completion of sentence after successfully going through the parole review committee's examination on the overall circumstances including motive for the crime, possibility of recidivism, etc., is limited under the Instant Provision as well. Further, the Instant Provision also restricts the right to vote of the prisoners who are sentenced to short term imprisonment for negligence nothing to do with any crime against the nation that denies the constitutional order. Such extensive restriction, however, seems not compatible with the

election system in a democratic nation that strives to accomplish the community order through free participation of various people in the election process whose backgrounds or ideologies are diverse, on the basis of a pluralistic worldview. Therefore, the legislators should carefully impose restriction on the right to vote only in a limited situation, considering the importance of such a right. Nevertheless, the Instant Provision easily and uniformly limits the prisoner's right to vote simply by establishing the standard of 'a person who is sentenced to imprisonment without prison labor or a heavier punishment, but whose sentence execution has not been terminated', without carefully contemplating 'the relation between the type, content or degree of illegality of each crime and the restriction on the prisoner's right to vote'. Therefore, the Instant Provision violates the rule of least restrictive means.

(Balance between legal interests)

The Instant Provision restricts the right to vote too broadly and includes no actual relation between the characteristics of a crime and restriction on the right to vote. Therefore, 'the prisoner's private interests or the public value in the democratic election system' infringed by the Instant Provision outweigh the public interest of 'punishing a person who commits a felony and improving citizen's respect to the rule of law' intended to be achieved by the Instant Provision. As a result, the Instant Provision fails to strike balance between the conflicting legal interests in relation to restriction of the basic rights.

(3) Conclusion

The Constitutional Court should uphold this constitutional complaint, and declare the Instant Provision unconstitutional as it infringes on the prisoner's right to vote in violation of Article 37, Section 2 of the Constitution and on the prisoner's equality right in violation of the principle of universal suffrage stipulated in Article 41, Section 1 and Article 67, Section 1 of the Constitution.

B. Denial Opinion of Justice Lee Kong-hyun, Justice Cho Dae-hyen,

Justice Lee Dong-heub

(1) Restriction on the right to vote of a felon and its scope and method are the matters to be decided based on the circumstance of a country including its historical experience, criminal law system and the public's legal sentiment toward crime. The nature of the Instant Provision, which does not recognize prisoner's right to vote corresponding the provisions of the Criminal Act, is to criminally punish a felon who commits an anti-social crime and the issue of how to punish a crime, or in other words, the choice of types and scope of statutory punishment, should be decided by the legislature, considering various aspects related to not only the nature of crime and protectable legal interests but also our history and culture, the situation at the time when the statute was legislated, citizens' value system or legal sentiment in general and the criminal policy to prevent crimes. In this regard, broad legislative discretion or freedom of legislative formation should be recognized. Therefore, the Court should keep this in mind while reviewing constitutionality of the Instant Provision in this case.

(2) Whether the Instant Provision violates the rule against excessive restriction

(Legitimacy of legislative purpose and appropriateness of means)

The legislative purposes of the Instant Provision are to impose criminal sanction against a felon who deserted the basic obligations that must be observed by the member of the community, to heighten the responsibility of general citizens as components of community and to reinforce their respect toward the rule of law. And the restriction on prisoners' voting right is one of the effective and proper measures to achieve these legitimate legislative purposes.

(Rule of the least restrictive means and balance between legal interests)

According to the Korean Criminal Act, imprisonment without prison labor is a punishment imposing serious restriction on the prisoner's basic rights including the bodily freedom, by confining a criminal in

prison for at least one month. And this punishment is graver than that of disqualification or suspension of qualification which limits the right to vote or the right to be elected. And, our Constitution stipulates that a judge may be removed from office by a 'sentence of the imprisonment without prison labor or a heavier punishment' and the State Public Officials Act provides that a public officer who is sentenced to 'imprisonment without prison labor or a heavier punishment' may be removed from office. Also, the statutory provisions specifying qualification of professionals such as lawyer stipulate certain grounds for disqualification in the case where those professionals are sentenced to 'imprisonment without prison labor or a heavier punishment'. Therefore, the standard of 'a sentence of the imprisonment without prison labor or a heavier punishment' is important enough to justify such restriction on the basic rights. Moreover, as the Instant Provision is applicable to prisoners who are sentenced to 'imprisonment without prison labor or a heavier punishment', not to persons who are under the suspension of the execution of punishment, preventing the prisoners who are sentenced to such grave punishment from exercising the right to vote during the period of execution of punishment does not seem excessive beyond necessary degree to achieve the legislative purposes.

The prisoner's disadvantage of being unable to exercise the right to vote due to the Instant Provision is merely one of the effects of the disqualification or suspension of qualification which is a less severe punishment than that of imprisonment without prison labor. The period during which the right to vote is limited does not uniformly apply to all the prisoners, but proportionally applies on the basis of each prisoner's sentence, or in other words, depending on the degree of one's criminal liability. The public purposes to be achieved by the Instant Provision including 'criminally punishing a person who commits a felony and improving citizen's respect to the rule of law' do not seem to be dwarfed by the prisoner's disadvantage that the right to vote is limited during his/her sentence execution period. Therefore, the Instant Provision strikes the balance between legal interests.

(3) Conclusion

As the Instant Provision neither violates the rule against excessive restriction stipulated in Article 37, Section 2 of the Constitution nor infringes on the complainant's right to vote and equality, this constitutional complaint should be denied for lack of merits.

C. Dismissal Opinion of Justice Lee Kang-kook

As the Instant Provision reflects the effect of Article 43, Section 2 of the Criminal Act (a person who is sentenced to imprisonment for a limited term or imprisonment without prison labor for a limited terms shall be under suspension of qualifications including suffrage and eligibility under the public Act.), the cause of action for infringement on the basic rights, such as restricting the right to vote, is also considered to arise when the sentence is finalized, like in Article 43, Section 2 of the Criminal Act. This constitutional complaint, however, was filed on December 27, 2007, after the lapse of one year since the final sentence was announced on November 23, 2006 so that his qualification under the public Act such as the right to vote was suspended. Therefore, this constitutional complaint should be dismissed, as it failed to satisfy the time limit for filing under Article 69, Section 1 of the Constitutional Court Act.

2. Regarding the Instant Provision, five Justices including Justice Kim Hee-ok, Justice Kim Jong-dae, Justice Min Hyeong-ki, Justice Mok Young-joon and Justice Song Doo-hwan present a unconstitutionality opinion; three Justices including Justice Lee Kong-hyun, Justice Cho Dae-hyen and Justice Lee Dong-heub present a denial opinion of; and Justice Lee Kang-kook presents a dismissal opinion. The unconstitutionality being the majority opinion, nevertheless, falls behind the quorum of six Justices needed for the holding of unconstitutionality. Therefore, this complaint is denied.

Party

Complainant Song ○-wook
Court-Appointed Counsel: Woo Yank-tae

Holding

Complainant's constitutional complaint is denied.

Reasoning

I. Introduction of the Case and Subject Matter of Review

A. Introduction of the Case

1. On April 3, 2006, complainant who was born on April 12, 1979, received a draft notice for active duty service from the Commissioner of the Military Manpower Administration which ordered him to enlist in the 306 replacement depot on May 9, 2006. The complainant, however, consciously objected to military service based on his personal conviction of pacifism and therefore, refused to join the army even after three days passed from the date of enlistment, thereby being indicted for violating Article 88, Section 1, Item 1 of the Military Service Act. On November 23, 2006, The Seoul Western District Court sentenced him to one and half year in prison and, as he decided not to appeal on the same day, the sentence was finalized.

2. While serving his time, the complaint tried to cast a vote in the presidential election held on December 19, 2007 but failed to do so due to Article 18, Section 1, Item 2 of the Public Official Election Act. At this, the complainant filed this constitutional complaint against the Instant Provision, arguing that Article 18, Section 1, Item 2 of the Public Official Election Act violate his right to pursue happiness under Article 10 of the Constitution, right to equality under Article 11 of the Constitution and right to vote under Article 24 of the Constitution.

B. Subject Matter of Review

8. Restriction on Prisoner's Right to Vote Case

The subject matter of review in this case is the constitutionality of the former portion of Article 18, Section 1, Item 2 of the Public Official Election Act (hereinafter, the "Instant Provision") which stipulates that "a person who is sentenced to imprisonment without prison labor or a heavier punishment, but whose sentence execution has not been terminated". The instant provision (underline added) and related provisions are followed as below:

Public Official Election Act

Article 18 (Disfranchised Persons)

(1) A person falling under any one of the following items, as of the election day, shall be disfranchised:

1. A person who is declared incompetent;

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

3. A person who commits an election crime, who commits the crimes provided for in the provisions of Article 45 and Article 49 of the Political Fund Act or who commits the crimes in connection with the duties while in office as the President, member of the National Assembly, member of local council, and head of local government, which are referred to in Articles 129 through 132 of the Criminal Act (including the Act on the Aggravated Punishment, etc., of Specific Crimes) and Article 3 of the Act on the Aggravated Punishment, etc., of Specific Crimes, and for whom five years have not passed since a fine exceeding one million won is sentenced and the sentence becomes final or ten years have not passed since the suspended sentence becomes final, or for whom ten years have not passed since imprisonment was sentenced and the decision not to execute the sentence became final or since the execution of the sentence was terminated or exempted (including a person whose punishment becomes invalidated); and

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

(2) For the purpose of Section 1, Item 3, the term "person who commits an election crime" means a person who commits a crime

provided in Chapter XVI Penal Provisions or a crime in violation of the National Referendum Act.

(3) A person who currently commits the crimes referred to in Section 3, Item 3 and other offences shall be tried and sentenced separately for each offence, despite the provisions of Article 38 of the Criminal Act.

[Related provision]

Criminal Act

Article 43 (Imposition of Sentence, Deprivation of Qualifications and Suspension of Qualification)

(1) A person who is sentenced to death penalty, imprisonment for life or imprisonment without prison labor for life, shall be deprived of the qualifications prescribed as follows:

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

(2) A person who is sentenced to imprisonment for a limited term or imprisonment without prison labor for a limited term shall be under suspension of qualifications as mentioned in Items 1 thought 3 of the preceding Section until the execution of punishment is completed or remitted.

Article 44 (Suspension of Qualifications)

(1) Suspension of all or part of the qualifications specified in the preceding Article shall be for not less than one year nor more than fifteen years.

(2) When both limited imprisonment or limited imprisonment without prison labor and suspension of qualifications have been concurrently imposed, the term of suspension shall be calculated from the day when the execution of imprisonment or imprisonment without prison labor is completed or remitted.

II. Arguments of Complainant and Related Bodies

(*intentionally omitted*)

III. Review

A. Unconstitutionality Opinion of Justice Kim Hee-ok, Justice Kim Jong-dae, Justice Min Hyeong-ki, Justice Mok Young-joon, and Justice Song Doo-hwan

1. Review on justiciability

(A) Time limit for filing

According to Article 69, Section 1 of the Constitutional Court Act, a constitutional complaint against statute shall be filed within 90 days after learning the enforcement of the statute at issue or within one year after the statute is enforced if the complainant's basic right is infringed at the same time when the statute at issue is enforced, or within 90 days after the existence of a cause of action is known and within one year after the cause occurs if the basic rights are infringed by a cause which occurs after the enforcement of the statute.

As the Instant Provision prevents 'a person who is sentenced to imprisonment without prison labor or a heavier punishment, but whose sentence execution has not been terminated as of the election day' from casting a vote for the relevant election while being imprisoned, the complainant's basic rights including the right to vote are infringed by the Instant Provision when the specific cause of action for such infringement arises, and in this case, the cause of action arises at the election day.

The complainant's right to vote is limited pursuant to the Instant Provision when the 17th Presidential Election was held on December 19, 2007, as his sentenced had not been terminated at the day. Therefore, it can be said that the cause of action for the infringement of basic rights arose and the complainant finally was aware of this at that time. This constitutional complaint was filed on December 27, 2007, within 90 days from that day, and therefore, does not exceed

the filing period.

(B) Legally protectable interests and necessity of constitutional clarification

The purpose of the constitutional complaint system is to provide relief for violation of citizens' basic right. Therefore, a constitutional complaint may be filed only when there are legally protectable interests which should exist not only at the time of filing but also at the time of announcement of decision. But in this case, the Presidential Election where the complainant intended to participate had already ended on December 19, 2007, before this constitutional complaint was filed. And, although the 18th Election of Members for the National Assembly was scheduled to be held on April 9, 2008 during the complainant's imprisonment, currently, the aforementioned election already ended and the complainant completed his time and was released from prison on May 22, 2008. Therefore, even though this constitutional complaint is upheld by the Court, since the legally protectable interests already evaporated, any decision on its part would not provide subjective legal relief to the complainant.

As the Court also has the objective function of protecting the constitutional order, however, it may recognize exceptions where constitutional complaints can be maintained even after the subjective legally protectable interest has been extinguished in the course of proceedings due to changes in fact or in law. Theses include cases where a decision on the merits involves issues critical to the defenses and maintenance of the constitutional order such that their clarification is of constitutional significance or cases where violations are likely to be repeated in the future (7-1 KCCR 687, 693-694, 91Hun-Ma44, May 25, 1995).

The constitutionality of the Instant Provision has been already clarified by the Court in 2002 Hun-Ma411 decision announced on May 25, 2004. After the decision, however, there were changes in the 'legal regulations on the prisoner's status in correction facility' on which the former decision was based and consequently, questions regarding the constitutionality of restricting prisoner's right to vote have been continuously raised. Since a decision on the constitutionality

of the Instant Provision is critical to the defenses and maintenance of the constitutional order and the clarification of such an issue is of constitutional significance, the legally protectable interests of the constitutional complaint in this case should be acknowledged as an exception.

(C) Sub-conclusion

Other than reviewed above, there also exist no other flaws in the justiciability requirements. Therefore, this constitutional complaint is justiciable.

2. Review on Merits

(A) Legal meaning of the right to vote and limitation in restricting prisoner's right to vote

1) In 2005Hun-Ma644 etc. case announced on June 28, 2007, our Court clarified the 'legal meaning of the right to vote and limitation in its restriction' (19-1 KCCR 859, 873-875). The summary of the decision is as follows and the grounds for the Court's decision are also applied in this case:

The significance of the principle of popular sovereignty stipulated in Article 1 of the Constitution is that the State authority shall be formed according to the consensus of the people. In order to make such objective be reality, the opportunity for the sovereign people to participate in the political process must be ensured to the greatest extent possible. In modern democracy, in which democracy through representation is the dominating principle, the participation of the people is achieved, first and foremost, through elections. Therefore, elections are the paths through which the sovereign people exercise their sovereignty.

To ensure the maintenance of this principle of popular sovereignty and the participation of the people through elections, Article 24 of the Constitution guarantees all citizens the right to vote as prescribed by relevant laws. Also, Article 11 prescribes the right to equality in the political aspect of people's life, and Article 41 Section 1 and Article

67 Section 1 ensure the principles of universal, equal, direct, secret voting in presidential and general elections. The reason why the Constitution clearly guarantees the right to vote and the principles in election is because under the system of popular sovereignty and democracy through representation, people's exercising their right to vote is the only way to enable the establishment and organization of the State and State authority and to provide democratic legitimacy.

Such exercise of the people's right to vote is, on the one hand, as the actual method for exercising popular sovereignty, an important way to reflect the ideas of the people in State affairs. On the other hand, it acts as a method of controlling State authority through regular elections. This is why the people's right to vote is regarded as the most basic and necessary right for realizing the principle of popular sovereignty, and to be superior to other basic rights.

Though Article 24 of the Constitution takes on the form of statutory reservation by stating that all people shall have the right to vote 'under conditions prescribed by statute', such statutory reservation is to realize and ensure the right to vote and not to restrict it. Therefore, even when the contents and process regarding the right to vote is stipulated by law, such stipulation must conform to Article 1 of the Constitution which declares popular sovereignty, Article 11 which speaks of equality, and Articles 41 and 67 which guarantee universal, equal, direct, secret elections for presidential and national assembly elections. Also, pertaining to the importance the right to vote in a democratic nation as the apparatus for realizing popular sovereignty and democracy through representation, the legislative branch should enact laws that guarantee the right to vote to its fullest. Accordingly, in cases where the constitutionality of legislation that restricts the right to vote is examined, said examination must be strict.

Therefore, legislations that restrict the right to vote cannot be justified directly by Article 24 of the Constitution, but can only be justified according to Article 37 Section 2 of the Constitution in exceptional and unavoidable cases only when necessary for national security, the maintenance of law and order or for public welfare. Even then, the essential aspect of the right to vote cannot be violated.

Moreover, as the principle of universal election disregards all actual factors such as the competence, wealth, or social status of the voter

and demands that anyone of age is given the right to vote, the requirements and limits laid out in Article 37 Section 2 of the Constitution should be abided by even more strictly when enacting legislation that restrict the right to vote in violation of the principle of universal election.

2) Meanwhile, the Criminal Act provides for deprivation of qualification and suspension of qualification as kinds of punishment (Article 41, Item 4 and 5, Article 43 and Article 44) and stipulates that "a person who is sentenced to death penalty, imprisonment for life or imprisonment without prison labor for life" and "a person who is sentenced to imprisonment for a limited term or imprisonment without prison labor for a limited term but whose sentence execution has not been terminated" or in other words, "a person who is sentenced to a person who is sentenced to imprisonment without prison labor or a heavier punishment, but whose sentence execution has not been terminated" is subject to deprivation or suspension of suffrage and eligibility under public Act (Article 43, Section 2, former part of Item 2). Regarding this, the Court, in 2002Hun-Ma411 decision, viewed the issue of restricting prisoner's right to vote as a matter of "choosing which of the specific method for the punishment of a certain crime", considering that restriction on the prisoner's right to vote imposed by the Instant Provision is natural consequence of Article 43 of the Criminal Act which provides for deprivation of qualification and suspension of qualification by criminal sentence and focusing on the fact that the legislators already recognized restriction on the right to vote as one type of punishment (deprivation of qualification and suspension of qualification). As a result, the Court acknowledged wide discretion of the legislators or freedom of legislative formative right in this matter (*see* 16-1 KCCR 468, 478-479, 2002 Hun-Ma411, March 25, 2004).

Of course, as the precedent shows, it is true that the matter of choosing "which of the specific method for the punishment of a certain crime" should be decided by the legislators considering many factors such as our history and culture, contemporaneous social situation at the time when the law is enacted, people's prevailing sentiment on law or values and the criminal policy to deter crimes,

and therefore, wide legislative discretion should be allowed for this (7-1 KCCR 478, 487, 91 Hun-Ba11, April 20, 1995).

But as reviewed before, given the importance of the right to vote as a critical means to realize the popular sovereignty and representative democracy system, if the right to vote is restricted as a punishment of crime, legitimacy of the punishment itself and its scope of application should be scrutinized under the strict proportionality test following Article 37, Section 2 of the Constitution, from the perspectives of protection of the right to vote and its restriction based on the principle of universal suffrage.

Therefore, the question as to whether the restriction of prisoner's right to vote by the Instant Provision infringes upon the basic rights of prisoners, including the complainant himself, or not should undergo a strict review of the principle of proportionality, and if the result of the strict test reveals that the Instant Provision excessively restricts the complainant's basic right, amounting to violation of the Constitution, the part of Article 43 of the Criminal Act regarding deprivation or suspension of suffrage and eligibility under the Public Act, which stipulates the same restriction as the Instant Provision within the same scope, should also be declared unconstitutional.

(B) Legitimacy of purpose and appropriateness of means of the Instant Provision

1) In 2002Hun-Ma411 decision announced on March 25, 2004, the Court presented several grounds for the 'legitimacy of purpose' of the Instant Provision. But since the decision, there have been changes in legal regulations regarding treatment of prisoners within correctional facilities, and as some of the grounds presented in the above precedent seem questionable, those points will be reexamined in the following paragraphs.

Our first review goes to this ground for argument in the precedent: "under the former Criminal Administration Act, it is doubtful that prisoners can properly cast an informed vote, given the fact that they are only granted to have limited access to communication with other people, letter, telephone, books, newspaper, radio and television, thereby failing to get enough information related to election".

The State bears responsibility to properly provide the people with sufficient information on a candidate's profile and his/her political view and a political party's policy and platform. Although incarceration in correctional facility possibly makes prisoners have less access to information on election, such insufficiency should not be the ground for restricting prisoner's right to vote. Rather, it is the State that has the duty to provide adequate information on election with which prisoners can reasonably exercise their right to vote.

Meanwhile, according to the 'Administration and Treatment of Correctional Institution Inmates Act', which was enacted on December 12, 2008 after 2002Hun-Ma411 decision was rendered, prisoners may apply for subscription to newspapers, magazines or books at their own expenses and each warden shall permit the subscription unless the newspapers, etc. to which prisoners have applied for the subscription are harmful publication under the 'Publishing Industry Promotion Act' (Article 47), and prisoners may listen to radio and watch television and the warden may temporarily prevent an individual prisoner from listening to radio or watching television when it is likely to harm to edification of convicted prisoners or their sound rehabilitation into society or when it is necessary for the maintenance of security and order of the institution (Article 48). Therefore, prisoners now, different from the treatment under the former Criminal Administration Act, seem to enjoy sufficient opportunity to obtain information necessary for exercising their right to vote, as it becomes far easier to have access to newspapers or television, which are considered as the main conduits through which information regarding election can be achieved.

Also, it seems unreasonable to present prisoner's lack of access to sufficient information on election as a ground for restricting prisoner's right to vote as opposed to unconvicted prisoners (a criminal suspect or a criminal defendant arrested or subject to execution of a warrant of confinement), despite the same treatment between (convicted) prisoners and unconvicted prisoners in terms of the opportunity to obtain information through subscribing newspapers, listening to radio or watching television.

Therefore, it is not proper to consider the possibility that 'prisoners who are incarcerated in correctional facility may not properly exercise their voting right due to insufficient information regarding election' as

a legitimate ground for restricting prisoners' voting right.

Second, we turn to the next ground for restricting prisoner's voting right in the precedent: "if prisoners are allowed to exercise their voting right in prison, such exercise would be possible only through absentee voting system. But granting absentee voting within correctional facility can impair fairness of election because it is easily conceivable that prison managers can wield influence over the process of forming political opinions of prisoners, thereby distorting them".

Since the State primarily has the duty to manage and protect the fairness of election, it is simply absurd to deny prisoner's voting right on the ground of concerns over the fairness of election. The State should exerts its effort to take precautionary measures to prevent prison managers from unduly influencing formation of political opinions by prisoners, and should not shift the responsibility on prisoners who are actually victims of such an unfair activity, denying their voting right.

Also, under the current situation of our nation where democracy takes deep root, it is doubtful that prison managers, not simply out of concern but in reality, can distort prisoner's formation of political opinion by ways of blocking information from outside or selectively conveying information favorable to a specific political party or a candidate.

Therefore, it is also unreasonable to discuss the legitimacy of restricting prisoner's voting right on the ground of the possibility of unfair election caused by influence of prison managers, etc.

Third, with regard to the ground that "a prisoner, taking advantage of the absentee voting, can communicate with his/her accomplice outside the prison by putting a personal letter in the absentee ballot envelope, which can have a negative effect on effective administration of punishment", not only should such a problem be prevented by close supervision over absentee voting within correction facilities, but also it is unsure whether it is technically possible for a prisoner to communicate with an accomplice outside the prison by using an absentee ballot envelope, given the fact that an absentee ballot envelope is clearly distinguishable from other ordinary letter envelopes and addressed to the relevant office of election management. It is hard to accept the reasoning that such abstract and unclear danger can be a

reason to restrict prisoner's voting right.

Lastly, let's discuss the ground presented in the precedent that "as prisoners usually have antisocial tendency in many cases and have a grudge against being punished, it is possible that their political opinions may not be properly formed. Thus, it seems unreasonable to allow prisoners to exercise their casting vote right in case where the result of an election would be decided by a small margin, although rare".

The principle of universal suffrage disregards all actual factors such as competence, wealth, or social status of voters and demands that anyone of or above certain age is given the right to vote. Therefore, that the citizen who reaches the legally designated age can and should be able to affect the outcome of the elections is the ideological premise and inevitable conclusion of the principle of universal suffrage. For the reason, assertion that the right to vote should be restricted as it may affect the outcome of the election is unacceptable, violating the principle of universal suffrage (*see* 9-1 KCCR 859, 876, 2004Hun-Ma644 etc., June 28, 2007).

2) Next, we will discuss points related to legitimacy of purpose and appropriateness of means of the Instant Provision other than suggested in (A).

As we have reviewed before, exercising the voting right, as a means to realize the popular sovereignty and the representative democracy, is an important act to directly and indirectly participate in organization and management of state power. The people, as members of the state and society, have duty to refrain from committing crimes specifically prohibited by the state for maintaining the community and protecting other members' rights and interests such as life and body. Prisoners, however, are those who are sentenced to death penalty, imprisonment for life or imprisonment without prison labor for life, imprisonment for a limited term or imprisonment without prison labor for a limited term but whose sentence execution has not been terminated as punishment of the crime they have committed and the ones who destructed social order and threatened security of our society by causing considerable harm to the state, society and community members.

The Instant Provision in this case is based upon the basic perception that it is not desirable to allow those individuals who have deserted the basic obligations that must be observed by the members of the community and harmed the maintenance of the community, to directly and indirectly participate in constituting the governing structure leading the operation of the community, and has a meaning as the social sanction against such anti-social behavior (16-1 KCCR 468, 479, 2002Hun-Ma411, March 25, 2004). Furthermore, our Criminal Act provides for provisions which contain the same purpose as the Instant Provision, by stipulating deprivation or suspension of qualifications such as suffrage and eligibility under the Pubic Act as a kind of punishment (Article 41) and providing that a person who is sentenced to imprisonment for a limited term or imprisonment without prison labor for a limited term shall be under suspension of qualifications until the execution of punishment is completed or remitted. Therefore, the deprivation of the right to vote by the Instant Provision functions as retribution for crime as an extension of criminal sanction against criminals, which can be regarded as an important purpose for the legislators to impose criminal sanctions or restrictions against grave crimes.

Further, the deprivation of the right to vote imposed on a prisoner by the Instant Provision, on top of the capital punishment or deprivation of liberty to which the prisoner is sentenced, can contribute to heighten the responsibility of general citizens including the prisoner himself/herself as a citizen and reinforce the their respect toward the rule of law.

Such legislative purposes of the Instant Provision are legitimate, and the restriction on prisoners' voting right is one of the effective and proper measures to achieve the legislative purposes. Therefore, the Instant Provision cannot be said to meet legitimate legislative purposes and appropriateness of means.

(C) The least restrictive means

1) Election is a system that forms state institutions by competition and majority vote. Court Opinion expressed by election also has binding force on minority, and the legitimacy of such binding force

comes from the fact that the same chance to participate in election is also equally given to individuals who fall under the minority group. in other words, the principle of universal suffrage is observed. Therefore, the principle of universal suffrage both shows the limitation of the principle of majority rule and provides legitimacy to the rule of majority rule. This is why Article 41 and Article 67 of our Constitution specifically elucidate the principle of universal suffrage for the election of the National Assembly members and the Presidential Election. Therefore, the principle of universal suffrage and the right to vote based on it should be restricted to the minimum extent if necessary.

Meanwhile, the core of punishments, such as death penalty, life imprisonment, imprisonment without prison labor for life, imprisonment for a limited term or imprisonment without prison labor for a limited term, is 'deprivation of life' or 'incarceration in correctional facility', and the decision as to which part of other freedoms and rights prisoners may enjoy as citizens would be restricted is not made directly based on each types of punishment mentioned above. So, a prisoner, in principle, still has right to enjoy their basic rights other than those restricted by the particular punishment sentenced to him/her. As restriction on the right to vote does not naturally derive from the essence of capital punishment or imprisonment sentenced to prisoners, prisoner's right to vote should be restricted to minimum necessary extend based on the principle of universal suffrage.

2) The Instant Provision, however, fully and uniformly restrict the right to vote of those who are sentenced to imprisonment without prison labor or a heavier punishment, but whose sentence execution has not been terminated. The restriction imposed by the Instant Provision is extended not only to those who are sentenced to death penalty, life imprisonment, imprisonment without prison labor for life, imprisonment for a limited term or imprisonment without prison labor for a limited term, for example, from one month to 25 years but also to those who are released on parole after fulfilling relevant requirements. In this sense, the scope of application of the Instant Provision is very broad, spanning from and neither does consider the type of crimes such as whether it is a criminal negligence or

intentional offence nor the type of legal interests infringed by the crimes such as whether it is state interest, social interest or personal interest.

3) But, regarding a person who is sentenced to imprisonment without prison labor for criminal negligence, although the result of infringing legal interests by his/her fault is grave enough to be sentenced to imprisonment, from the perspective of illegality of the act, such illegality is far less than that of intentional offence. For example, since the one who is serving prison terms after being sentenced to imprisonment without prison labor for causing a traffic accident due to negligence did not knowingly or intentionally commit the crime, he/she does not have any intention or awareness to do harm to the legal order of the community, either. Therefore, it is hard to accept to restrict such negligence offenders' right to vote, which is the means to realize the people's sovereignty.

A parolee is a person under execution of imprisonment or imprisonment without prison labor who has behaved himself/herself well and shown sincere repentance, and therefore returns to society before the completion of his/her prison term when ten years of a life sentence or one third of a limited term of punishment has been served after many factors such as the prisoner's age, motive of crime, name of the crime, prison terms, behavior in prison, living condition or situation after parole and possibility of recidivism are thoroughly reviewed by the Parole Board. As a result, although a parolee's sentence execution has not been terminated as of the election day, it is not reasonable to maintain the sanction of restricting parolee's voting right incidental to the main punishment, considering the fact that a parolee is the one who is released from imprisonment, which is the main punishment, for the various reasons we have reviewed before.

Further, the Instant Provision's wide-ranging restriction on the right to vote, even applying to the one who is sentenced to a short term imprisonment for a crime of little gravity nothing to do with any anti-state offence that denies the constitutional order such as the democracy, seems discrepant from the election system of a liberal democratic country that aims at creating and maintaining order within

the community by allowing various people with diverse ideological backgrounds and personal history to freely participate in elections based on pluralistic worldview.

To sum up, although it is important for the legislature to be very careful in restricting the right to vote in consideration of its importance, the Instant Provision simply and uniformly restricts prisoner's right to vote by setting the standard stipulating that 'a person who is sentenced to imprisonment without prison labor or a heavier punishment, but whose sentence execution has not been terminated', without carefully considering as to whether there is any direct relationship between the type, content or illegality of each crime and the restriction on prisoner's voting right.

Therefore, the Instant Provision violates the rule of the least restrictive means in restricting basic rights.

(D) Balance between legal interests

The right to vote, as a means through which the right holders can realize their political opinions, is a right every citizen holds. Further, maximum guarantee of the right to vote pursuant to the principle of universal suffrage is the core element for realizing 'the representative democracy on the basis of the popular sovereignty', which is the basic tenant of our Constitution and has the public value of guaranteeing democratic legitimacy of state power achieved by election to the maximum level. Therefore, arbitrary restriction on the voting right infringes on not only private interests of the right holders but also the above mentioned public interest.

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

Therefore, the Instant Provision fails to strike balance between the conflicting legal interests regarding the restriction on the basic rights.

(E) Sub-conclusion

The Instant Provision infringes on prisoner's right to vote in violation of Article 37, Section 2 of the Constitution and also on prisoner's right to equality in violation of the principle of universal suffrage stipulated in Article 41, Section 1 and Article 67, Section 1 of the Constitution.

3. Conclusion

As reviewed above, the constitutional complaint should be upheld and the Instant Provision should be declared unconstitutional.

B. Denial Opinion of Justice Lee Kong-hyun, Justice Cho Dae-hyen, Justice Lee Dong-heub

1. Meaning of restriction on the prisoner's right to vote and legislative examples

(A) Under the principle of popular sovereignty and the representative democracy in which establishment and composition of a state and the state power and its democratic legitimacy can be achieved only through citizens' exercising their right to vote, the right to vote bears special importance as a means to realize them.

But the right to vote cannot be regarded as an absolute right that should not be restricted in any case because it is not a 'natural right' that inherently exists even before the establishment of the Constitution but a 'legal right' that is created or recognized by the Constitution within a certain community.

Therefore, the right to vote, like any other basic rights, may be restricted when necessary for national security, the maintenance of law and order or for public welfare under Article 37, Section 2 of the Constitution as long as such restriction does not infringe on the core value of the right, and historically the right to vote has been restricted against those who have yet to reach a certain age or commit serious crimes destructing the social rule and doing harm to the community

order.

The Instant Provision, while preventing felons who fail to observe their fundamental duties as members of a community from directly and indirectly participating in the organization and management of the community, is meant to impose social sanction against the persons who commit antisocial behavior. The restriction on criminal's voting right, as a type of so-called 'social death' in the Greek-Roman period, has a deep rooted history and has been limitedly practicing within a certain boundary in the following countries as modified pursuant to each country's history and circumstances.

(B) Legislative examples in foreign countries achieve

In the United States, as of 2006, 48 states and the District of Colombia have statutes that deprive prisoners who commit felony of their right to vote while imprisoned. Among them, 13 states deprive a person of the right to vote while he/she is imprisoned, 5 states do so while imprisoned and paroled, and 18 states do so not only while imprisoned and paroled but also during the period of suspension of execution. In 13 states, the right to vote is deprived even after the execution of sentence is terminated, such as while on probation, and especially 6 of them permanently deprive a felon of the right to vote. The US Supreme Court also ruled that based upon Section 2 of the 14th Amendment, a state may deprive a prisoner of his/her right to vote unless it is intended to be racially discriminatory.

In Japan, same as the Instant Provision, 'a person who is sentenced to imprisonment without prison labor or a heavier punishment, but whose sentence execution has not been terminated' is deprived of the right to vote (Article 11 of the Public Officials Election Act). In France, a person who is convicted of concealing criminal activity and committing a crime cannot be on the voter's list for five years after the sentence is finalized. Germany removes some of prisoner's right to vote by authorizing the court to restrict prisoner's voting right pursuant to related statutory provisions.

Besides, many advanced countries, where the system of representative democracy is well developed, also impose various types of restriction on the right to vote for those who commit a serious

crime, although different in terms of the requirements, scope and means. Therefore, regarding question as to whether the right to vote for those who commit serious crime should be restricted and the scope and methods of such restriction, it depends on specific circumstances where each country is situated such as historical experience, criminal law system, people's legal sentiment toward crime and others.

2. legal character of restriction on prisoner's right to vote

Our Criminal Act provides for disqualification or suspension of qualification as a type of punishment (Article 41) and stipulates that qualification to become public officials and suffrage and eligibility under the Public Act, etc., are the qualifications that can be suspended or forfeited (Article 43). According to the Criminal Act, judges may impose a disqualification to a person who commits a certain crime for a specific period of time if there is a statutory provision that stipulates disqualification (from 1 year to 15 years) as a statutory punishment for the crime (Article 44, Section 1), but even when judges do not separately impose a disqualification, if a person is sentenced to death penalty, imprisonment for life or imprisonment without prison labor for life, he/she shall automatically be deprived of the qualification mentioned above (Article 43, Section 1), and if a person is sentenced to imprisonment for a limited term or imprisonment without prison labor for a limited term, he/she shall be under suspension of above mentioned qualifications until the execution of punishment is completed or remitted (Article 43, Section 2). As such, disqualification or suspension of qualification regarding suffrage and eligibility under Public Law, against those who are sentenced to imprisonment without prison labor or a heavier punishment but whose sentence execution has not been terminated bear the characteristics of punishment imposed against them.

In response to those provisions of the Criminal Act, the Public Officials Election Act does not recognize the right to vote for a person who is sentenced to imprisonment without prison labor or a heavier punishment but whose sentence execution has not been terminated. Considering the punishment system in our Criminal Act, as

we reviewed above, the restriction on the right to vote imposed by the Instant Provision reveals characteristics of criminal sanction imposed on felons who commit anti-social crimes.

But, the question as to how a crime should be punished, or in other words, the issue of choosing the type and scope of statutory punishment against a crime is the matter to be decided by the legislators, considering not only the nature of crime and the protectable legal interests but also our history and culture, situation at the time of legislation, the public's values or legal sentiment in general and the criminal deterrence policy, and therefore, this is an area where wide range of legislative discretion or formative freedom should be granted. Hence, unless clear violation of the principle of equality and the principle of balance guaranteed by the Constitution is perceived, for example, when a statutory punishment of a certain crime is so cruel and excessive, compared to the nature of the crime and the corresponding responsibility of the criminal, that the balance in criminal punishment system is remarkably broken or the punishment is beyond the degree necessary to achieve its original purpose and function, we should be very careful in making a conclusion that a statutory punishment violates the Constitution. This consideration should also be taken in this case when we review the constitutionality of the Instant Provision that bears the characteristics of criminal sanction.

In relation to this, our Court, in reviewing the constitutionality of Article 18 Section 2 Item 1 of the 'Public Officials Election and Prevention of Election Malpractice Act' (revised by Act No. 4739, March 16, 1994), has already considered the restriction of the right to vote pursuant to the aforementioned provision as criminal sanction and ruled that the above mentioned statutory provision does not violate the Constitution, as it is neither clearly unreasonable or unfair going far beyond the scope of legislative discretion nor in violation of the rule against excessive restriction (16-1 KCCR 468, 2002 Hun-Ma411, March 25, 2004).

3. Issues in this case

The issues in this case are whether preventing prisoners whose

sentence execution has yet to be terminated from exercising the right to vote during the period of sentence execution, under the standard of 'sentenced to imprisonment without prison labor or a heavier punishment" stipulated in the Instant Provision with characteristics of criminal sanction against felons, infringes the complainant's voting right in violation of the rule against excessive restriction under Section 2, Article 37 of the Constitution and the complaint's right to equality by discriminating prisoners who are sentenced to imprisonment without prison labor or a heavier punishment against other citizens in the political aspect of people's life.

In reviewing these issues, as the issue of infringement of the right to vote of the prisoners who are sentenced to imprisonment without prison labor or a heavier punishment and the issue of infringement of the right to equality thereof against other citizens are closely interconnected, the issue of infringement of the right to vote will be reviewed first, and on the basis of this, the issue of infringement of the right to equality will be review analyzed.

Meanwhile, although the complainant also argue that his right to pursue happiness is infringed by the Instant Provision, the issues regarding the right to pursue happiness will not be reviewed in this case as the right to pursue happiness under Article 10 of the Constitution is a basic right that is supplementarily applied only when the other basic rights cannot be applied (*see* 20-1(B) KCCR 447, 451-452, 2007Hun-Ma917, June 26, 2008).

4. Question regarding infringement of the right to vote

(A) legitimacy of legislative purpose and appropriateness of means

In general, exercising the right to vote is regarded as important in that it can determine the destiny of a national community and give direction to the community. And, citizens, as components of the national community, take various social responsibilities and duties such as paying tax, serving in the military and abiding by law in order to maintain the community order and respect and guarantee other people's rights and interests including their life and body. Prisoners who committed serious crimes, however, are the ones who destructed social

order and endangered the security of the community.

In relation to this, the Instant Provision was legislated in order to prevent crimes by imposing a criminal sanction of placing restriction on the right to vote of felons who fail to fulfill the basic duty as components of community and foster responsibility and law-abiding spirit of general citizens, which is legitimate to be constitutionally pursued by the legislature, and the voting right restriction imposed by the Instant Provision against prisoners sentenced to imprisonment without labor or a heavier punishment is found to be an appropriate means to achieve the purposes.

(B) The least restrictive means and balance between interests

1) The Instant Provision does not uniformly restrict the voting right of all prisoners or criminals but suspend the voting right of those who are 'sentenced to imprisonment without prison labor or a heavier punishment' until 'the end of execution of the sentence', which means that it restricts the right to vote only during the period of time proportional to the sentence imposed. On the other hand, if a person is sentenced to less than 30 days' detention for misdemeanor or sentenced to lockup at workhouse for failure to pay a fine or a minor fine, his/her right to vote is not restricted. Therefore, restriction of prisoner's right to vote as a criminal sanction is imposed not because of his/her confinement in a detention facility like prison but because of his/her own criminal responsibility for committing a serious crime. for this reason, in order to make a decision on the constitutionality of the Instant Provision, it is appropriate to review whether the requirement for restricting voting right, which is 'sentence of imprisonment without prison labor or a heavier punishment', and the period of suspension of the voting right imposed pursuant to it are excessive beyond the scope necessary for achieving the legislative purposes and whether the balance between the public interest to be achieved by the Instant Provision and the personal disadvantage of prisoners is well maintained.

2) Severity of 'sentence of imprisonment without prison labor or a heavier punishment' in our legal system

As our Criminal Act prescribes death penalty, imprisonment, imprisonment without prison labor, deprivation of qualifications, suspension of qualifications, fine, detention, minor fine and confiscation as types of punishment (Article 41), the deprivation of qualifications and the suspension of qualifications that impose restriction on the right to vote and the right to be elected are also types of punishment like imprisonment without prison labor. The severity of punishment follows the above mentioned order. Among them, punishments that deprive of a person's freedom include imprisonment, imprisonment without prison labor and detention and imprisonment or imprisonment without prison labor shall be either for life or for a limited term, and the limited term shall be from one month to fifteen years and detention shall be from one month to thirty days. And when the length of a fixed term of imprisonment without prison labor exceeds the length of a fixed term of imprisonment, the imprisonment without prison labor shall be deemed to be more severe (Article 42, Article 46, Article 50, Section 1 and 2). Therefore, the imprisonment without prison labor, as a punishment that imposes serious restriction on the basic rights including the bodily freedom by confining criminals in prison for at least one month and more, should be regarded as more severe than the deprivation or suspension of qualification which restricts the right to vote or the right to be elected.

Also, our Constitution stipulates that 'no judge shall be removed from office except by impeachment or a sentence of imprisonment without prison labor or a heavier punishment (Article 106, Section 1)' in order to guarantee independence of the judiciary, thereby imposing serious restriction on judge's right to hold public office by making it possible to remove him/her from the position if a judge is sentenced to imprisonment without prison labor or heavier punishment. Especially, considering that application of the above mentioned constitutional provision will not be swayed by whether the crime committed by a judge is related to the office or due to negligence, being sentenced to imprisonment without prison labor or a heavier punishment through criminal procedure itself may implicate the possibility of being seriously blamed by the society, regardless of the name and nature of crime or whether it is related to the office or

criminal negligence.

Also, according to the State Public Officials Act, if a public official in whose case five years have not passed since his/her imprisonment without prison labor or a heavier punishment as declared by a court was not completely executed or exempted, or if a public official is sentenced by the suspension of the execution of imprisonment without prison labor or a heavier punishment and two years have not passed since the period of suspension is expired, he/she shall retire ipso facto (Article 69, Article 33, Item 3 and 4). In the cases of lawyer, certified public accountant, certified tax accountant, patent lawyer, certified judicial scrivener and property appraiser, there are related statutory provisions that prescribe certain grounds for disqualification (Article 5, Section 1 of the Attorney at Law Act; Article 4, Section 2 of the Certified Public Accountant Act; Article 4, Section 7 of the Certified Tax Accountant Act; Article 4, Section 1 of the Patent Attorney Act; Article 6, Section 3 of the Certified Judicial Scrivener Act and Article 24; and Section 3 of the Public Notice of Values and Appraisal of Real Estate Act). Each of the above mentioned statutory provisions did not exclude a person who commits a negligence crime or a crime not related to the office from being subject to the provisions, with consideration of the gravity of sentencing imprisonment without prison labor or a heavier punishment.

Meanwhile, according to the statistics on the criminal cases in 2008, among 1,494,680 criminal trial and summary judgment cases, 44,861 cases are about imprisonment without labor or a heavier punishment at trial court level, and the imprisonment without labor or a heavier punishment has been sentenced only against serious crimes that occupy only 3% of all the criminal cases (*see* 2009 Annual Report of the Judiciary).

3) Given our criminal system and various provisions of the Constitution and other statutes, the standard of 'imprisonment without prison labor or a heavier punishment' is deemed to be grave enough to justify the restriction imposed on the basic rights including deprivation of status as public officer or judge or limitation on achieving professional licenses. Moreover, as the Instant Provision is not applicable to the person who is under the suspension of the

execution but to the prisoner who is sentenced to 'imprisonment without prison labor or a heavier punishment' and whose sentence is being executed, the suspension of the voting right of the prisoner who is sentenced to such a grave punishment during the period of execution of the sentence does not seem excessive beyond the scope necessary for achieving the legislative purposes we have reviewed in the previous section.

Also, considering the facts that judges in criminal trial determine the type and severity of punishment after carefully considering the sentencing conditions such as age, character and conduct of the offender; the motive for the commission of the crime, the means and the result; and circumstances after the commission of the crime, and that imposition of a fine is also stipulated as an option for most crimes except serious crimes against which very severe punishments are imposed, if a judge decides to impose a fine or to sentence a person to imposition without prison labor or a heavier punishment without ordering the suspension of sentence or the suspension of execution with consideration of all the circumstances before and after the commission of the crime, it can be said that such a decision by the judge implies that the crime may be serious enough to be legally and socially blamable. And this reasoning also similarly applies to the case where a person commits a crime by negligence or a crime endangers private legal interest, not national or social legal interests.

Furthermore, in view of legislative technique, it is very hard to place limitation on the exercise of the voting right crime by crime, respectively considering individuality and distinctiveness of every single crime. Moreover, considering the legislative purpose of imposing criminal sanction against anti-social felons, such a legislative method cannot be more regarded reasonable in any case than the standard of punishment reflecting each crime's gravity. Given this, the Instant Provision, which restricts the right to vote based on the strict standard of 'imprisonment without prison labor or a heavier punishment', should not be deemed as going beyond the permissible boundary of legislative discretion or exceeding the scope necessary for achieving the legislative purposes.

4) Proportionality in the degree of restraint on the voting right

In this case, the disadvantage of the prisoners who are sentenced to imprisonment without prison labor or a heavier punishment is simply one of the effects resulted from the deprivation of qualification or suspension of qualification, which is less severe than the imprisonment without prison labor. And, it seems difficult to conclude that additional deprivation of qualification or suspension of qualification against a felon who is already sentenced to imprisonment without prison labor or a heavier punishment under Article 43 of the Criminal Act breaks balance in criminal punishment system or exceed the scope necessary for achieving the purposes and function of punishment against the crime. Therefore, the Instant Provision which restricts the right to vote corresponding to the aforementioned provisions of the Criminal Act should not be regarded as clearly unreasonable or unfair going far beyond the scope of legislative discretion.

Moreover, the Instant Provision strikes balance between legal interests, given the facts that the period of time during which prisoner's right to vote is suspended is not uniformly fixed, but until the 'end of execution of the imprisonment without prison labor or a heavier punishment', being decided based on each prisoner's sentence or in other words, proportionate to the gravity of the prisoner's criminal responsibility and the public interests of 'imposing criminal sanction on felons and enhancing people's respect to the rule of law' to be achieved by the Instant Provision are not dwarfed by the prisoner's private disadvantage of being suspended to exercise the voting right during the execution of punishment.

(C) As to whether the Instant Provision violates the Constitution for not excluding those who commit a crime of negligence; infringe private legal interests; are sentenced to short term imprisonment; and paroled

Now, the majority opinion of five justices stating that the Instant Provision violates the Constitution since the Instant Provision does not exclude, among criminals who are sentenced to imprisonment without prison labor or a heavier punishment, those who ① commit a crime of negligence; ② commit a crime related to private legal interest without relation to a anti state crime denying the constitutional order

such as democracy; ③ are sentenced to short term imprisonment; and ④ are paroled is to be reviewed.

1) Whether the Instant Provision violates the Constitution for not excluding criminals who are sentenced to imprisonment without prison labor for negligence

The principle of responsibility, which is the basic principle of criminal law pertaining to punishment, contains two fold meanings: one is that punishment should be imposed only when causes for responsibility that makes it possible to blame an illegal act is recognized, which justifies the imposition of punishment itself (there is no crime without responsibility), and another is that punishment that exceeds the responsibility cannot be imposed (the principle of balance between responsibility and punishment).

Therefore, in order for imposing punishment on a certain crime to be legitimate, responsibility of a criminal should be recognized and the statutory punishment should be proportionate to the degree of responsibility of the criminal. And judges should also pass sentence on the criminal corresponding to his/her responsibility within the prescribed scope of statutory punishment.

The principle of responsibility should apply to not only criminal negligence but also intentional offense. And, as the cause, for which a criminal who commits an intentional offense is responsible, means the possibility of being condemned for neglecting the duty of care, if a judge passes a reasonable sentence proportionate to the responsibility toward a specific crime on the basis of the principle of responsibility, the gravity of statutory punishments can be regarded as a clear and reasonable standard to decide the gravity of responsibility of a specific crime, or the degree of blamability, regardless of whether the crime is criminal negligence or intentional offense. In other words, under the premise that a statutory punishment is to be proportionate to the responsibility, if a person who commit a crime by negligence is sentenced to one year imprisonment without prison labor, it is reasonable to consider that the blamability of the person same or similar as that of a person who is sentenced to one year imprisonment without prison labor for committing an intentional crime and more

than that of a person who is sentenced to imprisonment without prison labor for less than one year for committing an intentional crime. After all, when a person who commits an crime negligently is sentenced to imprisonment without prison labor, it is hard to say that his/her blamability is less than that of a person who commits a crime intentionally and sentenced to the same or less severe punishment only because he/she commits a crime by negligence.

As such, that the Instant Provision does not consider criminal negligence separately from intentional offense but restricts the right to vote on the basis of the standard of 'imprisonment without prison labor or a heavier punishment' seems reasonable. Rather, if a person is excluded from being subject to the Instant Provision simply because he/she commits a crime by negligence without considering the gravity of sentence, thereby possibly resulting in exclusion of a person who commits criminal negligence and is sentenced to a severe punishment as his/her responsibility is heavier than a specific criminal who commits a crime intentionally from being subject to the Instant Provision, this would be in violation of the equality among those who are sentenced to imprisonment without prison labor or a heavier punishment.

Therefore, we cannot state that the Instant Provision violates the Constitution simply because a person who commits a crime by negligence and is sentenced to imprisonment without prison labor or a heavier punishment is not excluded from being subject to the Instant Provision.

2) Whether the Instant Provision violates the Constitution as it does not exclude a person who commits a crime through infringing private legal interests not directly related to the right to vote and is accordingly sentenced to imprisonment without prison labor or a heavier punishment

First of all, it is hard to conclude that all the crimes against private legal interests cause far less harm to the community than those against the state or society because even a crime against private legal interest also can seriously damage the social order depending on each crime's nature and degree of its illegality. Nevertheless, if crimes against

private legal interests are uniformly excluded from being subject to the Instant Provision simply without considering gravity of each crime, there will be a problem of unequal treatment between prisoners who commit crimes against private legal interests and prisoners who commit crimes against social legal interests.

Also, there are several provisions in the Criminal Act which stipulate that the punishment of suspension of qualification pertaining to restriction on the right to vote can be imposed as an optional or concurrent punishment: optional punishments include crimes of inflicting bodily injury and violence (Article 257, Section 1) and concurrent punishments include homicide (Article 256), false arrest and illegal confinement (Article 282), fraud and extortion (Article 353), and embezzlement and misappropriation (Article 358).

According to the Instant Provision, although the aforementioned crimes are not directly related to the democratic order, the voting right, or the election system, it is possible to impose suspension of qualification pertaining to restriction on the right to vote. Given the fact that restriction on prisoner's right to vote also shares the characteristics of general punishment against crime, however, this discrepancy between the content of crime and punishment does not seem to be a serious problem. Namely, as it is impossible to conclude that a punishment that restricts physical freedom such as imprisonment without prison labor or imprisonment should be imposed only on a crime that infringes on a person's physical freedom or a punishment that restricts a person's property right should be imposed only on a crime that infringes a person's property right, it is also impossible to conclude that suspension of qualification such as restriction on the right to vote should be imposed only on a crime directly related to the democratic order, the voting right, or the election system.

Therefore, it cannot be said that the restriction on the right to vote pursuant to the Instant Provision which contains characteristics of criminal sanction should be imposed only on an anti-state crime that denies the constitutional order such as democracy or a crime directly related to restriction on the right to vote. In this sense, the Instant Provision cannot be deemed violative of the Constitution simply because it does not exclude such crimes from the scope of its application.

3) Whether the Instant Provision violates the Constitution as it does not exclude a prisoner who is sentenced to short term imprisonment

First, since among those who are sentenced to short-term imprisonment, a prisoner who is sentenced to imprisonment for more than 1 day to less than 30 days is not subject to the Instant Provision, his/her right to vote will not be suspended. And, as reviewed before, the standard of 'imprisonment without prison labor or a heavier punishment' is a very strict standard in our legal system and criminal practice, and such a sentence cannot be deemed a light one imposed on misdemeanor even though imprisonment is for short term, in that important basic rights such as the physical freedom are restricted while confined in correctional facility for at least one month.

Also, in terms of criminal practice, it is very rare for a judge to sentence a criminal to less than six months imprisonment without prison labor or imprisonment, and if so, the period during which the criminal's right to vote is suspended is less than 6 month, same as the period of sentence imposed. Therefore, the possibility that a prisoner who is sentenced to the short term imprisonment may not be able to exercise his/her right to vote in the Presidential Election held every five years or in the National Assembly Election and local elections held every four years under the Public Official Election Act in this case seems not very high, and although an election is held while a prisoner serves his/her time, and thereby the right to vote is limited, considering the fact that the aforementioned three types of election are held at certain intervals, practically speaking, restriction on the voting right will not be more than one or two times.

Given the strictness of the standard of 'imprisonment without prison labor or a heavier punishment' and the low degree of restriction on the right to vote in practice, it is hard to conclude that the Instant Provision runs afoul of the Constitution in violation of the rule against excessive restriction, simply because it does not exclude a prisoner who is sentenced to short term imprisonment without prison labor or imprisonment from the scope of its application.

4) Whether the Instant Provision violates the Constitution as it does not exclude a person who is sentenced to imprisonment without prison labor or a heavier punishment and paroled under execution of sentence.

As parole, stipulated in Article 72, Section 1 of the Criminal Act, should be understood as a measure for granting benefit to a prisoner by an act of the administrative authorities on the basis of the correctional policy of a correctional facility or a criminal policy decision, not by the individual application or request by a prisoner. Even though a prisoner satisfies the requirements for parole stipulated in the above provision, that does not necessarily mean that the prisoner acquires the subject right to request parole or the correctional facility has a legal duty to provisionally release the prisoner. Rather, a prisoner may achieve the factual interest of being released before the termination of prison term only by an administrative disposition by the correctional authorities based on the aforementioned provision (*see* 7-1 KCCR 416, 421-422, 93Hun-Ma12, March 23, 1995; 19-2 KCCR 158, 162-163, 2006Hun-Ma298, July 26, 2007).

Also, the disposition of parole neither exempts the punishment nor nullifies the existing sentence of imprisonment without prison labor or a heavier punishment, and the period of parole shall be ten years in case of the imprisonment for life and remaining term in case of the imprisonment for definite term and when the period of parole has elapsed without losing its effect or being revoked, after the disposition of parole is made, the execution of sentence shall be considered to have been terminated (Article 73, Section 2; Article 76, Section 1 of the Criminal Act).

Meanwhile, as a person under execution of imprisonment without prison labor may be paroled when ten years of a life sentence or one-third of a limited term of punishment has been served (Article 72, Section 1 of the Criminal Act), a prisoner's right to vote is not newly suspended by the Instant Provision for the reason that he/she is paroled after a certain period of sentence execution has been lapsed, but is suspended pursuant to the Instant Provision and Article 43 of the Criminal Act, separate from the execution of imprisonment after being sentenced to imprisonment without prison labor or a heavier

punishment. In other words, the decision as to whether there should be a provision of exception by which the application of the Instant Provision is excluded is not about restriction on the basic rights, but about a matter as to whether the additional criminal sanction of restriction on the right to vote, which is imposed when the imprisonment without prison labor or a heavier punishment is sentenced, should be partially exempted due to the ex-post reason of being paroled. As it is difficult to say that the legislature has a duty to provide such a provision of ex-post exemption of such a criminal sanction for the benefit of prisoner, it is an issue to be decided from the perspective of legislative policy.

Moreover, according to Article 72, Section 2 of the Criminal Act, if a fine or a minor fine has been imposed concurrently with the punishment, the amount thereof shall be paid in full in order for the parole to be granted. This provision means that the causes for parole do not automatically relieve the other concurrent punishments. Given the provision of the Criminal Act, it is difficult to conclude that the legislature exceeds the limit of legislative discretion because it fails to provide a provision that exempts the separate criminal sanction other than the execution of imprisonment, which is the restriction on the parolee's right to vote.

For the foregoing reasons, the Instant Provision cannot be deemed unconstitutional as it does not provide a provision of exception by which a parolee is excluded from being subject to the Instant Provision.

(D) Sub-conclusion

The Instant Provision does not infringe on the complainant's right to vote as it is not in violation of the rule against excessive restriction under Article 37, Section 2 of the Constitution.

5. whether the Instant Provision infringes on the right to equality

Now, we turn to the issue as to whether the complainant, who is a prisoner sentenced to imprisonment without prison labor or a heavier punishment, is treated discriminatorily from other general citizens in

the political aspect of life by the Instant Provision's restriction on the right to vote.

As such discrimination mentioned before is resulted from the restriction on the right to vote of a prisoner who is sentenced to imprisonment without prison labor or a heavier punishment imposed by the Instant Provision on the basis of the legislative purpose of imposing criminal sanction and deterring crime therefrom and heightening the law abiding spirits, and as we reviewed before, since the restriction on the right to vote by the Instant Provision does not violate the rule against least restrictive means, the resultant discrimination, which is based on rational causes, also should not be considered arbitrary, going far beyond the limit of legislative discretion.

6. Conclusion

For the foregoing reasons, this constitutional complaint should be denied.

C. Opinion of dismissal by Justice Lee Kang-kook

Article 43, Section 2 of the Criminal Act stipulates that a person who is sentenced to imprisonment for a limited term or imprisonment without prison labor for a limited term shall be under suspension of qualifications, such as the right to vote under the Public Officials Election Act, until the execution of punishment is completed or remitted. According to this, the suspension of qualifications takes effect when the sentence of imprisonment for a limited term or imprisonment without prison labor for a limited term is finalized. As the Instant Provision reflects the effect of Article 43, Section 2 of the Criminal Act, the cause of action for the infringement on the basic rights, including the restriction on the right to vote, by the Instant Provision also arises when the sentence is finalized, like in Article 43, Section 2 of the Criminal Act (*see* 16-1 KCCR 468, 476, 2002Hun-Ma411, December 27, 2007).

In this case, however, the complainant file this constitutional complaint on December 27, 2007, after one year has elapsed since

November 23, 2006 when the complainant's sentence to imprisonment was finalized and the right to vote under Public Law was suspended therefrom.

Therefore, this constitutional complaint should be dismissed as it fails to meet the time limit for filing, stipulated in Article 69, Section 1 of the Constitutional Court Act, which requires a constitutional complaint to be filed within one year after the day when the basic rights are infringed.

IV. Conclusion

Regarding the Instant Provision, five Justices including Justice Kim Hee-ok, Justice Kim Jong-dae, Justice Min Hyeong-ki, Justice Mok Young-joon and Justice Song Doo-hwan present a unconstitutionality opinion; three Justices including Justice Lee Kong-hyun, Justice Cho Dae-hyen and Justice Lee Dong-heub present a denial opinion; and Justice Lee Kang-kook presents a dismissal opinion. The unconstitutionality opinion being the majority opinion, nevertheless, falls behind the quorum of six Justices needed for the holding of unconstitutionality. Therefore, we decide as the Holding.

II. Summaries of Opinions

1. Assessment of Litigation Costs by a Judicial Assistant Officer Case

[21-1(A) KCCR 45, 2007Hun-Ba8 · 84 (consolidated), February 26, 2009]

In this case, the Constitutional Court held that the provision of the Court Organization Act with regard to the assessment of litigation costs by a judicial assistant officer does not violate the Constitution.

Background of the Case

The Court Organization Act, Article 54 (2) articulates that judicial assistant officers may take charge of the procedures to assess litigation costs prescribed in the Civil Procedure Act (hereinafter, refer to the contested provision of the Court Organization Act as "the Instant Provision"). The petitioner, who was a respondent of the underlying case, pending at the Seoul Central District Court, to assess litigation costs, raised the objection to the disposition of a judicial assistant officer regarding the assessment of litigation costs. The petitioner, at the same time, also filed a motion to request for the adjudication on the constitutionality of the Instant Provision. When the said district court denied the motion, the petitioner filed this constitutional complaint with the Constitutional Court.

Provision at Issue

Court Organization Act (revised by Act No. 7402 on March 24. 2005)

Article 54 (Judicial Assistant Officers)

Section 2 The judicial assistant officers may carry out the duties provided by the Supreme Court Regulations from among the following duties:

1. Duties of the court in the procedures for final decision of the amount of litigation expenses and execution expenses, the procedures for urges and publicity-notified peremptory notice under the Civil Procedures Act (including the cases to which the said Act is applied mutatis mutandis);

Summary of the Opinions

The Constitutional Court has decided that the Instant Provision is not against the Constitution, in an 8 to 1 vote for the following reasons:

1. Court Opinion

A. The legislative purpose of adopting the system of judicial assistant officers by the Court Organization Act is to promote the efficiency of operation of judicial human resources. A judicial assistant officer, who is not a judicial officer but satisfies a certain degree of qualification among the general officers of the Court, is entrusted with the procedure of non-contentious cases. This system would be worthwhile because it reduces the burden of judicial officers and improves the entire judicial service as well. Therefore, the legislative purpose of the Instant Provision assigning the proceeding for the assessment of litigation costs to judicial assistant officers is legitimate.

B. With regard to the right to trial of Article 27 Section 1 of the Constitution, the procedure for objections to the disposition of judicial assistant officers would be significant to ensure the right to trial in which fact finding, interpretation and application of statutes is made by judges. Article 54 Section 3 of the Court Organization Act guarantees the right to retrial by judges within the same level of trial, by permitting objections to the disposition of judicial assistant officers. The proceeding of the assessment of litigation costs according to the Instant Provision also provides the opportunity that a judge finds the facts and applies the law through establishing objection procedure carried out by judges.

C. As examined above, the system of judicial assistant officers of the Instant Provision is equipped with the procedure for objection that judges shall review the assessment of litigation costs by a judicial assistant officer. It would not only promote the appropriateness of services; but also ensures the right to trial in conformity with the law by judges with regard to dispositions of judicial assistant officers. Accordingly, the assessment of litigation costs by a judicial assistant officer would be appropriate means to accomplish the legislative purpose that intends to concentrate the limited judicial human resources on practical disputes and, eventually, to secure the substance of the right to trial.

Therefore, the Instant Provision would not violate Article 27 Section 1 of the Constitution because it does not exceed the legislative discretion, unreasonably or arbitrarily.

2. Dissenting Opinion of One Justice

'Trial by judges', a fundamental requirement of fairness, should be employed in every trial procedure. It is not allowed to mitigate arbitrarily the degree of fairness, depending on the formation or procedure of the trial. Therefore, the assessment of litigation costs by judicial assistant officers under the Instant Provision would violate the 'the right to trial by judges' and the 'fairness of trial' of the Constitution.

The decision of the assessment of litigation costs according to the Instant Provision may be significant for parties to resolve their disputes despite it is not a judgment, but a decision or order that does not require oral arguments. The substance of disputes cannot be solely determined by the formality of proceedings, without the consideration of the systematic consistency or the position of parties.

Besides, a procedure for objection to the disposition of judicial assistant officers would be another level of trial de facto because it requires judges to be involved for the review and imposes additional costs and inconvenience on parties. It implies that it does not coincide with the 'trial by judges' to provide the procedure for objection to the disposition of judicial assistant officers.

Accordingly, the Instant Provision is against the Constitution, infringing on the 'the right to trial by judges' of Article 27 Section 1 of the Constitution.

2. *Restriction on Right to Prosecute Offenders of Traffic Accidents Causing Serious Injury Case*

[21-1(A) KCCR 156, 2005Hun-Ma764, 2008Hun-Ma118 (consolidated), February 26, 2009]

In this case, the Constitutional Court decided that, the provision of the Act on Special Cases Concerning the Settlement of Traffic Accidents which prevents the prosecution of drivers inflicting serious injury in a traffic accident resulting from negligence in driver's duties or gross negligence (bodily injury leading to life-threatening status, disability or incurable or intractable diseases) infringes on the right to be heard at trial and equality of the complainants.

Background of the Case

Article 4 Section 1 of the Act on Special Cases Concerning the Settlement of Traffic Accidents (hereinafter, "Instant Provision") provides that even in cases where the driver causes a traffic accident leading to severe injury due to negligence in driver's duties or gross negligence, he/she shall not be prosecuted insofar as the ten obligations including observance of traffic signals as prescribed by law (hereinafter, "Ten Obligations") are not violated and the vehicle in question is covered by general car insurance. The complainants, herein victims of traffic accidents suffering from severe aftereffects, filed a constitutional complaint arguing that they had been infringed on their right to be heard at trial and equality as the prosecutor decided, in accordance with the Instant Provision, that the victims have no right to prosecute the traffic accident offenders.

Provisions at issue

Act on Special cases concerning the settlement of traffic accidents

Article 4 (Special cases concerning Insurance Coverage, etc.)

(1) In case where a vehicle which has caused a traffic accident, is covered by insurance or mutual aid association in accordance with the

provisions of Article 4 and 126 through 128 of the Insurance Business Act, Article 8 of the Land Transportation Promotion Act, or Article 51 of the Trucking Transport Business Act, the driver who commit a crime provided in main sentence of Article 3 (2) shall not be prosecuted, provided that this insurer of mutual aid manager is not liable to pay the amount insured or mutual aid money because of the contract of insurance or mutual aid being null and void or rescinded for the future or an exemption clause of the contract.

Summary of the Decision

In a 7 to 2 vote, the Constitutional Court held that the Instant Provision infringed on the right to be heard at trial and equality of the complainants according to the following reasons.

1. Court Opinion

A. In case traffic accident victims suffer serious injury, they should be, in consideration of details of accident causes, victim characteristics (the weak and the elderly, etc.), whether or not the offender is guilty of negligence and the degree of negligence thereof, etc., entitled to actions such as summary indictment or stay of prosecution as well as prosecution and, in case of being prosecuted, to the right to be heard at trial. Nevertheless, the Instant Provision allows unconditional immunity to drivers whose vehicles are covered by general car insurance as long as the driver has not violated the Ten Obligations, and this is against the principle of the least restrictive means.

Meanwhile, traffic accident rate in Korea is very high compared to other OECD member countries. It is also hardly the case in developed countries to prevent prosecution of drivers causing traffic accidents just because the vehicles in question are insured. The drivers involved in traffic accidents are apt to make light of violating small traffic rules and neglect their duty of safe driving, and there is a tendency even for drivers inflicting severe injury to entrust post-accident management including payment of insurance money to insurers and not be sincerely committed to recovering the damage of victims. In light of this fact,

foreclosing the exercise of the right to be heard at trial of the seriously injured victims as prescribed by the Instant Provision is equivalent to substantially neglecting the said victims' private interests in order to uphold the public interests--preventing mass-production of individuals with criminal records. This is thus a violation of the principle of balance of interests.

Therefore, the Instant Provision violates the rule against excessive restriction and thus infringes on the right to be heard at trial of the victims who were severely injured in traffic accidents resulting from negligence in driver's duties or gross negligence.

B. Severely injured victims of traffic accidents not in violation of the Ten Obligations are differentiated from those involved in accidents that violated the Ten Obligations. Such differentiation may be at issue because whether or not the driver involved in the traffic accident is prosecuted will determine if the victim is able to exercise the right to be heard at trial guaranteed under the Constitution. As such discrimination constitutes a significant restriction on the exercise of basic rights, a strict standard of review shall be applied in judging if the right to equality has been infringed upon.

Severely injured victims of traffic accidents not in violation of the Ten Obligations become, due to a coincidental circumstance where the traffic accident they are involved in does not fall under the category specified in the proviso concerned, completely unable to exercise the right to be heard at a criminal trial. This is discrimination without reasonable grounds, given that such victims involved in accidents that coincidentally violated the Ten Obligations are entitled to exercise the right to be heard at trial.

In addition, in case the victim falls into a vegetative state, becomes severely disabled or has developed an intractable disease as a result of a traffic accident, the resulting illegitimacy cannot be concluded as being more insignificant than traffic accidents leading to death. In that sense, it would amount to discriminatory treatment without reasonable grounds to restrict the rights of the seriously injured victims to be heard at trial by not prosecuting the driver in question unlike cases involving death of victims.

Therefore, it would be an infringement on equality rights of victims

of traffic accidents leading to serious injury but not in violation of the Ten Obligations to differentiate, in accordance with the Instant Provision, the exercise their right to be heard at trial as opposed to the victims involved in accidents violating the Ten Obligations and those leading to death.

2. Dissenting Opinion by Two Justices

The Instant Provision promotes prompt recovery from traffic accident damages by encouraging drivers to buy general car insurance, etc. based on the consideration that driving is an essential part of people's daily lives and serves as an appropriate means to exempt drivers who cause accidents not in violation of the Ten Obligations from criminal punishment.

If victims are to be permitted to prosecute offenders for inflicting serious injury even though the offenders did not violate the Ten Obligations, the problem would be that it is difficult to judge clearly whether the injury is severe or not. Additionally, as the degree of traffic accident injury is not proportionate to the degree of negligence in driver's duties but may vary by coincidental circumstances such as the victim's age, sex, injured parts and physical characteristics, it would be difficult to secure predictability and coherence of law application.

3. *Infringement of Right to Equality for Severely Disabled Candidates Running for Public Office*

[21-1(A) KCCR 211, 2006Hun-Ma626, February 26, 2009]

Background of the Case

The Public Official Election Act (hereinafter, the "POEA") imposes a variety of restrictions on election campaign such as the number of political campaign staff and the election campaign method, and does not provide a separate provision that allows a candidate who or whose spouse is severely disabled to have additional personal assistants, other than campaign staff, who may distribute name cards.

The complainants, who are severely disabled candidates running for local office, filed this constitutional complaint, arguing that the contested provisions of the POEA infringe on their basic rights including the right to equality.

Provisions at Issue

POEA (revised by Act No. 7681, August 4, 2005)

Article 62 (Appointment of Persons in Charge of Election Campaign Affairs)

(2) In order to attend to the election campaign affairs, the manager of an election campaign office or the chief of an election campaign liaison office may appoint election campaign workers (referring to those who are paid allowances and actual expenses provided in the text of Article 135 (1); hereinafter, the same shall apply) from among those who are eligible to engage in an election campaign, as provided in the following items:

4. For an election of a local constituency City/Do council member

Not more than ten persons in the election campaign office

7. For an election of an autonomous Gu/Si/Gun council member of local constituency

Not more than eight persons in the election campaign office

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

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

Summary of the Decision

1) Regarding the provisions of the POEA which place the same restrictions for severely disabled candidates as for non-disabled candidates in terms of the total number of campaign staff and the number of persons who can distribute campaign business cards, the Constitutional Court unanimously delivered a dismissal opinion on the grounds that there is no possibility for the provisions of the POEA to infringe on the complainants' basic rights including the right to equality.

2) Regarding the provision of the POEA which places the same restrictions for severely disabled candidates as for non-disabled candidates in terms of the election campaign method, four Justices presented an incompatibility opinion and one Justice presented a unconstitutionality opinion. This constitutional complaint, however, was denied for failure to meet the quorum requirement of six Justices to

uphold a constitutional complaint.

1. Decision to dismiss the constitutional complaint regarding the provisions of the POEA which place the same restrictions for severely disabled candidates as for non-disabled candidates in terms of the number of campaign staff and the persons who can distribute campaign business cards

A. The candidates in this case who are severely disabled definitely need to be assisted and helped by caregivers for conducting almost every activity including election campaign as their physical condition prevents them from willingly moving by themselves. The assistants or caregivers are the ones dedicated to wait on them hand and foot, providing close and personal assistance to physical activities of the severely disabled candidates and their roles and responsibilities are clearly different from those of the political campaign staff stipulated in the provisions of the POEA. Due to the inherent difference in their job descriptions, it is impossible for the assistants or caregivers to be included in the category of political campaign staff. Therefore, the complainants who are severely disabled candidates can get help from assistants regardless of the limitation imposed by the provisions of the POEA on the number of campaign staff. For the foregoing reasons, the Court decided that the uniform restriction subscribed in the provisions of the POEA against both disabled and non disabled candidates on the number of campaign staff did not violate the complainants' basic rights such as the right to equality.

B. It is physically impossible for a candidate or a candidate's spouse who is severely disabled to distribute business cards to electors in person during campaign period. Therefore, it is easily expected that assistance from a caregiver in distributing business cards for such a candidate/spouse is indispensable. In this regard, the distribution of business cards by caregivers to electors should be considered equivalent to that by a disabled candidate or a disabled spouse himself/herself. Therefore, although there is no specific provision in the POEA that allows a severely disabled candidate or a spouse to 'get help from a personal assistant or caregiver in distributing

campaign business cards', it is naturally inferred from the situation that such an assistant should be accompanied for them. As such a personal assistant or caregiver is interpreted to be included in the category of those who can distribute business cards in the run-to the election, the provisions of the POEA do not infringe on the complainants' basic rights including the right to equality.

2. Decision to deny the constitutional complaint regarding the provision of the POEA which places the same restrictions for severely disabled candidates as for non-disabled candidates in terms of the election campaign method

A. Regarding Article 93 (1) of the POEA which imposes limitation on the campaign method (hereinafter, the "Instant Provision"), the alleged violation of the right to equality seems to be incurred not by exclusively prohibiting severely disabled candidates from mounting certain types of election campaign, but by treating severely disabled candidates and non-disabled candidates all the same. Therefore, the standard of review for this facially neutral provision should be the rationality test.

In the phrase "everyone is equal under the law", equality means prohibition of unequal treatment under the law, and does not necessarily mean that every socio-economic inequality should be corrected and everyone should be treated absolutely equal in any case. Therefore, it is hard to say that the facially neutral provision that does not treat the candidates with speech impediments differently from non-disabled candidates, thereby creating de facto discrimination against the disabled candidates, clearly violate the principle of equality.

Although the candidates with speech impediments cannot directly and personally communicate with their electors and canvass a district for votes, there are some types of election campaign method which can be used by them, such as publishing advertisements and campaign address in newspapers, on television, radio or the internet. Moreover, those new methods are gaining greater influence in modern society. Also, as the magnitude and scope of "oral" statements by a candidate himself/herself in an election campaign is relatively small and narrow except for having personal conversations with electors, the verbally

disabled candidates may not be so much disadvantaged in terms of "oral" communication because they can communicate through the help of their agents such as campaign staff, volunteers or personal assistants who can meet the individual electors and canvass a district for votes in lieu of them. In this light, allowing the verbally disabled candidates to use more campaign methods such as additional documents, voice or video recordings than those stipulated in the POEA does not necessarily ensure a level playing field for them, nor does the preference, if any, seem to be remarkably helpful even if such additional methods are allowed. Therefore, although the Instant Provision puts uniform limitation on the campaign methods against both severely disabled candidates and non-disabled candidates, it seems far-fetched to state that the Instant Provision arbitrarily omits to provide different treatment to those who are clearly in de facto disadvantage, thereby violating the complainants' basic rights including the right to equality.

Of course, it is worth considering granting preference to disabled candidates with speech impediments, such as allowing them to distribute more written documents to their electors than candidates without disabilities, in order to alleviate the de facto inequality. But granting additional campaign methods exclusive to the verbally disabled candidates requires another law that regulates criteria for evaluating the degree of speech disorders of the disabled candidates and for the types and quantity of additional documents to be allowed for them, which would be very difficult to be enacted given both the legislative technique and reality.

B. Opinion of Incompatibility with the Constitution of Four Justices

As the Instant Provision brings about grave limitation on the exercise of the basic right of freedom of election campaign, we need to review this case on the basis of the principle of proportionality.

The verbally disabled candidates are definitely at disadvantage in terms of communicating their political views and policies to electors and appealing for support as they cannot clearly deliver their message and intention due to their speech disorders. Moreover, even for those who have a certain degree of communicative competence, the prejudice

or hostility of some electors toward the ways the verbally disabled or deficient candidates communicate, including their speaking attitude or pronunciation, would become a stumbling block that is hard to be overcome for them. Given the lasting importance of traditional campaign method of face-to-face communication and interaction with electors, it is suffice to say that the general situation in election campaign is clearly far less favorable to verbally disabled candidates than to non-disabled candidates. Accordingly, there should have been a legal measure suited to level the playing field for the disabled candidates by providing them with extra campaign methods that can be effective substitutes for verbal communication, such as allowing them to have one or two more campaign staff who can assist them to have smooth communication with electors in addition to the number of staff fixed in the POEA, or extending the upper limit on the volume of campaign literature stipulated in the POEA. The facially neutral Instant Provision imposing uniform restriction on the campaign methods against both disabled and non-disabled candidates finally resulted in creating de facto discrimination against the disabled candidates due to the failure to consider the difference between them, thereby breaking the balance between the legislative purpose (guaranteeing the real freedom and fairness in election) and the means to achieve the purpose (imposing restriction on campaign methods), in violation of the complainants' right to equality.

But, considering that the declaration of "simple" unconstitutionality which instantly nullifies the existing restrictions on the campaign methods for both disabled and non-disabled candidates can bring about confusion and disorder by making it possible for all the candidates to arbitrarily use any types of campaign methods at will, we decide to deliver a decision of incompatibility with the Constitution regarding the Instant Provision and ask the legislators to revise the law in order to remove the constitutional defect.

C. Unconstitutionality Opinion of One Justice

The campaign method using campaign literature, books or booklets, which is known for the most effective way to give electors information about a candidate, must be constitutionally protected as

freedom of political expression. Such a campaign method is cost effective and seldom undermines the fairness of elections even without imposing limitation on the quantity of documents to be distributed and the frequency of distribution of such documents. As the POEA sets the expenditure ceiling for an election campaign, a candidate should be given a free rein in choosing types of campaign methods as long as his/her campaign expenditure does not exceed the boundary of the legally prescribed maximum. In this regard, the Instant Provision of the POEA which places restriction on the election campaign using campaign literature or books should be declared unconstitutional as it fails to prove legitimacy of the legislative purpose and places excessive restriction on the candidates' freedom to campaign in elections.

4. Authorization Requirement for Establishment of Law Schools and Limitation of Total Number of Admitted Students Case

[21-1(A) KCCR 292, 2008Hun-Ma370 · 147 (consolidated), February 26, 2009]

In this case, the Constitutional Court decided that, the provisions of the Act on the Establishment and Operation of Law Schools (hereinafter, the "Law School Act") which requires the government to authorize the establishment of a law school and to decide the total number of admitted students do not violate the Constitution.

Background of the Case

In case the establisher or the administrator of the public or private university desires to establish a law school, the Law School Act requires the authorization of the Minister of Education, Science and Technology (hereinafter, the "Minister of Education"), regulates specific authorization standards and total number of admitted students (hereinafter, the "Instant Provisions"). The complainants are educational foundations that establish and operate private universities and on November 30, 2007, the complainants applied for authorization of establishing law schools but they were not included in the preliminary authorized schools announced by the Minister of Education on February 4th, 2009. Therefore, the complainants filed this constitutional complaint arguing that the Minister of Education's denial of the authorization of law school (hereinafter, "denial of preliminary authorization") and the Instant Provisions infringe on their fundamental rights. The text of the Instant Provisions are as follow:

Provisions at Issue

Act on the Establishment and Operation of Law Schools(revised by Act No. 8852 on February 29, 2008)

Article 6 (standard of authorization)

② Detailed standard for authorization in Section 1 is defined by the

Minister of Education, Science and Technology.

Summary of the Opinions

The Constitutional Court, with a unanimous vote, dismissed the constitutional complaint requesting the cancellation of the dismissal decision of preliminary authorization and held that the Instant Provisions do not violate the Constitution for the following reasons.

1. Justiciability of the constitutional complaint on the denial of preliminary authorization

Since the complainants have the right to apply for preliminary authorization of this case and the universities, which have been dismissed of preliminary authorization, cannot participate in the following proceedings, and therefore, cannot be authorized to establish law school, the decision of denial of preliminary authorization can directly influence complainants' rights or legal interest.

However, according to Article 68 (1) of the Constitutional Court Act, in order for a person, whose fundamental right has been violated by the exercise or non exercise of a public power, to file a constitutional complaint, the person is required to exhaust all relief proceedings of other laws. Although the denial of the preliminary authorization falls under administrative action that can be appealed to the ordinary courts, the complainants' constitutional complaint, seeking for the unconstitutionality of the denial of the preliminary authorization, did not follow all the rights relief proceedings of the administrative action, which is against the exhaustion rule. Therefore, the constitutional complaint on the denial of preliminary authorization is not justiciable.

2. Constitutionality of the Provisions

A. Whether the Provisions violate the university's right to freedom and citizen's right to choose occupation

The purpose of the Provisions is to control the size of legal human

resources by considering supply and demand for lawyers and efficiently utilize national human resource through it. The policy of authorization and the total number of admitted students is proper means for this objective. Moreover, in the case of universities that have not achieved law school establishment authorization, the chance to establish law school has not been permanently deprived of and they continue to have the chance to educate law through an undergraduate curriculum. Therefore, the Instant Provisions do not seem to violate the principle of least restrictive means.

Also, the disadvantage that occurs to each university and citizen from the Instant Provisions cannot be said to be larger than the public interest derived from efficient human resource allocation, high quality legal education assurance, decrease of social costs from providing high quality legal service and restoration of citizen's trust in the legal field. The Instant Provision satisfies the requisite of balancing equities.

Therefore, the Instant Provisions do not violate the university's right to freedom and the citizen's right to choose occupation.

B. Whether the Instant Provision which requires the Minister of Education to decide the total number of admitted students of law schools violates the prohibition of blanket delegation

The Instant Provision declares the principle that the total number of law school students shall be decided by the government and further authorizes the Minister of Education to decide the specific number of admitted students for each law school. However, the total number of admitted students is not a matter that must be decided by law since it does not restrict fundamental rights and therefore the specific number of students does not have to be regulated by law to be enacted by the legislator.

Also, the total number of admitted students of law schools is a matter that needs to be revised according to the changes of social circumstances, thus delegating the Minister of Education to decide on this is efficient for quick and appropriate operation of law school system. The Instant Provision on the number of students specifically states that when deciding the total number of admitted students, 'various matters such as the sufficient legal service supply to citizens

and the balance of demand and supply of lawyers should be considered'. Therefore, the content of regulation by the Presidential decree from the Instant Provision can be predicted. Therefore the Instant Provision on the number of students does not violate the constitutional principle of prohibition of blanket delegation.

5. Suspension of Veteran's Retirement Pension Benefits Case

[21-1(A) KCCR 312, 2007Hun-Ka5 · 6 · 7 (consolidated), March 26, 2009]

In this case, the Constitutional Court reviewed the provision of the former Veterans' Pension Act which allows suspension of veteran's retirement pension benefits upon employment by government-invested (or reinvested) institutions, delegating the requirements and substances of the payment suspension to the Presidential Decree. The Constitutional Court dismissed the request for adjudication on the constitutionality of statutes with regard to the part suspending more than the half of the retirement pension benefits, which amounts to the portion of an accrued benefit derived from voluntary veteran contributions (hereinafter, the "Individual Contribution Portion"). However, it held that the part, suspending less than the half of the retirement pension, which amounts to portion of an accrued benefit derived from state contributions (hereinafter, the "State Contribution Portion"), violates the prohibition of blanket delegation.

Background of the Case

Article 21 (5) (b) of the former Veteran's Pension Act (prior to revision by Act No. 5063, Dec. 29, 1995) allows to suspend retirement pension benefits in the case where a veteran, who is entitled to such benefits, is employed and paid remuneration from government-invested (or reinvested) institutions, delegating the requirements and substances of the payment suspension to the Presidential Decree (hereinafter, "Suspension Provision"). In the decision rendered on June 30, 1994 (92Hun-Ka9), the Constitutional Court has declared unconstitutionality regarding a part of the Suspension Provision, which suspends the payment of the Individual Contribution Portion that has the nature of the deferred payment of remuneration, on the ground it limits the right to receive a retirement pension benefits in violation of the principle of proportionality. Movants at the Requesting Court, who retired from military service of more than twenty years, have been paid remuneration from government-invested (or reinvested) institutions for their employments

and suspended the half of their retirement pension benefits during the corresponding period of employment, grounding on the above Suspension Provision that has survived even after the finding of unconstitutionality. Nonetheless, the movants at the Requesting Court filed a motion to request for the adjudication by the Constitutional Court on the constitutionality of the Suspension Provision in whole, and the requesting court also requested the entire Suspension Provision to the Constitutional Court for the adjudication on its constitutionality.

Provisions at Issue

Former Veterans' Pension Act (revised by Act No. 3587 on December 28, 1982, but before revised by Act No. 5063 on December 29, 1995)

Article 21 (retirement pension)

⑤ The payment of retirement pension can be suspended partly or wholly according to the Presidential Decree for the period of the person is paid remuneration from the institutions listed on the following items:

2. Institutions that the State or local government invest more than half of the capital fund and institutions, prescribed in the National Defense Ministry Ordinance, that Korea Bank("government-invested institutions"), State · local government, and government-invested institutions invest, respectively alone or joint, more than half of the capital fund.

Summary of the Decision

In a unanimous vote of eight Justices, the Constitutional Court dismissed the request for adjudication on the constitutionality of the suspension of the Individual Contribution Portion while it found the unconstitutionality on the suspension of the State Contribution Portion.

1. Suspension of Individual Contribution Portion

The decision of unconstitutionality against statutes binds the ordinary courts, other state agencies and local governments (Article 47 (1) of

the Constitutional Court Act). As such, the request for adjudication on the constitutionality of the statute which had been already found unconstitutional by the Constitutional Court is not justiciable (6-2 KCCR 153, 161, 91Hun-Ka1, Aug. 31, 1994). As the Constitutional Court had declared unconstitutional the suspension of the Individual Contribution Portion under the Suspension Provision before, the request for adjudication on the constitutionality of the same provision in the instant case is not justiciable.

2. Suspension of State Contribution Portion

In the case where a pensioner has a new income source after his or her retirement, a part of the pension benefits is to be suspended in connection with such income. In providing for the requirements and substances of suspension of pension benefits, the law shall take into consideration on both the existence and level of income. However, with regard to the State Contribution Portion, the Suspension Provision delegates every consideration on suspension of pension benefits and the income level to a Presidential Decree. As the Suspension Provision comprehensively delegates the requirements and substances of suspension to a Presidential Decree without prescribing an income level, thus it may suspend the amount of pension benefits exceeding his or her income. Also, the rights to receive a pension would be excessively restricted by the automatic suspension of the half of the retirement pension benefits regardless of the income level. Therefore, the Suspension Provision suspending less than the half of the retirement pension benefits (i.e., the State Contribution Portion) violates the principle against blanket delegation.

6. *Case on 50 Times Administrative Penalty Fee for Violators of Public Official Election Act*

[21-1(A) KCCR 337, 2007Hun-ka22, March 26, 2009]

In this case, the Constitutional Court ruled that the provision of the Public Official Election Act which imposes a 50 times administrative penalty fee for persons who received goods from candidates or persons related to the election violates the Constitution.

Background of the Case

The Article 261 (5) (a) of the Public Official Election Act (hereinafter, the 'Inatant Provision') states that in case a person receives goods from election related persons, that person shall be subjected to a administrative penalty fee 50 times worth the good. Movants at the requesting court and other appellants of the underlying cases (hereinafter, the said movants and appellants 'petitioner') were imposed a administrative penalty fee of 450,000 won by the Busan Election Commission for having each received a box of dried fish worth 9,000 won during the election of local governments and local council members, violating the Provision. The petitioners made an immediate appeal against the decision on the administrative penalty fee and the court reviewing the case requested this constitutional review partly sua sponte, partly upon granting the motion of the said movants to the Constitutional Court.

Provisions at Issue

The former Public Official Election Act (revised by Act No. 7189 on March 12, 2004, but before revised by Act No. 8879 on February 29, 2008)

Article 261 (Imposition and Collection of Administrative Penalty for Negligence, etc.)

(5) A person who falls under any of the following items (excluding a person who has been given money, food or articles the value of

which exceeds one million won) by violating the provisions of Article 116 shall be punished by an administrative penalty for negligence equivalent to 50 times (two million won in the case of officiators) of the amount, or the values of food or goods given to him: Provided, That the ceiling on administrative penalty fee shall be set as fifty million won:

1. A person who receives goods, food, books, sight-seeing and other travel conveniences;

The Public Official Election Act (revised by Act No. 8879 on February 29, 2008)

Article 261 (Imposition and Collection of Administrative Penalty for Negligence, etc.)

(5) A person who falls under any of the following items (excluding a person who has been given money, food or articles the value of which exceeds one million won) by violating the provisions of Article 116 shall be punished by a fine for negligence equivalent to 50 times (two million won in the case of officiators) of the amount, or the values of food or goods given to him: Provided, That the person falling under items 1 or 2 has returned the money, food or articles (refers to money equivalent to the value in cases where those that have been given cannot be returned) that have been given to the election commission and has surrendered himself, he may be given a reduction in or be relieved of the fine for negligence as prescribed by National Election Commission Regulations:

1. A person who receives goods, food, books, sight-seeing and other travel conveniences;

Summary of the Opinions

In a vote of 7 to 2, the Constitutional Court held that the Instant Provision is incompatible with the Constitution and the reasons are the following.

1. Court Opinion

A. The Instant Provision states that the administrative penalty fee imposed on any person who received goods from people related to election is uniformly 'the amount 50 times worth the received money or the value of food, goods' with no possibility of reduction. However, in case of 'an action which received goods, food, books, travel etc., and convenient transportation by violating the regulations prohibiting donation which is subject to administrative penalty fee, there can be a big difference as to the level of violation according to the motivation and types of the violation, the context and the method of donation, the relationship between the donator and the violator, the circumstances afterwards etc. However, imposing administrative penalty fees that are uniformly decided just by the standards of the donated goods without considering specific and individual situations cannot be restrictions that correspond to levels of responsibility for specific violations.

B. Moreover, since the amount of administrative penalty fee imposed by such uniform standard is '50 times' the received money or the value of food, goods, the difference in administrative penalty fee may be large depending on the value of goods. In this regard, an administrative penalty fee of 50 times worth the received goods for average citizens cannot be perceived as a light regulation. Especially, the administrative penalty fee regulated by the Instant Provision is imposed on light matters such as when the received money or goods are less than 1,000,000 won in order to eradicate small amounts of donation. On the other hand, when the received money or goods exceeds 1,000,000 won, a criminal fine less than 5,000,000 won is imposed according to Article 257 (2) of the Public Official Election Act. Although the criminal fine is less than 5,000,000 won when the good received exceeds 1,000,000 won, when the violation is lighter such as when the good received is worth 1,000,000 won, the fact that the administrative penalty fee would be 50,000,000 won uniformly according to the Instant Provision makes the penalty regulation excessively heavy. Moreover, the goal of fair election by eradicating small illegal donations can be accomplished by imposing administrative penalty 'less than 50 times', not '50 times' etc., or other mitigated legal methods.

C. Therefore, not only is the standard and the amount of penalty fee imposed on the violated act standardized disproportionately to the principle of liability but they are excessively heavy that they deviate from the amount needed to accomplish the purpose of the act. Therefore, since the Instant Provision violates the rule against excessiveness, it should be decided as unconstitutional. However, in consideration of the fact that the unconstitutionality is not the fee regulation itself but its standard and the amount, the fact that there could be confusion in enforcing the law and problems of fairness due to the absence of legal regulations in case the Instant Provision loses its effect from the decision of its unconstitutionality. Since the duty mediating unconstitutional provisions into constitutional provisions is included in legislative discretion of the legislators, we declare that the Instant Provision is incompatible with the Constitution. Until the legislators eliminate the unconstitutionality by revision the law, the Instant Provision will be suspended.

2. Dissenting Opinion of Two Justices

There is a strong legislative need to regulate acts of providing money, goods or food by candidates to the voters in Korea's election culture. The Instant Provision that imposes an administrative penalty fee of 50 times the value of the received goods in the case where there is a violation is a quick and effective regulation method that brings the voter's attention. Moreover, the 50 times fee established by the Instant Provision is only applied to received goods that are less than 1,000,000 won. Due to the enforcement of the Administrative Penalty Fee Act, in case a violation activity was not done by intention or mistake or in case there was a mistake of illegality with justified, no fee shall be imposed. As such, the unbalance between the violating act and the responsibility has been supplemented. In this regard, the Instant Provision cannot be seen to have deviated from the scope of legislative discretion and therefore, does not violate the Constitution.

7. *Judgment of Unconstitutionality on Municipal Ordinance regarding Electroal Districts and Seats of City and Gun Council of Chungcheongnam-Do*

[21-1(A) KCCR 592, 2006Hun-Ma240 · 371 (consolidated), March 26, 2009]

In this case, the Constitutional Court renders a decision of incompatiblity with the Constitution on the 'Municipal Ordinance regarding Electroal Districts and Seats of City and Gun Council of Chungcheongnam-Do (revised by ordinance No. 3174 on December 30, 2005), Article 3, Appendix 2. The Court finds that the Electroal Disctrict Ga of Hongsung-Gun and the Electroal District Ga of Yesan-Gun are out of sixty percent variation limit and, therefore, all the Electroal districts of Hongsung-Gun and Yesan-Gun are unconstitutional. Incompatibility with the Constitution allows the lawmakers to legislate a new municipal ordinance before December 31, 2009. Until then, the existing ordinance will be valid. However, the violation of right to equality and voting rights does not occur in Electroal District Na of Dangjin-Gun because the variation is within 60 percent there.

Background of the Case

Complainants are registered voters in the election for the 4th City council and Gun council of Chungcheongnam-Do scheduled on May 31, 2006. They are registered to vote in Dangjin-Gun Na, Hongsung-Gun Ga, Yesan-Gun Ga listed in the Appendix 2 of 'Municipal Ordinance regarding Electroal Districts and Seats of City and Gun Council of Chungcheongnam-Do (revised by ordinance No. 3174 on December 30, 2005).

Complainants filed this case of constitutional complaints claiming that there are substantial disparities in population among different electroal districts which were approved by the above mentioned Appendix 2. They further claim that new electroal districts violate their constitutionally guaranteed voting rights and the right to equality by creating vote-value disparity.

7. Judgment of Unconstitutionality on Municipal Ordinance regarding Electroal Districts and Seats of City and Gun Council of Chungcheongnam-Do

Provisions at Issue

Municipal Ordinance regarding Electroal Districts and Seats of City and Gun Council of Chungcheongnam-Do (revised by ordinance No. 3174 on December 30, 2005).

Article 3 (Name, Districts Line and Apportionment of Electroal Districts and Seats of City and Gun Council) Name, Districts Line and Apportionment of Electroal Districts and Seats of City and Gun Council prescribed in Article 26 Section 2 of the Public Office Election Act is Appendix2 below.

[Appendix 2]

	Name	Apportion ment	Districts Line
Dangjin-Gun	Dangjin-Gun Ga	3	Dangjin-Eup, Chungmi-Myun, Adihoji-Myun
	Dangjin-Gun Na	2	Godae-Myun, Seokmun-Myun, Songsan-Myun
	Dangjin-Gun Da	3	Hapduk-Eup, Myuncheon-Myun, Sunsung-Myun, Woogang-Myun
	Dangjin-Gun Ra	2	Shinpyun-Myun, Songak-Myun
Hongsung-Gun	Hongsung-Gun Ga	2	Hongsung-Eup
	Hongsung-Gun Na	3	Hongbuk-Myun, Keuma, Myun, Galsan-Myun, Guhang-Myun
	Hongsung-Gun Da	2	Kwangcheon-Eup, Hongdong-Myun, Changok-Myun

	Name	Apportion ment	Districts Line
	Hongsung-Gun Ra	2	Eunha-Myun, Geolsung-Myun, Seobu-Myun
Yesan-Gun	Yesan-Gun Ga	2	Yesan-Eup
	Yesan-Gun Na	2	Daesul-Myun, Shinyang-Myun, Kwangsi-Myun
	Yesan-Gun Da	2	Daeheung-Myun, Eungbong-Myun, Shinam-Myun, Ohga-Myun
	Yesan-Gun Ra	3	Sapkyo-Eup, Deoksan-Myun, Bongsan-Myun, Goduck-Myun

Summary of the Decision

The Constitutional Court, in a unanimous vote, holds that the issues on Hongsung-Gun council and Yesan-Gun council are incompatible with the Constitution and set a time limit for the application of the order until December 31, 2009.

1. Court opinion

A. The electroal districts of City, Gun and other local councils should be reasonably made under the principle of the equal vote-value by considering the following three factors: 1) the principle of population proportion; 2) regional representation of the council members; and 3) gross disparity of population between city and the rural area due to the concentration of population in city.

A specific electroal district's vote-value is measured by comparing its seat-to-population ratio with an average vote-value. Same as City and Do councils, constitutionally permitted variation limit for each

electroal district of a Gun is plus-or-minus sixty (60) percent from the average seat-to-population ratio of a Gun.

B. Petitioner, AAA, BBB, CCC reside at electroal Disctrict Ga of Hongsung-Gun and electroal District Ga of Yesan-Gun. These two electroal districts' seat-to-population ratio is out of sixty percent variation limit and beyond the constitutionally allowed scope of discretion for local governments to make electroal districts. This variation violates the right to equality and voting rights of complainants. However, the violation does not occur in electroal District Na of Dangjin-Gun where petitioner DDD resides because the variation is within 60 percent limit there.

C. Further, due to the inseparability of electroal districts, every electroal district of Hongsung-Gun and Yesan-Gun are found unconstitutional. However, this Court renders a modified decision of Incompatibiity with the Constitution which allows the legislators to revise a new municipal ordinance before December 31, 2009. Until then, the existing ordinance is valid.

2. Two Justices' concurring opinion

The best way to measure a vote-value is to compare the population of the biggest electroal district and the smallest electroal district of a Gun. It is the simplest way and satisfies the public benefit. If the population disparity of the above mentioned two electroal districts is more than 2 to 1, it shows gross inequality. Hongsung-Gun and Yesan-Gun has two districts with more than 2 to 1 of population disparity. These disparities are unconstitutional and yet they are found to be incompatible with the Constitution in order to avoid the disorder from legal vacuum. Dangjin Gun's case is different because it shows less than 200% of population disparity between two districts and therefore should be dismissed.

3. One Justice's concurring opinion

It satisfies the goal of subjective remedy through constitutional

adjudication to simply compare the population of compalinants' electroal district and the smallest voting district of a Gun. The standard should be stricter than that for regional local government and, therefore, a 3 to 1 standard is ideal. In Hongsung-Gun's and Yesan-Gun's cases, the population disparity between compalinants' districts and the smallest districts are more than 3 to 1. The majority opinion correctly finds these disparities unconstitutional and I join them with this concurring opinion.

8. Resident Recall against the Head of Local Government Case

[21-1(A) KCCR 592, 2007Hun-Ma843, March 26, 2009]

The Resident Recall Act states that the signatures of 15 or more percentages of voters, regardless of the reason of resident recall against the head of local government, shall suffice the request of the resident recall vote against the head of local government. Also, the authority of the recalled head of local government shall have been suspended from the request of a resident recall vote until the confirmation of the resident recall, and the resident recall shall be confirmed by more than a majority out of one third of voters. In regard of this Act, the Constitutional Court decided the said Act does not infringe on the right to hold public office and equality of the complainant under the rule against excessive restriction.

Background of the Case

The complainant was elected as the Mayor of Hanam City in the election of the head of local government on May 31, 2006. In accordance with the campaign pledge to establish a large-scale crematorium under the sponsorship of Gyeonggi Province to promote the local economy, the complainant submitted a proposal of such crematorium to the Governor of Gyeonggi Province on Aug. 25, 2006, sought the agreement of the council of Hanam City on Oct. 16, 2006, and planned a presentation meeting and public hearing for local residents. However, the proposal could not have been accomplished because of a series of demonstrations against such equipment by local residents.

32,848 citizens of Hanam City, which amount to 31.2 percentages of voters, requested the resident recall vote to the Hanam City Election Commission on Jul. 23, 2007 for the complainant's plan mentioned above was not sufficiently reflecting the public opinion regarding such equipment.

On Jul. 25, 2007, the complainant filed a constitutional complaint, alleging the Resident Recall Act (hereinafter, the "Act") infringed his right to hold public office due to the failure of specification on

reasons of resident recall. The complainant also brought a revocation lawsuit against the Hanam City Election Commission because of its acceptance of the request of the resident recall vote. However, while the appellate review of the lawsuit was pending, the resident recall vote proceeded according to the second request of the resident recall for the same reason. Accordingly, the complainant amended the constitutional complaint to include the provision which suspends the power of the head of local government from when the resident recall vote is notified until when the result of the vote is announced, without limiting the repeated request of resident recall for the identical reason.

Provisions at Issue

Resident Recall Act (enacted by Act No. 7958 on May 24, 2006)

Article 7 (Request for Resident Recall Vote)

① Any person, who falls into Article 3 Section 1 Items 1 and 2, in the residential registration roll or foreigner registration roll as of December 31, the last year("requester for resident recall vote"), may request the vote of resident recall of competent head of local government and member of local council (except the proportional representation members, "local public officer elected") to competent Election Commission with the reason for recall by the signatures of those as follow items.

2. Mayor, Head of County, District Head: More than 15 % of total number of requester for resident recall vote in the competent municipality.

Summary of the Decision

The Constitutional Court unanimously dismissed the complaint, confirming the constitutionality of the provisions of the Act, except the dissenting opinion of four Justices regarding Article 21 Section 1 of the Act which suspends the authority of a recalled officer from the notification of the resident recall vote to the announcement of the result.

1. Court Opinion

A. No Limitation on the Grounds for Resident Recall

Article 7 Section 1 Item b of the Act, which does not limit the grounds of resident recall, has a purpose to make resident recall a political system to pursue responsible politics or administration by unseating a public officer who has committed illegal conducts as well as who is incompetent or corruptible in carrying out a policy.

Legislators have a broad discretion in forming a resident recall system. According to its nature, which takes an issue of confidence as re-election, it is appropriate not to specify grounds for resident recall: It does not have to limit the grounds of recall because of the necessity of a broad regulation over undemocratic and arbitrary drive of policy. It is not easy to specify the grounds of resident recall from the perspective of the broadness of business and legislative techniques, and limiting grounds of resident recall would be accompanied with a judicial review, which would be inappropriate and retard the process. Therefore, not only it is justifiable that the grounds of resident recall are not limited, but also such legislative decision, unlimiting the grounds of resident recall, is not inappropriate within their discretion. Also, it appreciates the balance of equity when the public interests of residents' controlling against public officers and participating into politics are compared with the risk of an abusive resident recall against public officers because the reasons of resident recall are not limited. Therefore, the challenged provision does not violate the right to hold public office under the rule against excessive restriction.

B. Requirement for Resident Recall Request

The part of Article 7 Section 1 Item b of the Act states the signatures of fifteen percentages of residents eligible to resident recall vote suffice the request for resident recall. In setting such requirements of resident recall vote, the broad discretion is granted to the legislature. Besides, the requirements of resident recall votes are not lenient so that recall could be abused, and the provision of resident

recall intends to reflect the public opinion of residents at most, preventing the biased and unjust request. Therefore, the part of resident recall request neither violates the rule against excessive restriction nor infringes on the right to hold public office.

C. Limitation on the Request Period for Resident Recall Vote

There are three legislative purposes to limit the request period of resident recall vote: First, it intends to provide opportunities for elected public officers to promote policies according to his or her conviction at the beginning of his or her term of office; second, it considers the lack of efficacy of the resident recall when the expiration of his or her term of office is approaching; and third, it purposes to prevent the abuse of repeated resident recalls despite the rejection against the resident recall vote. Therefore, the repeated resident recall would be allowed for the second or third times and there are no reasons to be limited, unless residents repeatedly request the recall vote within a certain period despite the rejection against the vote.

Therefore, Article 8 of the Act, setting the request period for a resident recall vote, does not infringe on the right to hold public office although it does not have the provision to prevent the second request of resident recall vote for the same reason.

D. Solicitation Activity for Signatures of Resident Recall Request

Residents are allowed to solicit for the signatures of the resident recall vote, while, the recalled head of local governments is not allowed to solicit not to sign for the resident recall. Because the request of resident recall vote requires a certain number of residents' signatures, the activities of solicitation for signatures should be protected. However, it does not mean that the solicitation for signatures is included into the resident recall vote campaign or such solicitation virtually accomplishes to satisfy the requirements of resident recall vote and to realize the request of resident recall vote. Accordingly, there are few necessities to ensure the public officer, subject to a recall request, the opportunity to protect himself or herself

from the recall even before the request of resident recall. Otherwise, the administrative vacuum would be unreasonably extended. Besides, from the perspective of the entire procedure, the Act provides fair opportunities against the recall for a public officer. The competent election commission allows the recalled officer to vindicate himself or herself, following the request of resident recall (Article 14 of the Act), and the recalled officer can mount a campaign against the recall, after the proposal of the resident recall vote (Article 17, 18 of the Act). Considering these elements collectively, Article 9 of the Act, ensuring residents can solicit for the signatures of a resident recall vote but forbidding the recalled officer to mount a campaign against the resident recall, would not infringe on the complainant's right to hold public office under the rule against excessive restriction.

E. Suspension of authority

Article 21 Section 1 of the Act suspends the authority of the public officer subject to the resident recall vote against him or her from the notification of the resident recall vote to the announcement of the result. Such suspension of the authority of the recalled public officer is an appropriate means to accomplish the purpose of the above provision that strives for the public interests of the regular administration service and fair supervision on the vote. Because the temporary suspension during the above period would not infringe the fundamental substance of the right to hold public office and the period of suspension of authority may be short as 20 or 30 days, the public interests aimed by the instant provision and the right to hold public office subject to a resident recall vote, restricted by the public interest, would not be disproportionate. Therefore, the instant provision would not infringe on the right to hold public office and would not violate the rule against excessive restriction.

The requirements of the suspension of the authority of the public officer subject to the resident recall are lenient compared to the requirements of the suspension of the authority of the public officer, for example, President, who is accused impeachment. However, the two requirements are incomparable in considering the infringement of equality because of the different natures and levels between the two

requirements. Therefore, the alleged infringement of equity of the complainant, comparing with the public officer subject to impeachment, should be rejected.

F. Confirmation Requirements of the Result of a Resident Recall Vote

Article 22 Section 1 of the Act states the resident recall is confirmed by more than a majority out of one third of voters. This requirement, from the objective perspective, would not cause the abuse of resident recall because it would be not easily attainable; rather, its requirement, more than a majority out of one third of voters, is more restrictive than the one of elections in general. The difficulty of the above requirement would be supported by the low turnout of voters in recent local elections and the high possibility of solitary resident recall vote in weekdays, unconnected to other elections. Further, such requirement is within the scope of legislative discretion in nature. Accordingly, the instant provision violates neither the rule against excessive restriction nor the complainant's right to hold public office.

The complainant also alleged the violation of equality, based on the provision that 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 (Article 64 Section 3 of the Constitution). However, because a member of the National Assembly subject to expulsion is not comparable to the head of local governments subject to resident recall, the allegation should be denied.

2. Partial Dissenting Opinion of Four Justices (Unconstitutional)

Article 21 Section 1 of the Act infringes on the right to hold public office of a head of local governments by election and violates the principle of a representative system and the rule against excessive restriction because the challenged provision suspends automatically the authority of the public officer subject to a resident recall vote if a resident recall vote were proposed.

The grounds to propose resident recall are not limited and the requirements to propose resident recall are not restricted. It implies the

great possibility of abusive resident recall for the political purpose if the notice of resident recall vote proposal automatically suspends the authority of the public officer subject to a resident recall vote.

The requirements, compared to the public officer subject to impeachment as stated in the Constitution, would be excessively lenient, being against the principle of equality of the elected public officer of local governments.

The period of authority suspension, which may be not so long, does not justify the suspension of authority: First, the degree of infringement on the basic rights is not insignificant because the suspension of authority could last 90 days at most; and second, the suspension of authority would lack legitimacy if the resident recall is rejected.

An alternative system could prevent the harmful effects of the exercise of authority if it were allowed. Besides, the challenged provision does not balance the public and private interests well: the suspension of power is the most rigorous infringement means against the right to hold public office when the resident recall is proposed; and it is more coincident with the spirit of the constitution and infringes less on complainant's basic rights when the recalled public officer continued his service during the recall process than when the power is suspended but the proposal of resident recall is rejected later.

It would violate the substance of the representative system by ignoring the result of a confirmed election as well as the definite term if the signature of fifteen or more percentages of residents, the requirements of recall proposal, could suspend the power even before the confirmation of resident recall.

9. *Reversion of a Public Auction Deposit to the Nation Coffers Case*

[21-2 KCCR 1, 2007Hun-Ka8, April 30, 2009]

The later part of Article 78 Section 2 of the National Tax Collection Act stated that a deposit to secure the contract shall be reverted to the Nation Coffers if a purchaser, who is authorized to buy the property subject to public auction, fails to pay a purchase price. The Constitutional Court held that the said provision is against the principle of equality, grounded on the comparison to civil execution proceedings where a deposit of application for purchase should be distributed as dividends, and therefore, it is incompatible with the Constitution.

Background of the Case

The movant at the Requesting Court had established the right to collateral security on the property subject to a public auction. The Office of Disposition on Default seized the property subject to a public auction, and requested Korea Asset Management Corporation (hereinafter, "KAMCO") to execute a public auction by proxy when the owner of the instant property defaulted aggregate land tax. However, when the purchaser, who is authorized to buy the property subject to the public auction, failed to pay the rest of the purchase price until the designated time limit after the payment of the contract deposit, KAMCO annulled the decision to sell. KAMCO executed a re-auction, and the successful bidder of the re-auction completed the payment of the purchase price. Afterwards, in allocating the proceeds from a sale, KAMCO distributed the proceeds from a re-auction to expenses, taxes in arrears, and a requesting petitioner, after the payment of the deposit of the first purchaser to the Office of Disposition on Default, according to the later part of Article 78 Section 2 of the National Tax Collection Act that is applicable to proceedings of local taxes in arrears. The movant at the Requesting Court brought an administrative proceeding on October 20, 2005 to

claim the cancellation of the disposition of the distribution of proceeds from a public auction due to the alleged illegality of such disposition, at the same time, and filed a motion to request for the constitutional review of the later part of Article 78 Section 2 of the National Tax Collection Act ("Instant Provision") that stipulates the reversion of the deposit to the Nation Coffers, separating the deposit from dividends. The ordinary court made this request for the adjudication on the constitutionality of the Instant Provision on January 29, 2007.

Provisions at Issue

National Tax Collection Act (revised by Act No. 6805 on December 26, 2002)

Article 78 (Cancellation of Decision to Sell)

(2) Where any decision on sale of attached properties is cancelled under Section 1 Item 1, the deposit shall be returned to the purchaser, and where any decision on sale of attached properties is cancelled under Section 1 Item 2, the deposit shall be reverted to the Nation Coffers.

Summary of the Decision

By an 8 (incompatible with the Constitution) to 1 (partially unconstitutional) vote, the Constitutional Court held the Instant Provision incompatible with the Constitution. The Instant Provision shall be revised by December 31, 2009, and its application shall be suspended until its revision for the following reasons:

1. Court Opinion

A. Violation of the Principle of Equality

A defaulter or security right holder in public auction proceedings of the National Tax Collection Act is unfavorably treated by the law with regard to the scope of the expiration of an obligation and dividends, without any option in a proceeding, compared to a debtor

or security right holder in public auction proceedings the Civil Execution Act.

Nevertheless, the structure of the relavant provisions and operation system of the public auction of the National Tax Collection Act are equivalent, in nature, to those of the deposit for application for purchase in the Civil Execution Act. Under the National Tax Collection Act, the characteristic of a public auction is a private sale contract between a defaulter and purchaser, but executed by the Office of Disposition on Default as proxy, and the characteristic of a deposit is a penalty for breach of contract that legalizes the condition of sales.

The rapidity of proceedings, intended by a system of a deposit, does not relate to where the deposit should be finally reverted. A deposit enforces a purchaser to pay the price under the condition that a deposit may not be returned if defaulted. Further, the decrease of dividends by reverting of deposits to the Nation Coffers may obstruct the fair execution of tax credits that commence the proceeding. On the other hand, it does not correspond with the legal characteristic of the National Tax Collection Act, which is a procedure law of compulsory collection in administration, to ordain that relative credits should not be satisfied with a resource from a third party by differentiating a system that is equivalent to a penalty for breach of contract. Besides, to grant the self-execution right for tax credits to the State does not imply that the State may acquire extra benefits in addition to tax credits and proceeding expenses in the process of the liquidation of properties subject to public auction.

The Instant Provision discriminates unreasonably between a defaulter or security right holder in public auction proceedings of the National Tax Collection Act and a debtor or security right holder in public auction proceedings of the Civil Execution Act, in that it dissociates the deposit of the National Tax Collection Act from the deposit for application for purchase, while the both share the common nature. Therefore, the Instant Provision violates the principle of equality of the Constitution.

B. Decision of Incompatibility with the Constitution

Article 80 Section 1 of the National Tax Collection Act regarding dividends does not provide pertinent provisions, despite it is within the discretion of the Legislature to decide whether the contract deposit that may be not returned to a purchaser under some conditions, such as a penalty for breach of contract, should be devoted to tax credits or distributed in accordance with the priority of credits with regard to security right holders. Therefore, the Instant Provision shall be declared as incompatible with the Constitution, and its application shall be suspended in order to prevent the further reversion of deposit to the Nation Coffers.

2. Partial Dissenting Opinion of One Justice (Partially Unconstitutional)

A deposit that would be forfeited in the case of default of a purchaser should be regarded as proceeds from a sale, prescribed in Article 80 Section 1 Item 3 of the National Tax Collection Act. Accordingly, the part of the 'nationalization' of the Instant Provision, stipulating deposit shall be reverted to the Nation Coffers, violates the Constitution in that it infringes unreasonably the right to property of the person who possess a property subject to a public auction. However, the part of the 'forfeiture', stipulating deposit shall not be returned to a purchaser, does not violate the Constitution.

10. Prohibition on Registering Trademarks Identical with or Similar to a Nullified Trademark Case

[21-1(B) KCCR 91, 2006Hun-Ba113· 114, April 30, 2009]

In this case, the Constitutional Court held that a provision of the Trademark Act which prohibits people from registering trademarks identical with or similar to an invalidated trademark previously registered by another person violates the Constitution on grounds that it infringes their property rights and the freedom of occupation.

Background of the Case

The petitioner, a producer of electric beds and mattress pads, filed a trademark application and had his trademark "Jang-Soo" registered in 1987. In 1998, Park ○-ja successfully applied to register a trademark similar to "Jang-Soo". Then, the petitioner registered another trademark "Jang-Soo ○○" in 2004 and filed a lawsuit seeking nullification of Park ○-ja's trademark, arguing that it was similar to his registered trademark "Jang-Soo", in which case the court decided to nullify Park's registration on July 23, 2004. Meanwhile, an interested person Lee ○-ahn also filed a complaint in 2006 to seek nullification of the petitioner's registered trademark "Jang-Soo ○○" on grounds that it was similar to Park's nullified trademark.

The Trademark Act bans the registration of trademarks which are identical with or similar to another person's registered trademark applied for previously and are to be used on goods identical with or similar to the designated goods. Further, the provision under review in this case (hereinafter, the "Instant Provision") provides that a trademark is unregistrable even when its registration is applied for after the existing identical or similar trademark is invalidated. Pursuant to the Instant Provision, in the case filed by Lee ○-ahn against the petitioner of this case, the Korean Intellectual Property Tribunal nullified the petitioner's trademark "Jang-Soo ○○". In response, the petitioner sought cancellation of the decision invalidating his trademark, filing a motion to request for the constitutional review of

the Instant Provision, arguing that it infringed on his property rights, etc. As the motion was denied, however, he filed this constitutional complaint on December 27, 2006.

Provision at Issue

Trademark Act (revised by Act No. 5355 on August 22, 1997)
Article 7 (Unregistrable Trademark)
(3) Section 1 Items 7 and 8 shall apply to a trademark (including the case of other person's trademark is nullified according to Article 71 (3)) which falls thereunder at the time of the application for trademark registration. (*below is intentionally omitted*)

Summary of the Decision

In a vote of 8 (unconstitutional) to 1 (constitutional), the Constitutional Court held that the Instant Provision violated the Constitution according to the following reasons.

1. Court Opinion

A. Restricted basic rights and standard of review

The trademark right, an exclusive right to use the registered trademark (Article 50, Trademark Act), is a property right protected under the Constitution, and regulating the sale of goods under the trademark desired by producers and sellers, such as the petitioner, restricts their freedom of occupation.

Indeed, legislators are entitled to extensive legislative discretion over the requirements and procedures of trademark registration. Nevertheless, if the measure employed by legislators to protect the trademark right is extremely unreasonable and exceeds the legislative limitations by infringing on people's property rights, etc., such legislative action violates the Constitution.

B. Application for and Registration of Trademarks

The Korean Intellectual Property Office has, irrespective of the Provision, the authority to reject the registration of a trademark if, at the time of application of its registration, there is another identical or similar trademark already registered. Even if the existing registered trademark is invalidated by a decision of nullification, consumers will still have the memory and credit of the trademark for a certain period of time, in which case immediate permission of other similar or identical trademarks may cause misunderstanding or confusion among consumers. However, the Trademark Act resolves the problem by providing that registration of identical or similar trademarks may be rejected if one year has not elapsed from the date of extinguishment of the existing trademark right and by limiting the registrable trademarks to those not likely to cause consumers' misunderstanding and confusion for not having been used for over one year from the extinguishment of the trademark right. Therefore, applying the Instant Provision at time of application for trademark registration barely serves the legislative purpose of preventing consumers' misunderstanding and confusion by regulating the coexistence of identical or similar trademarks.

C. Decision on Nullification of Registration

The Instant Provision makes it possible to nullify a trademark identical with or similar to another person's existing trademark even if the decision to invalidate the latter is finalized. In this case, because an identical or similar trademark already in place when the decision to nullify the existing registered trademark became final and conclusive, newly nullifying the identical or similar trademark registered later on does little to serve the legislative purpose of preventing consumers' misunderstanding and confusion. Rather, the Instant Provision contradicts the "retroactive effect" of the trademark right (Article 71 Section 3, Trademark Act) and causes confusion in the overall system of the Trademark Act. Moreover, when the person who registered a trademark similar to the existing one has his/hers nullified even after the pre-existing registered trademark has been conclusively invalidated, this results in an unjustified violation of the freedom of occupation

based on property rights-trademark rights and the relevant trademark. It is to be noted that it is possible, pursuant to the Instant Provision, to register a trademark identical with or similar to an existing registered trademark that has been conclusively nullified if one year has elapsed since the date of extinguishment of the existing trademark right, but this results in forcing legitimate trademark holders to repeat useless procedures - reapplication for trademark registration.

D. In conclusion, the Instant Provision hardly serves the legislative purpose of preventing consumers' misunderstanding and confusion, and, without reasonable cause, violates the property rights and occupational freedom of innocent, legitimate trademark holders who registered a trademark identical with or similar to the existing, but nullified trademark.

2. Dissenting Opinion of One Justice

Once the decision to nullify an existing registered trademark is finalized, the trademark registration thereof is retroactively nullified. However, because it is an objective fact that the existing registered trademark was in place until the decision of nullification became final, it is required to put aside the general principle of retroactive effect and allow exceptions in order to prevent consumers' misunderstanding or confusion over who the producer is. In addition, once the retroactive effect of the nullification decision is indefinitely acknowledged as mentioned in the Court Opinion, relational issues in trademark registration may become unstable for a long term and unreasonable circumstances may occur in which the future of the later registered trademark will totally vary by which comes before between the following: at which point the review of whether to register trademarks identical or similar to an existing one takes place, when the decision in an appeal to rejection of registration is handed down, and when the decision to nullify the existing registered trademark is finalized. Therefore, the Provision which, contrary to the principle of the retroactive effect in nullification decisions, permits the pre-existing trademark that was nullified to serve as a valid standard for reviewing whether to authorize registration is reasonable and does not overstep

the boundary of legislative discretion. For this reason, the Provision does not infringe on the petitioner's property rights and the freedom of occupation.

11. The Provision Restricting Contribution in Public Official Election Act

[21-1(B) KCCR 108, 2007Hun-Ba29 · 86 (consolidated), April 30, 2009]

In this case, Constitutional Court held constitutional the provision at issue of Public Office Election Act ("POEA") that the candidates shall not make a contribution to those within a constituency and those having connection with the electorate even if they reside out of a constituency because the provision does not violate the rule of clarity in nulla poena sine lege. Further, Constitutional Court upheld the provision prohibiting contribution at all times without setting a time period of prohibition is not unconstitutional because it does not infringe on the basic rights such as the right to the pursuit of happiness in violation of the rule of proportionality.

Background of the Case

1. 2007Hun-Ba29

Petitioner Lee ○-○ ("LEE") was elected as the council member of Gyungsangnam-Do at the 2nd Electoral District of Kosung in the nationwide local government election held on May 31, 2006. The article 113 (1) of POEA stipulates that a candidate shall not make a contribution to those having connections with voters even if the recipients reside out of a constituency. Yet, LEE was indicted for making the prohibited contribution when Lee gave 2,000,000 won to Hahn ○-○ ("HAHN"), Secretary of General of Kosung-Gun Athlete Association under the pretense of HAHN's living expenses. At the Pusan High Court, Petitioner, LEE was fined 1,500,000 won which could invalidate LEE's election. Petitioner appealed to the Supreme Court and, subsequently, filed a motion to request for a constitutional review of the provision at issue. After the Supreme Court denied the appeal and the motion, petitioner filed the instant constitutional complaint.

2. 2007Hun-Ba86

Petitioner Kim ○-○ is the spouse of Kim △-△ who was elected as President of Changheung-Gun in the nationwide local government election held on May 31, 2006. Yet, Petitioner was indicted for violation of POEA, Article 113 (1) based on the allegation that Petitioner made a prohibited contribution of a 100,000,000 won check to the pastor of the Changheung Central Church under the pretense of a tithe in January 2006. Petitioner was sentenced to six months in jail with a stay of execution for two years at the Kwangju High Court. Petitioner appealed to the Supreme Court and filed a motion to request for a constitutional review of the provision at issue. After the Supreme Court denied the appeal and the motion, petitioner filed the instant constitutional complaint.

Provisions at Issue

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

Article 113 (Restriction on Contribution by Candidates, etc.)

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

Article 257 (Violation of Prohibition and Restriction on Contribution)

Any person who falls under any of following items shall be punished by imprisonment for not more than five years or by a fine not exceeding ten million won

1. A person who violates Article 113, 114 (1) or 115; and

Summary of the Opinion

The Constitutional Court held that the provision at issue is not

unconstitutional in a 5 to 4 vote.

1. Court Opinion

A. Whether the language, 'those having connection with', violates the rule of clarity.

It is necessary to block out the influence if contribution to those having connection with electorate creates the influences on the decisions of the electorate even if the recipients of the contribution are not electorate. The provision at issue describes this certain relatedness as "having connection with". Although the terminology, "having connection with" is an abstract expression, people with common sense can easily understand the legislative intent of the provision at issue by considering the legislative purpose of prohibiting contribution, the relationship with other provisions, and the technical limitation in legislating.

Also, during the process of the application of the provision at issue, the risk of inconsistent interpretation is deemed little owing to the subsidiary interpretation by judge. For this reason, the provision at issue does not fall into the case of the arbitrary interpretation and enforcement of Authority, and, therefore, it does not violate the rule of clarity in nulla poena sine lege.

B. Whether the language, 'a person intending to become a candidate', - who belongs to those not allowed to make a contribution, - violates the rule of clarity

Whether one belongs to a group subjected to the restriction of making contribution prescribed in Article 113 (1) of POEA is determined not only by one's subjective intent but also by objective signs which cast one's intent to become a candidate based on the facts such as one's status, contacted people and behavior.

In determining whether one falls into the people intending to become candidates, it is questioned which election should be the basis of the determination among many different elections including the present one, the future one and concurrent multiple ones. To solve

this question, we should determine a candidate's intent with objective indicator on the basis of the present election. Therefore, the language, "a person intending to become a candidate" does not violate the rule of clarity.

C. whether restricting contribution at all times infringes on the right to personality, right to equality, right to pursuit of happiness and the right to hold public office in violation of the rule against excessive restriction.

The legislative purpose of the contested provision restricting contribution is to guarantee the fairness of election by punishing any campaign work which distorts the free will of the electorate with unjustified financial interest. Thus, the legitimacy of the legislative purpose and the appropriateness of means is acknowledged. Although the provision at issue always restricts contributions, the range of the prohibited contribution is confined by the Article 112. Further, the National Election Commission Rule may additionally prescribe the list of non-prohibited contributions. Furthermore, even though a contribution does not fall into those non-prohibited acts such as the regular activities of a political party, activity ex officio, or customary act as defined in Article 112 (2), it can be justified as a kind of customary ex officio action not contradicting social customs and rules if it is one of normal life styles within the boundary of a historically created social order. (the Supreme Court of Korea, 2007. 6. 29. declared 2007do3211). Upon this review, we find the rule of the least restrictiveness is not violated.

Also, if fairness of election is destroyed, people's will on the choice of candidate can be distorted, and, further representative democracy itself can be threatened. Accordingly, in order to safeguard the fairness of election and democracy, the restriction of the basic right within the scope of non- infringement of essential elements can be allowed as it satisfies the balance of different legal interests.

Therefore, the provision at issue does not infringe the right to personality, right to equality, right to pursuit of happiness and the right to hold public office in violation of the rule against excessive restriction.

2. Dissenting Opinion of Four Justices

Since the provision at issue is the regulation on the criminal punishment and the removal of public office, it should be prescribed with clarity. The abstract expression, 'connection with' is not appropriate to be an element for criminal punishment, and is likely interpreted and applied arbitrarily. Also, the language, "intending to become a candidate" violates the rule of clarity in the Constitution because it does not clearly define the based election among many different elections such as the current one and the future ones including the one after the next.

Furthermore, the provision at issue prescribes 'those who are not allowed to make a contribution' broadly enough to include "a person intending to become a candidate". However, it neither questions the relevance between the contribution and the election nor sets a time period of restriction. In result, it prevents people from making a contribution to person or institutions in connection even when a scheduled election is far away and a person has not decided to be a candidate. In this regard, the provision at issue infringes the right to pursuit of happiness in violation of the rule against the excessive restriction.

12. Compulsory Allocation of High School Student Case

[21-1(B) KCCR 185, 2005Hun-Ma514, April 30, 2009]

In this case, the Constitutional Court decided that the provision of the Enforcement Decree of the Elementary and Secondary Education Act does not infringe on the basic right of the complaint who is a parent.

Background of the Case

Complainant whose son is a high school student and whose daughter is a middle school student filed this constitutional complaint on May 23, 2005, arguing that Article 84 of the Enforcement Decree of the Elementary and Secondary Education Act (hereinafter, the 'Instant Provision') violates the Constitution. The Instant Provision stipulates that new students at day-time sessions of general high schools in an area where the entrance screening is conducted by the Superintendent of the Office of Education (meaning an area where the levels of high schools are equalized) shall be allocated to each high school by lottery conducted by the Superintendent of the Office of Education. Regarding this, the complainant maintained that the Instant Provision deprived his children of an opportunity to choose schools where they desire to go to, while randomly allocating them to schools that have specific philosophy or religious education programs with which they do not agree, thereby infringing on parents' right to choose school for their own child, right to educate child based on their religion, and right to pursue happiness.

Provisions at Issue

Enforcement Decree of the Elementary and Secondary Education Act

Article 84 (Recruiting new students and allocation of general school) New students at day-time sessions of general high schools in an area prescribed in the Ordinance of the Ministry of Education, Science and Technology by the Article 77 Section 2 shall be allocated to each high school by lottery, provided students who had applied may be

allocated to the school on the application in the event of applicants applied to two more schools according to the Article 81 Section 5.

Summary of the Decision

In a vote of 5 to 4, the Constitutional Court held constitutional Article 84 of the Enforcement Decree of the Elementary and Secondary Education Act. The summary of the decision is as follows:

Although not expressly stipulated in the Constitution, the parents' right to educate children is one of the important basic rights derived from Article 36, Section 1 of the Constitution which protects marriage and family life and Article 37, Section 1 of the Constitution. In relation to school education, this right includes parents' right to make a choice for children's educational course or parents' right to choose schools for the children.

Article 31 of the Constitution endows a broad formative right to the state regarding fundamental matters pertaining to the school education such as school system, administration, types of school and contents and method of class. The purpose of the Instant Provision is to normalize middle school education by controlling extreme competition in high school entrance examination and to provide equal opportunity for high school education by eradicating school hierarchy and minimizing regional disparity in education, and this purpose is legitimate. And the entrance screening procedures conducted by the Superintendent of the Office of Education and the allocation method of lottery selection system according to school groups and districts, as opposed to the competitive selection process conducted by each school, are proper means to achieve the legislative purpose.

When it comes to the allocation method by lottery conducted by the Superintendent of the Office of Education, the most reasonable and commonly used method is to allocate students to schools in their neighborhood, taking into consideration of the distance and distribution of schools in a certain school district. And the Instant Provision provides various supplementary measures such as allowing multiple applications or conducting lottery selection only among those who have already filed applications. Therefore, it is hard to assert that the

Instant Provision excessively restricts the parents' right to choose schools based on one's place of residence. Meanwhile, the guarantee of the right to choose a 'private' school is the issue to be put on the political agenda after the educational infrastructure is sufficiently settled down. Considering that our country is moving toward guaranteeing the right to choose a private school as the number of special purpose high schools, independent private high schools and autonomous high schools is increasing; that most cities/provinces limitedly allow the right to choose or not choose a religious school by conducting lottery selection only among those who have already filed applications; and that it is mandatory for a school which has religion class as regular course of education to provide alternative class, it cannot be said that the parents' right to choose a 'private' school or the right to choose a school for religious education are excessively limited by the Instant Provision.

Article 47, Section 2 of the Elementary and Secondary Education Act is the legal basis of the Instant Provision as it should be considered that the high school entrance screening method and process, in an area where the levels of high schools are equalized, are decided by the Ordinance of the Ministry of Education and Science, taking into consideration of the balance between demand of students and supply of high schools and the opinions of the local residents and the Office of Education. Further, given the fact that the Instant Provision is enacted to make it possible for the Superintendent of the Office of Education to control the demand of students and supply of high schools and effectively utilize educational facilities, taking into consideration of the balance between demand of students and supply of high schools and the opinions of the local residents and the Office of Education, it is consistent with the purpose of the delegated legislation.

Dissenting Opinion of Three Justices

The system of the 'high school entrance processes by lottery', which is the very basic and fundamental element pertaining to school education system and its management, should be directly controlled by the National Assembly through enacting related statute pursuant to

Article 31, Section 6 of the Constitution, since it restricts the parents' right to choose school for their children. Nevertheless, Article 47, Section 2 of the Elementary and Secondary Education Act delegates this authority to the Instant Provision, which is administrative legislation, without providing specific conditions or guideline, thereby violating the Constitution. Consequently, the Instant Provision, which stipulates the system of 'high school entrance processes by lottery' pursuant to the unconstitutional delegation by the aforementioned provision of the Elementary and Secondary Education Act, runs afoul of the Constitution as it restricts the parents' right to choose school for their children in violation of the constitutional principle of parliamentary reservation.

Dissenting Opinion of One Justice

The portion of the Instant Provision which does not give students a chance to choose and apply for high school to attend should be regarded violating Article 31, Section 1 and Article 37, Section 2 of the Constitution because it intrinsically limits the students' freedom to choose school according to their aptitude and ability without proper ground and thus infringes on the parents' right to educate their children.

13. Competence Dispute over Inspection of Autonomous Affairs of Local Government Case

[21-1(B) KCCR 418, 2006Hun-Ra6, May 28, 2009]

In this case, Seoul City, the plaintiff, filed a petition for competence dispute adjudication to the Constitutional Court, arguing that the joint inspection on the autonomous affairs of the plaintiff, conducted by the respondents including the Minister of Public Administration and Security from September 9 to 29, 2006, infringed on the plaintiff's right to local autonomy. At this, the Constitutional Court ruled in favor of the plaintiff on the ground that the aforementioned joint inspection failed to fulfill the requirement for conducting inspection prescribed in the proviso of Article 158 of the former Local Autonomy Act (hereinafter, the "LAA"), thereby violating the plaintiff's self-governing right.

Background of the Case

The Minister of Public Administration and Security, the respondent, gave notice to Seoul City, the plaintiff, about joint inspection by central government agencies on the city's autonomous affairs and conducted the joint inspection from September 14 to September 29, 2009. Regarding the inspection on the autonomous affairs of a local government, Article 158 of the LAA states that "the Minister of Government Administration and Home Affairs or Mayor/ Do governor may receive a report on the autonomous affairs of a local government, or inspect its documents, books or accounts. In this case, the inspection shall be made only in respect of matters which are in violation of Acts and subordinate statutes".

The plaintiff filed this competence dispute adjudication to the Constitutional Court, arguing that the preemptive, blanket joint inspection conducted by the respondent even when there was neither any proof nor reasonable doubt about the violation of Acts and subordinate statutes regarding the autonomous affairs subject to the joint inspection was in violation of the proviso of Article 158 of the

LAA and infringed the self governing authority of the plaintiff such as the right to autonomous administration and finance endowed by the Constitution and the LAA.

Subject Matter of Review

Subject matter of this case is whether the joint inspection over the plaintiff's autonomous affairs by the respondent from September 14 to September 29, 2009 infringes on the plaintiff's right to local autonomy guaranteed by the Constitution and LAA.

Summary of the Decision

In a 7 to 2 vote, the Constitutional Court held that the general and blanket inspection on the autonomous affairs of a local government, conducted by the head of a central administrative agency without any proof of violation of statute, infringes on the self-governing authority of the local government guaranteed by the Constitution and the LAA. The summary of the Court opinion and dissenting opinion are respectively stated in the following paragraphs.

1. Court Opinion

A. Considering all the following facts such as 1) the constitutional revision which deleted Article 10 of the Addenda of the Constitution that deferred starting of the local government system; 2) the background of enacting Article 158 of the LAA that curtails the scope of inspection conducted by a central administrative agency on the autonomous affairs of a local government by adding the proviso of 'violation of Acts and subordinate statutes' to the original provision regarding inspection on the autonomous affairs of a local government; 3) the purpose of the LAA which changed the relationship between a central administrative agency and a local government from supervisory, hierarchical one to complementary, supportive one; 4) the fact that the exercise of supervisory power by a central administrative agency is limitedly conditioned to the violation of concrete statutes by a local

government; and 5) the fact that there is no additional need for inspection by another central administrative agency because the Board of Audit and Inspection's inspection to see if the local government's affairs conform to the purpose is also considered as exercising the state's power to conduct inspection on the autonomous affairs of a local government, the inspection power of a central administrative agency on the autonomous affairs of a local government stipulated in the proviso of Article 158 of the LAA should not be considered preemptive, general and comprehensive power but be considered limited power in its subject matter and scope.

B. In order for a central administrative agency to conduct inspection under the proviso of Article 158 of former Local Autonomy Act, there should be proof or a reasonable doubt that a specific statutory provision is violated in relation to the autonomous affairs of the local government, and the matters subject to inspection should be specifically identified. Therefore, a general inspection preemptively and comprehensively conducted, for example, twice a year in a designated time period, an inspection conducted without identifying specific statutory violation or an inspection conducted to check out whether there is any statutory violation should not be allowed.

C. The subject matter of inspection notified by the Minister of Public Administration and Security actually covers almost all the autonomous affairs of Seoul City and therefore, we can say that the notification failed to specifically designate the matters to be inspected. And, when the Minister of Public Administration and Security notified the plan for joint inspection to the city, it did not identify which specific statutory provision was violated and what kind of local government affairs had been conducted in violation of such provision. As such, the joint inspection conducted by the respondents including the Minister of Public Administration and Security failed to fulfill the requirement stipulated in the proviso of Article 158 of the former Local Autonomy Act, thereby violating the self governing authority of Seoul City endowed by the Constitution and the LAA.

2. Dissenting Opinion of Two Justices

A. Considering the background of its enactment under the heading of 'inspection of the autonomous affairs of a local government', and its relationship with Article 155, Section 1 of the LAA which allows the head of a central administrative agency or Mayor/Do governor to request the local government to present materials for advising, recommending or guiding on affairs of the local government, Article 158 of the LAA should be interpreted that 'the Minister of Public Administration and Security or Mayor/Do governor may get report from the local government subject to inspection or ask it to submit related materials in order to find out any violation of statutory provision, but if no possibility of such statutory violation is shown during the inspection, then the inspection should be immediately stopped and necessary measures should be taken only for the inspected violation, if any'. Also, it is absurd to consider that Article 158 of the LAA sets a requirement to initiate inspection.

B. There are also other legal measures to prevent double inspection on a local government, such as Article 26 and Article 26-2 of the Regulation for Administrative Audit and Inspection which is a Presidential Decree, Article 13-4, Section 1, Item 3 of the former Local Autonomy Act and Article 30-2, Section 2 of the Board of Audit and Inspection Act. Moreover, as reviewing the scope of inspection provided in the notice of the joint inspection and the attached list of required materials for the inspection distributed to Seoul City, we cannot assert that the scope of the joint inspection is not specified or the inspection virtually amounts to an inspection to see if the local government's affairs conform to the purpose.

14. Ban on Internet Distribution of Obscene Materials Case

[21-1(B) KCCR 545, 2006Hun-Ba109, 2007Hun-Ba49 · 57 · 83 · 129 (consolidated), May 28, 2009]

In this case, the Constitutional Court decided that the contested provision which imposes criminal punishment on those who distribute and sell obscene materials over the information and communication network, does not violate the Constitution for the reason that "obscene" expressions are part of freedom of speech and press to be protected by the Constitution and the rule of clarity and the rule against excessive restriction cannot be found to be violated. Three Justices, however, agreed to this conclusion but based on different reason. Furthermore, in a 7 to 2 vote, the Court dismissed the complaints of part of petitioners who were acquitted during their trials respectively for the reason that it cannot be ascertained the relevance of the contested provision to the underlying cases.

Background of the Case

The petitioners were prosecuted and being tried for violating Article 65 Section 1 Item 2 (hereinafter, "Instant Provision") of the former Act on Promotion of Information and Communications Network Utilization and Information Protection, Etc. (hereinafter, the "former Information and Communications Network Act") by distributing and openly displaying obscene materials on internet portals and mobile communication services. During their trials were pending, petitioners filed motions for their court's request for the constitutional review of the Instant Provision. As the motions were denied, however, the petitioners respectively filed these constitutional complaints with the Constitutional Court, arguing that the Instant Provision violates the rule of clarity and rule against excessive restriction, etc. from November 15. 2006. Meanwhile, some of the petitioners were ruled not guilty of violating the Instant Provision at their ordinary courts respectively.

Provision at issue

Former Act on Promotion of Information and Communications Network Utilization and Information Protection, Etc.(revised by Act No. 6360 Jan. 16. 2001 but before revised by Act No. 8289 Jan. 26. 2007)

Article 65 (Punishment) Section 1 Item 2

Any person who has distributed, sold, rented, or openly displayed lascivious codes, letters, sounds, visuals, or films through information and communications network shall be punished by imprisonment with prison labor for not more than 1 year or by a fine not exceeding 10 million won (hereinafter, the "Provision").

Summary of the Decision

In a unanimous vote, the Constitutional Court ruled the Instant Provision constitutional, reasoning that the Instant Provision does not contradict the rule of clarity and prohibition of excessive restriction. At the same time, in a 6 to 3 vote, the Court also overruled its precedent that an "obscene" expression in its strict sense is not protected under Article 21 of the Constitution that ensures freedom of speech and the press (95Hun-Ka16, April 30, 1998) according to the following reasons.

1. Court Opinion

If an "obscene expression" is interpreted to be outside the boundary of freedom of speech protected by the Constitution, it will not only be impossible to conduct a constitutional review of an obscene expression in accordance with basic constitutional principles for restriction on freedom of speech, such as the rule of clarity and ban on censorship, but also be difficult to apply constitutional basic principles for restriction on fundamental rights, such as statutory restriction and the rule against excessive restriction. As a result, it becomes also impossible to control every obscene expression through preliminary censorship and, in case of no such prior censorship, to impose criminal punishment, to ban possession of obscene materials

without the purpose of distribution, or to unlawfully impose disadvantage on obscene publications. In the end, it cannot be overlooked that obscene expressions are highly likely to be denied even the minimum constitutional protection.

Therefore, it should be interpreted that, obscene expressions are also entitled to the protection of freedom of speech under Article 21 of the Constitution, except that they can be regulated for the purpose of ensuring national safety, public law and order or public welfare pursuant to Article 37 Section 2 of the Constitution. As the obscenity specified in the Provision should thus be protected by Article 21 of the Constitution that guarantees the freedom of speech and press, the Constitutional Court has come to overrule its former judgment that obscene expressions are not to be protected as freedom of speech under Article 21 of the Constitution (10-1 KCCR 327, 340-341, 95Hun-Ka16, April 30, 1998).

The "obscenity" in the Instant Provision may have room for more specificity, but it can be considered to provide, in its current form, offenders and law enforcement officials with appropriate standards for review or interpretation and exclude arbitrary interpretation and execution of law as regards which expression is "obscene". In this sense, "obscenity" in the Instant Provision does not contradict the rule of clarity. Even if obscene expressions are subject to constitutional protection of freedom of speech and thus imposing heavy criminal punishment on acts such as distribution of obscene materials and information may somewhat restrict the said fundamental rights, this restriction is necessary for public welfare. Therefore, the Instant Provision hardly contradicts the rule against excessive restriction under Article 37 Section 2 of the Constitution.

2. Concurring Opinion of Three Justices

Determining the inherent boundary of protection for fundamental rights under the law is significant as the first step of a constitutional review. It is evident that not all of the problematic expressions of every case can be protected as part of the freedom of speech, so discussion on the scope of freedom of speech to be protected becomes an essential prerequisite for a constitutional review of freedom of

speech.

As Article 31 Section 4 of the Constitution specifies the constitutional limitation to freedom of speech, expressions that exceed the limitation are not protected by the Constitution as part of the freedom of speech. Whether such obscene expressions are to be recognized as part of freedom of speech is a matter determined by how the review standard for obscenity as a normative concept is established.

The concept of "obscenity" in the Instant Provision is "obscenity" in the strict sense of the term--indecent and blunt sexual expression that distorts human dignity or personality, that solely appeals to sexual interest, and that overall has no literary, artistic, scientific or political values. In this context, such obscene expressions are sexual expressions similar to or more harmful than "obscenity" not considered by the U.S. Supreme Court to be part of rights protected under the First Amendment of the U.S. Constitution or "hardcore pornography" defined in the German criminal law. Therefore, obscene expressions in their strict sense exceeds the limitation allowed by Article 21 Section 4 of the Constitution and therefore are not protected by Article 21 Section 1 of the Constitution that ensures freedom of speech.

The concept of "obscenity" in the Instant Provision at least offers an appropriate guideline for offenders and law enforcement officers, and implication of the term hardly varies with individual preference of the competent enforcement authority. The Instant Provision, therefore, does not contradict the rule of clarity.

Meanwhile, because "obscenity" in its strict sense is not constitutionally protected as part of freedom of speech, there is no need for review of whether the Instant Provision that penalizes distribution of obscene materials through information and communication network violates the rule against excessive restriction in regulating the freedom of speech and press.

15. Advance Report Duty for Outdoor Assembly Case

[578 KCCR 21-1 B, 2007Hun-Ba22, May 28, 2009]

In this case, the Constitutional Court held that the Assembly and Demonstration Act, Article 6 (1) is not against the rule of clarity and does not infringe on the freedom of assembly by not violating the rule against excessive restriction when it mandates advance report duty for outdoor assembly. Also, the Act, Article 19 (2) does not violate the rule of clarity by exercising legislative discretion on criminal punishment and therefore is not against the Constitution.

Background of the Case

The Constitution, Article 21 (2) guarantees the freedom of assembly by prescribing that 'licensing of assembly shall not be permitted'. The former Assembly and Demonstration Act (revised by Act No. 7123 on January 29, 2004 and before revised by Act No. 8424 on May 11, 2007. Hereinafter, referred to as "former ADA") defines that "outdoor assembly" is the assembly of people at place where there is no ceiling or walls (Item 1 of Article 2 (1), hereinafter as "definition provision"). Further, the former ADA mandates that the organizer of an outdoor assembly to report to the competent police department in the area between 720 hours and 48 hours prior to the scheduled assembly (the part regarding outdoor assembly of Article 6 (1), hereinafter as "report provision"). Those who hold an assembly without a report will be penalized with no more than two years of imprisonment or no more than two million won of fine (the former ADA, the part regarding Article 6 (1) in Article 19 (2), hereinafter as "penalty provision").

Petitioner was indicted for having an assembly without report. During the trial, petitioner filed a motion to request for the constitutional review of "report provision" and "penalty provision" claiming that these unconstitutional provisions infringe upon petitioner's freedom of assembly. After the motion being denied, petitioner filed the instant constitutional complaint with this Court.

The Provisions at Issue

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

Article 2 (Definitions)

For the purpose of this Act, the definitions of terms shall be as follows:

1. The term "outdoor assembly" means an assembly at a place where there is no ceiling or all sides are not closed;

Article 6 (Report, etc. on Outdoor Assembly and Demonstration)

(1) Any person who desires to hold an outdoor assembly or demonstration shall submit to the superintendent of the competent police station, forty-eight hours before the assembly or demonstration is held, a report stating the object, date, time (including the required hours) and place of the assembly or demonstration; the name, address of occupation of the promoter (including the representative in the case of an organization); the person responsible for liaison and the order keeper; the name, address, occupation and subject of speech of the speaker; the organizations expected to participate therein; the estimated number of participants, and the method of demonstration (including the course and route map): Provided, That if the assembly or demonstration is under the jurisdiction of two or more police stations, it shall be agency submitted to the commissioner of the competent local police agency, and if the demonstration is under the jurisdiction of two or more local police agencies, it shall be submitted to the commissioner of the competent local police agency having the jurisdiction over the place where it is held.

Article 19 (Penal Provisions)

(2) Any person who violates the provisions of Article 5 (1) or 6 (1), or who sponsors an assembly or demonstration against which a notice on prohibition has been issued under Article 8 above shall be punished by imprisonment for not more than two years, or a fine not exceeding two million won.

Summary of the Decision

The Constitutional Court held that "report provision" is not against

the Constitution in a 7 (constitutional) to 1 (incompatible with the Constitution) vote (one Justice withdrew). The Court also held that "penalty provision" is not against the Constitution in a 6 (constitutional) to 2 (unconstitutional) vote (one Justice withdrew).

1. Review on Report Provision

A. Court Opinion

(1) Whether it is against the rule of clarity

While the former ADA defines that "outdoor assembly" is the assembly of people at place where there is no ceiling or walls, it does not define "assembly" itself. In general, assembly is the temporary gathering of people at a certain place with a specific agenda. The common purpose of the assembly is 'formation of inner tie'. A reasonable person with common legal awareness would infer the meaning of 'assembly' from the above mentioned explanation. For this reason, we find that the definition of 'assembly' is not unclear and "report provision" is not against the rule of clarity.

(2) Whether it violates the freedom of assembly

Generally, in its principle, the Assembly and Demonstration Act guarantees outdoor assembly and demonstration as far as it is properly reported. Therefore, advance report for outdoor assembly cannot be construed as advance permit which is prohibited under the Constitution, Article 21 (2). Advance report for outdoor assembly is enacted in order to ensure peaceful and effective assembly and to protect public safety with legitimate legislative purpose. Further, it intends to increase the communication and cooperation between the organizer of an assembly and relevant administrative agency through advance report and therefore is deemed to be a proper measure to implement these goals. A requirement for information and schedule of an assembly is not excessive to make the report impossible and therefore not against the principle of the least restrictive means. Further, report provision satisfies the balancing test between the

restricted private interest from inconvenience incurred by the organizer of an assembly and the protected public interest. For this reason, the report provision neither infringes upon the freedom of assembly nor violates the principle of no excessive restriction.

B. Incompatibility Opinion of One Justice

The instant "report provision" is against the Constitution, Article 37 (2). It mandates the duty of report only because an assembly is held outside without questioning whether it may threaten public safety, whether it is to be held in a public place, or whether it is a spontaneous or an emergency one. Nevertheless, I hold it is incompatible with the Constitution because it is the work of the legislature to repeal the unconstitutional portion of a law and to enact a new constitutional provision.

2. Review on Penalty Provision

A. Court Opinion

(1) Whether it violates the rule of clarity

As we found in the Article 6 (1), the definition of 'assembly' is not unclear and, therefore, "penalty provision" to regulate the organizer of an unreported assembly is not against the rule of clarity.

(2) Administrative discretion

Several issues arise on this subject: 1) whether the violation of an administrative rule should be treated as the violation of the administrative goal and the public interest which is serious enough to be regulated with administrative penalty; and 2) how the sentencing guideline should be set under what category, if the administrative penalty is assessed. Unreported outdoor assembly has the high probability to threaten the administrative goal and the public interest. Therefore, penalty provision does not infringe on the freedom of assembly when it allows administrative penalty for the violation of

law. Further, the penalty is not excessive as we find it is not out of limit of lawmaker's discretion and does not change report regulation to permit regulation.

2. Unconstitutional Opinion of Two Justices

The report obligation for assembly is a simple administrative measure for the purpose of cooperation. This type of cooperative duty is sufficiently regulated with administrative sanction such as fines. Nevertheless, penalty provision enforces this administrative duty with penalty of imprisonment and therefore causes chilling effects on the constitutional freedom of assembly. Penalty provision change report system to permit (license) system which is contrary to the original purpose of the report system. Further, the penalty provision treats the violator of this provision same as the organizers of violent assembly and demonstration which are prohibited under the Assembly and Demonstration Act. This treatment exceeds the limit of the state's punishment power in a government by the rule of law because it imposes the same penalty for the violation with that of a totally different violation in infringement of interest. For this reason, penalty provision imposes such excessive punishment for the violation and therefore it is against the Constitution.

16. Standard Korean Language Case

[21-1(B) KCCR 746, 2006Hun-Ma618, May 28, 2009]

Regarding the constitutional complaint against Part 1, Chapter 1, Clause 1 of the Standard Language Regulation which stipulates the standard Korean be the "modern Seoul vernacular widely used by civilized people", the Constitutional Court unanimously delivered an opinion of dismissal on the grounds that there is no exercise of governmental power. Regarding the provisions of the Framework Act on the National Language which mandates public documents and textbooks to be written in the standard language, the constitutional complaint was denied on the grounds that the provisions cannot be regarded infringing on the basic rights.

Background of the Case

Complainants are elementary, middle and high school students and parents all over the country and people who make out public documents, working for public institutions including state organs. Part 1, Chapter 1, Clause 1 of the Standard Language Regulation stipulates the standard Korean be the "modern Seoul vernacular widely used by civilized people" (hereinafter, the standard Korean language provision). Article 14, Section 1 of the Framework Act on the National Language mandates public documents to be written following the Standard Language Regulation and Article 18 of the Framework Act on the National Language stipulates the standard Korean language be used in compiling, authorizing or approving textbooks (hereinafter, combined the two provisions of Framework Act on the National Language referred to as the "Instant Provisions") The complainants filed this constitutional complaint on May 23, 2006, arguing that the standard Korean language provision and the Instant Provisions infringe on their right to happiness, equality and education.

Provisions at Issue

Standard Language Regulation

Article 1. Standard Korean is the modern Seoul vernacular widely used by civilized people.

Fomer Framework Act on the National Language(before revised by Act No. 8852, On February 29, 2008)

Article 14 (writing public documents)

① Public documents shall be written in Korean following the Standard Language Regulation. Provided that Chinese letter or other foreign letter may be used in the parenthesis according to the Presidential decree.

② Others necessary in writing Korean in the Public documents will be stipulated in the Presidential decree.

Article 18 (observation of standard regulation in textbooks) Ministry of Education and Human Resource Development shall observe the standard regulation in compiling, authorizing or approving textbooks prescribed in Article 29 of Act on Elementary and Middle Education, and can consult with the Ministry of Culture and Sightseeing if necessary.

Summary of the Decision

The Constitutional Court unanimously dismissed this complaint regarding the standard Korean language provision and denied it regarding the Instant Provisions in a 7 to 2 vote. The summary of the decision is as follows:

1. Court Opinion

A. Standard Korean Language Provision

The standard Korean language provision defines the modern Seoul vernacular, which is widely used by civilized people in the metropolitan area, as the standard language of Korea. This provision which merely provides a definition of standard language does not have any legal effect in itself. As it neither denies or limits the

complainants' rights and freedom nor imposes duties on them, it does not have effect on the complainants' legal status. Therefore, we cannot say that there is possibility or danger for the standard Korean language provision to infringe on the basic rights.

B. Instant Provisions

Considering the citizens' expectation on uniformity of language used to draft public documents by public institutions and the possible confusion and disorder in communication caused by using non standardized dialects in drafting public documents, the rule on public documents prescribed in the Instant Provisions is indispensable.

Regarding the rule on textbook in the Instant Provisions, if the language used to write textbook differs by region, students living in areas where distinctive provincial dialects are used may lose opportunity to learn the standard Korean, which would end up negatively affecting communication among members of the country. Therefore, the Instant Provisions are necessary for public interest.

The provisions of Framework Act on the National Language stipulate the scope of standard language according to the standard Korean language provision. Given the following facts such as Seoul has the deepest historical and cultural significances, the city signifies the nation's geographic center, the Seoul vernacular is used by the most number of people and many other factors, and designating the Seoul vernacular as the standard Korean language cannot be seen as a violation of fundamental rights. Also, as there are many different branches even within the Seoul vernacular, it is logical to set the language used by civilized people as the standard language.

The Standard Language Regulation, which was enacted in 1988 after collecting opinions of specialists through various channels such as the National Language Deliberation Council from the 1970s, is the fruit of the endeavor of numerous specialists in Korean language. Therefore, judicial review on the content of the standard Korean language provision should be conducted very cautiously.

In conclusion, we think the Instant Provisions are not in violation of the rule against excessive restriction and therefore, not in violation of the Constitution.

2. Dissenting Opinion of Two Justices (Opinion of Unconstitutionality)

Designating a specific dialect as a standard language may cause considerable inconvenience and difficulties to those who use other dialects than the standard language. Today, the differences among various dialects used in our country has dwindled down to the extent that people from all different parts of the country seldom have difficulties in communicating with each other. Against this backdrop, strict adherence to the old standard for standard language may hamper the development of the standard language, and further the development of Korean language itself.

Each local language other than Seoul vernacular is not only a product of history, culture and spirit of people living in the area but also our cultural heritage as a whole inherited over the long haul. Considering such local languages can be the most appropriate means to convey and express emotion and sentiment of the whole people in our country as well as the local people using the dialects, exclusion of those local languages from the scope of standard language, which may make the local people feel culturally deprived, does not seem proper.

The standard that defines the modern Seoul vernacular as the standard Korean language is too narrow and rigid to facilitate communication among people, and can be a hindrance to cultural integration of our country. Therefore, this standard cannot be a reasonable norm to restrict the basic rights of people not living in Seoul.

The Instant Provisions which confine the scope of standard language only to the Seoul vernacular and mandate public documents and textbooks to be written in the standard language infringe on the people's right to pursue happiness in terms of using language, thereby violating the Constitution.

17. Wartime Reinforcement Military Practice of 2007 Case

[21-2(B) KCCR 769, 2007Hun-Ma369, May 28, 2009]

Constitutional Court held that a constitutional complaint is not justiciable because "the right to peaceful livelihood" cannot be found to be a constitutionally guaranteed basic right while the complainant claims that citizens' "right to peaceful livelihood" was infringed by 'President's decision for military practice'.

Background of the Case

In March 2007, President, as a commander-in-chief, decided to start a Korea-U.S. joint military practice named "Reception, Staging, Onward Movement, and Integration practice of 2007" (hereinafter, "Military Practice"). Complainants filed this constitutional complaint claiming that their constitutionally guaranteed rights to peaceful livelihood were infringed.

Subject Matter of Review

Subject matter of this case is whether the President's decision about the Military Practice infringes upon complainants' right to peaceful livelihood.

Summary of the Opinion

In a 6 to 3 vote, Constitutional Court dismissed the complaint based on the finding that "while the right to peaceful livelihood is the legal basis of the this complaint, it is not a constitutionally guaranteed basic right because the peace is an absolute concept as the spirit and the goal of the Constitution and, therefore, this complaint premised by the infringement of the right to peaceful livelihood is not justiciable and should be dismissed". Meanwhile, Three Justices rendered a concurring opinion saying that "although the right to peaceful livelihood is not an enumerated constitutional right, it is still considered as a concrete

right, and, yet, we dismiss this complaint because this complaint is without the possibility of the infringement of the right to peaceful livelihood and therefore is not justiciable.

1. Court Opinion

The Constitution, in its goal and spirit, opposes aggression, aims for peaceful reunification and makes efforts to maintain the world peace. A country has an undeniable duty to make sure that citizens live with peace free from the threat of war and terror and enjoy a maximum capacity of constitutionally guaranteed basic rights while preserving human dignity and value. Despite pacifism is the goal and spirit of the Constitution, however, it does not directly create citizen's individual right to peaceful livelihood. In order to acknowledge a basic right not enumerated in the Constitution, first, we should find the special need for the right. Additionally, the scope of the right (scope of protection) should be comparably clear so that the right retains the power to demand its contents, as its concrete substance, from subjected person. Finally, it should be the concrete right of which legal resort can be sought through a court proceeding in case of violation.

In this case, however, the notion of peace is nothing but an absolute concept because it is the spirit and the goal of the Constitution by nature. What may be the substances of the right to peaceful livelihood are: 1) "the right not to be drafted for a war of aggression"; and 2) "the right to seek to cease the exercise of governmental power which creates a great amount of threat by being used for war preparation such as military practice for a war of aggression, building a military base and manufacturing/importing the weapon of destruction. Yet, it is difficult to differentiate an aggressive war from a defensive one. In fact, whether a war is aggressive is highly a political question which the Judiciary should reserve its power of review on. Further, 'the right to peaceful livelihood', in its origin of concept, cannot be construed as an individual concrete right which leads to 'the right to demand not to be drafted for an aggressive war and to have a peaceful livelihood'.

For this reason, the right to peaceful livelihood is not a

constitutionally guaranteed basic right and, therefore, this complaint premised by the infringement of right to peaceful livelihood is not justiciable without the need for the further review.

2. Concurring Opinion of Three Justices

The basic rights of citizens exist contingent upon the existence of a country and its basic orders of liberal democracy. Even for the citizens' basic rights, it is unavoidable to conduct a war and other military operation to protect land and citizens and to defend liberal democracy. Therefore, a country is allowed to: 1) impose the military duty on its citizens; 2) organize and maintain military force; and 3) conduct military practices for the above mentioned purpose. Yet, a country is not allowed to demand citizens to join a war of aggression which destroys the world peace because it defeats the abovementioned purpose. Drafting people for a war and leaving them under the threat of terror are against the duty of a country prescribed in the Article 10 of the Constitution because the freedom from an aggressive war, terror and military operation is the basic premises to materialize human dignity and value and to pursue happiness. Therefore, citizens have the right to demand peaceful livelihood free from the draft of an aggressive war and the threat of terror. This right, although not enumerated in the Constitution, is a constitutionally guaranteed basic right. It is a concrete right which can be sought in a country.

Nevertheless, we do not find that "Military Practice" in this case can possibly infringe upon citizens right to peaceful livelihood. This complaint fails to state the possibility of infringement of basic rights and therefore lacks the justiciability. For this reason, we dismiss this complaint.

18. Partial Credit on Pretrial Detention Case

[784 KCCR 21-1(B), 2007Hun-Ba25, June 25, 2009]

The Constitutional Court held unconstitutional the provision of Criminal Act that allows partial credit on pretrial detention based on the finding that the provision infringes on the freedom of body by violating the constitutional principle of the presumption of innocence and due process. However, the Constitutional Court decided it is not unconstitutional that the relating penalty provision of Aggravated Sexual Assault and Robbery which is in the same level with that of the Aggravated Robbery and Rape.

Background of the Case

The petitioner was sentenced to five years of imprisonment for aggravated sexual assault and robbery under the Article 5, Section 2 of the 'Sexual Crimes and Protection of Victims Act' (revised by Act No. 5343 on August 22, 1997, hereinafter, the "penalty provision"). Subsequently, the conviction was affirmed by higher courts. Theses courts, however, gave only a partial credit on pretrial to the petitioner under the Article 57, Section 1 of the Criminal Act (hereinafter, the "pretrial credit provision"). Claiming both the penalty provision and the "pretrial credit provision" unconstitutional, petitioner filed a motion to request for adjudication on the constitutionality of those provisions in an appellate court. When the said motion was denied, the petitioner filed this constitutional complaint to this Court.

Provisions at Issue

Act on the Punishment of Sexual Crimes and Protection of Victims (revised by Act No. 5343 on August 22, 1997), Article 5 (Special Robbery and Rape)

(1) If a person who has committed the crime as prescribed in Article 334 or 342 (limited to attempted crimes of Article 334) of the Criminal Act, commits the crime as prescribed in Article 297 through 299 of the said Act, he shall be punished by capital punishment, or

imprisonment for life or not less than ten years.

The Criminal Act, Article 57 (Inclusion of Number of Days of Confinement before Imposition of Sentence)

(1) The number of days of confinement before imposition of sentence shall be included in whole or in part to the period of limited imprisonment, or limited imprisonment without prison labor, or lockup at workhouse in respect to a fine or minor fine, or detention.

Summary of the Decision

The Constitutional Court held that "pretrial credit provision" is against the Constitution in an 8 to 1 vote. However, the Court held that "penalty provision" is not against the Constitution in a 7 to 2 vote.

1. Pretrial credit provision

A. Court Opinion (Unconstitutional)

Article 57 (1) of the Criminal Act allows a judge's discretion of giving a defendant a partial credit on pretrial detention. A judge exercises this discretion in order to prevent intentional and unreasonable delay of a proceeding by a defendant. The exercise of the discretion is intended to increase the effectiveness of a criminal proceeding and to decrease of the caseload of appellate courts by deterring frivolous appeals. However, it should be noted that a legal proceeding for a defendant in custody is allowed as an exception to the principle of "out-of-custody investigation" which is stemming from the principle of presumption of innocence. In this case, however, the partial pretrial credit operates as a special application of the said exception and seriously infringes on the freedom of body which is the most essential basic right.

Further, "pretrial credit provision" cannot be a proper measure to achieve the legislative intent of deterring appeals and preventing frivolous appeals if it is applied after the notice of appeal is filed. Instead, it obstructs a criminal defendant's right to trial and an appeal under the pretext of preventing frivolous appeals. Additionally, if the law allows the selective application of the pretrial credit in case of

the intentional delay of a legal proceeding and the frivolous appeal by a defendant in custody, it violates the principle of due process and the presumption of innocence because it turns out punishing the manner of a litigation which is not subject to a criminal penalty.

Under the principle of presumption of innocence, a criminal defendant shall not be mistreated as a guilty person before a conviction is entered and thus shall not be materially and immaterially disadvantaged in dealing with legal and factual issues. Particularly, pretrial detention is same as serving time with the restriction of freedom to a criminal defendant whose freedom of body is infringed. Therefore, pretrial credit should be given without exception under the principle of human rights and equality. However, "pretrial credit provision" does not faithfully reflect the nature of pretrial detention and allows a judge to be able to give only partial pretrial credit to a criminal defendant. In this regard, "pretrial credit provision" violates the constitutional principle of presumption of innocence and due process. Therefore, it is found unconstitutional.

B. Concurring Opinion of one Justice

If a law does not guarantee a full pretrial credit while restricting a citizen's freedom of body in exercising a state's power to punish criminals, the law does not comply with the Constitution, Article 37 (2), which prescribes a necessary and minimal amount of basic rights shall be restricted. The instant "pretrial credit provision" does not provide any legal basis to allow partial pretrial credit with a judge's discretion and therefore violates the Constitution, Article 37 (2).

C. Dissenting Opinion (Constitutional)

In its legal nature, pretrial detention is the forcible detention of a suspect or a defendant during a criminal procedure and therefore should be treated differently from post-conviction incarceration which is the deprivation of legal interest by creating legal effect. Pretrial detention is exceptionally made with a judge's warrant under a proper law and a procedure for the purpose of investigation and trial while restricting a person's freedom of body. It is legally allowed as the exception to the principle of presumption of innocence and due process.

If a defendant is found not guilty, the entire days of pretrial

detention are to be compensated because those days are regarded as damages without legal justification. However, if a defendant is found guilty, pretrial detention credit should be treated differently. Pretrial detention satisfies the principle of equity by providing remedial measures although it constitutes bodily restriction of a defendant in securing legal procedure.

Pretrial credit is the area where the Legislature's extensive liberty of lawmaking power exists. Therefore, unless the discretionary power of lawmaking is palpably against reasonableness, it cannot be found unconstitutional. For this reason, we do not agree with the assertion that the full credit for pretrial detention warrants human rights. If the Criminal law, Article 57 (1) does not allow partial pretrial credit, it cannot draw a distinction between pretrial detention and post-conviction incarceration. Further, it is against criminal justice to allow a full pretrial detention credit because, in some cases, a defendant is responsible for some part of pretrial detention period. Given mixed nature of pretrial detention, the Criminal Law, Article 57 (1) is reasonable under the maxim of equity as it allows judge's discretion to give partial pretrial credit by determining the necessary time frame for a proceeding and the defendant's responsibility for the delay.

Because of the reasonableness and the justification, the pretrial credit provision does not infringe on the freedom of body and therefore does not violate the constitutional principle of due process and presumption of innocence.

2. Penalty provision

A. Court Opinion (Constitutional)

The penalty provision in this case regulates aggravated robbery and sexual assault for the purpose of preventing and eradicating the sexual crime which infringes on the victim's property and sexual autonomy and further destroys the institution of family. The penalty provision is not found severe in view of the nature of crime, the extent of the responsibility and its deterrence effect. Lawmakers enacted this law to block the possibility of the suspension of sentence for the crime of sexual assault during aggravate robbery. This legislative decision does not infringe on court's sentencing power because it is not arbitrary

under the circumstances that the suspension of sentence is possible by mitigating factors.

Sexual assault ("*it is a more inclusive crime than rape. It includes crimes involving offensive sexual contacts even in absence of forcible sexual intercourse*") could be a more serious crime than rape by causing more severe damages on victims. An offense of a normal sexual assault could be equally or more seriously penalized than a rapist depending on motive, circumstances and the protected interest of a victim. When an offender of an aggravated robbery sexually assaults a victim, the offender is to be treated no less seriously than a rapist. Therefore, the penalty provision in this case is not found to be an arbitrary legislation and does not violate the principle of equality.

B. Dissenting Opinion of two Justice (Unconstitutional)

The penalty provision in the instant case applies the sentencing guideline of 'capital punishment, lifetime or no less than 10 years of prison time' to both sexual assault and rape only because the sexual assault is combined with aggravated robbery.

Comparably, the Criminal Sexual Act, Article 6 (2) prescribes that sexual offender with a weapon or group sexual offenders are penalized with no less than three years of prison time. Under this Act, the penalty is grossly different depending on whether a sexual offender with a weapon or group sexual offenders have the intention to commit robbery. With respect to the nature of crimes, sexual offenders without the act of robbery are still a serious crime and therefore cannot justify this disparity of penalties. Further, the disparity is not reasonable in view of the seriousness of crimes and the infringement of protected interest.

Additionally, when a person makes an offensive physical contact without permission, it constitutes criminal sexual assault which, if combined with aggravated robbery, results in aggravated robbery and sexual assault subject to the Criminal Sexual Assault Act, Article 5 (2). We do not believe that "aggravated sexual assault and robbery" and "aggravated rape and robbery" should be distinguishable in their natures and therefore should be regulated differently. Therefore, the penalty provision in this case is without justification in its sentencing guideline and further is against the principle of equality guaranteed by the Constitution, Article 11.

19. Case on Prohibition of Succeeding Local Council Seats Reserved for Proportional Representation in the Event of Vacancies Occurring from Election Crimes

[21-1(B) KCCR 850, 2007Hun-Ma40, June 25, 2009]

In this case, concerning a provision of the Public Official Election Act providing that vacancies in the office of a proportional representation local council member, in principle, should be filled by the next eligible candidate on the relevant party list except for ones arising from invalidation of election due to election crimes, the Constitutional Court held the provision unconstitutional by arguing that it infringes on the right of the next eligible candidate to hold public office and therefore violates the Constitution.

Background of the Case

The complainant is one of the candidates registered on the list of former People First Party's proportional representation members of Nonsan City Council at the time of local council member elections held on May 31, 2006. As the member-elect lost his post for committing an election crime, the complainant was entitled to succeed the vacant seat. However, he was not allowed to take over the seat because the vacancy fell under the stipulated exceptions to succession (proviso of Article 200 Section 2, Public Official Election Act, hereinafter the "Instant Provision"). In response, the complainant filed this constitutional complaint in this case on January 12, 2007, arguing that the Instant Provision violated his right to hold public office, etc. The Instant Provision under review is as follows:

Provisions at Issue

POEA(revised by Act No. 7681 on August 4, 2005)

Article 200 (Special Election)

(2) If the office of a proportional representation National Assembly member or a proportional representation local council member becomes vacant, the constituency election commission shall decide the person to

succeed to the seat of the vacant member in the order of the roll of candidates for the proportional representation National Assembly members and for the proportional representation local members of the political party to which the vacant member belonged at the time of his election, within 10 days after it receives the notification of such vacancy: Provided, That where his election becomes invalidated as provided in Article 264, the political party to which he belongs is dissolved or a vacant member accrues within 180 days before the date on which his term of office expires, the same shall not apply.

Summary of the Decision

In a vote of 8 (unconstitutional) to 1 (constitutional), the Constitutional Court decided that the Instant Provision violates the Constitution according to the following reasons.

1. Court Opinion

A. Under the current proportional representation election system, voters' expression of political will directly determines the number of seats of proportional representation local council members allocated to a political party, instead of which candidate becomes the proportional representation local council member. However, the Instant Provision not only deprives the accountable member-elect of his/her officer for committing an election crime, but also denies the succession of the vacant seat by the next eligible candidate of the same political party as the member-elect, resulting in disregarding and distorting voters' political will to allocate a seat of a proportional representation local council member to the said party. Also, since only one proportional representation local council member is designated for 117 local councils of Gu (district), Si (city), and Gun (county), the denial of seat succession may, in the extreme, lead to an absence of a proportional representation local council member in many of the Gus, Sis, and Guns. There is a possibility that such a consequence may also undermine the significance of proportional representation elections. In addition, it is hardly reasonable to address the invalidation of the

member-elect's election for reasons of committing an election crime differently from general cases of vacancies, such as those occurring from resignation or retirement. Therefore, the Instant Provision is incompatible with the principles of representative democracy in that it may result in disregarding and distorting the intention of voters.

B. The exception to succession by the next qualified candidate for the proportional representation local council member on the roll of the political party concerned as provided for in the Instant Provision is not admitted due to responsible acts of the consequently disadvantaged political party or the next eligible candidate on the party list, but because of the election crime committed by the member-elect whose election has been invalidated. Yet, the Instant Provision does not even accuse the party concerned or the next eligible candidate on the party list of any of their intervention or involvement in the election crime. Whether the election crime was intended to and actually did affect the voting result is not taken into account, either. Given the current political party system, in which constituency party chapters and the elements constituting an election crime that causes invalidation of elections have been removed and the statutory number of City/Do parties is defined as five or more, it does not seem that our society is yet equipped with the conditions to prevent candidates from committing election crimes nor to supervise or control the candidates substantially. All considered, the Instant Provision, by providing a disadvantage against the political party to which the member-elect belongs or the next eligible candidate of the party, violates the principle of liability defining that one is liable only for one's own act.

C. Instead of help serving the specific legislative purpose to correct voters' distorted will and ensure fair elections, the Instant Provision, drawn by the abstract and vague slogan to create fair environment for elections solely through strict punishment of election crimes, nothing but leads to disregard and distort voters' political will expressed in the proportional representation local member election. Therefore, the Instant Provision hardly fulfills the requirement for suitability of means. Additionally, the legislative purpose to achieve fair elections through prevention of election crimes can be served to a certain extent just

through various penal Instant Provisions specifying election crimes and by invalidating the election of the member-elect who is guilty of an election crime. At the same time, the legislative purpose can be also served by a less restrictive alternative while reflecting voters' will to the utmost. In that sense, the Instant Provision provides an overly excessive regulation that is more than necessary. Therefore, the Instant Provision contradicts the prohibition against excessive restriction and thereby infringes on the complainant's right to hold public office.

2. Dissenting Opinion of One Justice

A. As a measure to correct voters' will distorted by an election crime committed by the member-elect, the Instant Provision is not against the principles of representative democracy. In particular, in proportional representation local council member elections where, unlike in proportional representation National Assembly member elections, relatively a small number of members are elected at the level of the relevant Si/Do and autonomous Gu/Si/Gun, it is more likely that voters' will can be distorted by the member-elect's involvement in an election crime. This means the need for prevention thereof is even stronger. Furthermore, when considering the directive, comprehensive role and function of political parties, indispensable relationship between political parties and candidates, etc. in elections for proportional representation local council members, the Instant Provision bases itself on the legislative discretion to help prevent unfair elections by stressing the responsibility of political parties over the overall process of election campaigns, including the recommendation and registration of candidates. In this case, the underlying rationale is neither wrong nor unfair. Therefore, the Instant Provision does not violate the rule that one is liable only for one's own act.

B. The Instant Provision, by defining exceptions to the automatic succession, aims to impose responsibilities on political parties more strictly for the purpose of preventing election crimes, so it can serve as a suitable means to fulfill the legislative purpose to establish clean and fair climate for elections. Moreover, given the directive and

comprehensive role of political parties in the election of proportional representation local council members, it would be hardly viewed that legislators' decision was distinctly in the wrong or greatly unfair when they transferred the responsibility of the member-elect's election crime to the political parties to which the member-elect belongs in order to prevent unfair elections. In this sense, it is hardly the case that the Instant Provision imposes overly excessive regulations, and it is not easy to find a less restrictive means to serve the legislative purpose, either. Because the exception to succession is only limited to cases of invalidation of member-elects' election in the event of their involvement in election crimes, the extent to which fundamental rights are restricted is not larger than the public interest intended to be served by the Instant Provision. Therefore, the Instant Provision does not involve distinct transgression of the scope of legislative discretion and therefore does not infringe on the complainant's right to hold public office.

20. Definition of Abduction Victims Case

[21-1(B) KCCR 915, 2008Hun-Ma393, June 25, 2009]

Article 2 Item 1 of the 'Act on the Compensation and Support for Abduction Victims by North Korea after the Korean War Armistice Agreement' prescribes abductees and victims of North Korean abductions occurred after concluding the agreement on military armistice. The Constitutional Court decided that the said provision does not infringe on the right to equality and right to pursue happiness of the abduction victims by North Korea during the Korean War.

Background of the Case

According to the allegation of the complainant, whose father, Kim ○-dong, was a member of the founding National Assembly and abducted by North Korea during the Korean War. The complainant filed this constitutional complaint on May 19, 2008, claiming that the right to equality is infringed by Article 2 of the 'Act on the Compensation and Support for Abduction Victims by North Korea after the Korea War Armistice Agreement' (hereinafter, the "Instant Provision") that defines abductees as the persons abducted after the Korean War Armistice Agreement and excludes the abductees or abduction victims prior to the agreement out of the application of the law.

Provision at Issue

Act on the Compensation and Support for Abduction Victims by North Korea after the Korea War Armistice Agreement

Article 2 (definition)

1. Abductee is a Korean who entered into North Korea(north of the MDL, the same shall apply below) from South Korea(south of the MDL, the same shall apply below) and lived there against his own will after the Korean War Armistice Agreement on July 27, 1953.

Summary of the Opinions

The Constitutional Court held that the Instant Provision does not infringe on the right to equality and the right to pursue happiness of the abduction victims during the Korean War, in a 7 (constitutional) to 2 (unconstitutional) vote for the following reasons.

1. Court Opinion

A. The Nature of this Constitutional Complaint

The legislature may omit a certain group of people from a beneficiary provision of statutes as did they in the Instant Provision. A constitutional complaint that requests the extension of the applicable scope of such provisions may appear to be a legislative inaction case.However, the inaction is merely resulted from the reflective effect of the enactment of a beneficiary provision. The complainant alleged that legislators should have considered the abductees both before and after the Korean War Armistice Agreement under the principle of equality. Thus, this case would be not a genuine legislative inaction based on the constitutionally imposed obligation of enactment, but a quasi legislative inaction that is led by the limitation of the applicable scope of the beneficiary provision.

B. The Right to Equality

The Instant Provision does not include the abductees by North Korea during the Korean War in the beneficiary group for the following reasons. It is difficult to investigate the actual condition of abductions by North Korea during the Korean War due to the length of the time elapsed, and it is ambiguous how to determine whether it was the abduction by North Korea or not. Abductions occurred in time of war that is an exceptional situation where the government could not exercise its authority, and it may raise an equality issue in treatment of other war victims, such as death, injury, or disappearance. Because it belongs to the legislative discretion, the Instant Provision would be not an arbitrary discrimination. Therefore, the Instant Provision would not infringe on the right to equality of the

complainant.

C. The Right to Pursue Happiness

The instant provision states the scope of national protection and support with regard to the victims or survivors of abductions occurred after the Korean War Armistice Agreement. Because it is not related to the right to liberty or the limitation of the right to liberty, the Instant Provision would not infringe on the right to pursue happiness of the complainant.

2. Dissenting Opinion of Two Justices (Unconstitutional)

Article 1 (Purpose) of the said Act limits its applicable scope in the abductees by North Korea after concluding the Korean War Armistice Agreement. Besides, the said Act is named as the 'Act on the Compensation and Support for Abduction Victims by North Korea after the Korea War Armistice Agreement', so that it excludes the abductees during the Korean War. It suggests that there have been no legislative actions with regard to the compensation and support for the victims of North Korean abductions before the Korean War Armistice Agreement. Therefore, this case would be one of genuine legislative inaction.

The permanent existence of the State would be one of the most fundamental spirits of the Constitution, and the Citizens should be united and fight the enemy for the existence of the State. With the consideration of this rationale of national existence, the comprehensive interpretation of Preamble, Article 10, Article 39, Article 30, Article 32 of the Constitution indicates the Constitutional obligation to enact the legislation with regard to the compensation for the abductees by North Korea during the Korean War.

The Legislature has not taken any legislative actions to repatriate or compensate abductees during the Korean War despite it has been more than 50 years since armistice and we now become a major economic power. It could be the neglect of the highest priority obligation of the State and it may lose the national dignity as an independent state. Besides, the abductees by North Korea after the Korean War

Armistice Agreement are compensated and supported by the said Act. Under these circumstances, there would be no legitimate reasons of the inaction, from the perspective of the priority of national obligations and fairness.

The legislature has not enacted any legislation to compensate the abductees during the Korean War for more than 50 years despite the Constitution imposed the duty of legislation. It would be the legislative inaction beyond the scope of the legislative discretion, therefore, it violates the Constitution.

21. Case on Prohibition of Succeeding National Assembly Member Seats Reserved for Proportional Representation in the Event of Vacancies Occurring Within 180 Days Prior to the Term Expiration Date

[21-1(B) KCCR 928, 2008Hun-Ma413, June 25, 2009]

In this case, the Constitutional Court ruled that, the provision of the Public Official Election Act providing that a vacancy in the seat of the National Assembly reserved for proportional representation should, in principle, be succeeded by the next eligible candidate on the roll of proportional representation National Assembly members but that the same will not apply to vacancies occurring within 180 days prior to expiration of terms is against the Constitution, for the reason that the provision infringed on the next eligible candidate's right to hold public office. The Court declared the provision incompatible with the Constitution but ordered its continuous application until legislators revise it by December 31, 2010.

Background of the Case

The complainants are candidates of proportional representation National Assembly members who were registered on the list of the Grand National Party at the time of the 17th National Assembly member elections, and they were in the position to succeed the seat at the National Assembly as the three member-elects quit the GNP and resigned from their office. However, under the new Public Official Election Act ("POEA") revised during the 17th term of the National Assembly, which provides that the same will not apply in case "a vacant member accrues within 180 days before the date on which his term of office expires, (proviso in Article 200 Section 2, hereinafter the "Instant Provision")", the complainants became unable to succeed the seats of proportional representation National Assembly members. In response, the complainants filed a constitutional complaint in this case on May 27, 2008, arguing that the Instant Provision violated their rights to hold public office, etc. The full text of the provision at issue

is as follows:

Provisions at Issue

POEA(revised by Act No. 7681 on August 4, 2005)

Article 200 (Special election)

(2) If the office of a proportional representation National Assembly member or a proportional representation local council member becomes vacant, the constituency election commission shall decide the person to succeed to the seat of the vacant member in the order of the roll of candidates for the proportional representation National Assembly members and for the proportional representation local members of the political party to which the vacant member belonged at the time of his election, within 10 days after it receives the notification of such vacancy: Provided, That where his election becomes invalidated as provided in Article 264, the political party to which he belongs is dissolved or a vacant member accrues within 180 days before the date on which his term of office expires, the same shall not apply.

Summary of the Decision

In a vote of 4 (unconstitutional) to 3 (incompatible) to 2 (constitutional), the Constitutional Court ruled the Instant Provision incompatible with the Constitution for the following reasons.

1. Court Opinion

A. Under the current proportional representation election system, voters' expression of political will directly determines the number of seats of proportional representation members assigned to the entitled political party, instead of which candidate will be elected for the seat. Yet, the Instant Provision does not allow for automatic succession to a vacant seat by the next eligible candidate on the list of the political party to which the seat belonged in case a vacancy in the seat of proportional representation National Assembly members arising within 180 days before a day prior to the expiration of the term,

consequently disregarding and distorting the political will of voters who intended to grant a seat to the political party in question.

It is also not reasonable to judge that the case in which "a vacant member accrues within 180 days before the date on which his term of office expires" should be addressed differently from other general cases, given that vacancies in the seat of proportional representation National Assembly members are, as opposed to vacancies in National Assembly members of local constituencies, in principle briefly filled by eligible candidates according to the order of the list submitted by the political party in question without by-elections or re-elections that are considerably time and money consuming and that it is hardly impossible nor very difficult for the successor as a member to prepare for state affair activities or discharge of duties within 180 days before the predecessor's expiration of term, etc.

Furthermore, if a number of vacancies arise in the seats of proportional representation National Assembly members within 180 days before the day the term expires, normal functioning of the National Assembly may be unjustly restricted. Therefore, the Instant Provision is incompatible with the principles of representative democracy, or the basic principles of the Constitution, in that it may disregard and distort the will of voters and hinder normal functioning of the National Assembly.

B. As reviewed earlier, the Instant Provision is incompatible with the principles of representative democracy, only resulting in unreasonably disregarding and distorting the political will of voters expressed through proportional representation National Assembly member elections. Thus, it hardly meets the requirement for the suitability of means.

Additionally, 180 days, which amounts to one eighth of the entire term of proportional representation National Assembly members (4 years), is by no means a short period of time to administer state affairs, and complete prohibition on succeeding the vacant seat of a proportional representation National Assembly member with less than 180 days left as the remaining term is excessive in view of the legislative purpose and thus contradicts the principle of the least restrictive means. Therefore, the Instant Provision violates the rule

against excessive restriction and thereby infringes on the complainants' rights to hold public office.

C. As regards the type of the Holding, four Justices contend that the Instant Provision has to be ruled unconstitutional since it is deemed neither reasonable nor legitimate to stipulate an exception to succession based on the remaining term of office, whereas three Justices maintain that the Instant Provision, despite its unconstitutionality, should be held incompatibility in due respect for the legislative power because precisely how a specific unconstitutional portion will be adjusted in a constitutional fashion, in principle, falls under the boundary of legislators' legislative discretion. Since an opinion of unconstitutionality and incompatibility are the same with respect to the constitutionality of a provision itself, the Court decides to rule the challenged provision incompatible with the Constitution, on the condition that it remains effective until the legislators revises it by December 31, 2010.

2. Dissenting Opinion of Two Justices

The Instant Provision is not directly aimed at disadvantaging a specific political party or the next eligible candidate on the list of the political party. Also, the total number of members in the National Assembly is 299, among whom 54 are proportional representation members, and the number of seats reserved for proportional representation which may become vacant within 180 days before a day prior to the term expiration date would be extremely minimal.

Meanwhile, the date of National Assembly member elections is, in principle, designated in law as the first Wednesday after 50 days before a day prior to term expiration, so "in case a vacant member accrues within 180 days before the date on which his term of office expires" in effect only a month or so will be remained if the year end and beginning, election campaign periods, and post-election days during which the conduct of substantial state affairs is in fact difficult are excluded. For this reason, it would be actually impossible for a National Assembly member to discharge his/her regular duties during that period. Also, it is stipulated in law that by-elections may not be

held in case less than a year is left before the term expires when there is a vacancy in the seat of a National Assembly member of local constituencies.

All considered, the Instant Provision, by disallowing the merely nominal succession of a proportional representation National Assembly member limited to the extent that no specific damage is done to the functioning of the National Assembly, serves as a suitable means to fulfill the legislative purpose to further develop our political culture. It is hardly considered an unnecessarily excessive restriction, either. Therefore, the Instant Provision is neither against the principles of representative democracy nor infringes on the complainants' rights to hold public office.

22. *Prohibition of Establishing Charnel House within the School Environmental Sanitation and Cleanup Zone Case*

[21-1(A) KCCR 46, 2008Hun-Ka2, July 30, 2009]

In this case, the Constitutional Court held that Article 6, Section 1, Item 3 of the School Health Act prohibiting establishment and operation of charnel facility within the school environmental sanitation and cleanup zone is not unconstitutional.

Background of the Case

On May 17, 2005, the Catholic Foundation for Property Management of the Archdioceses of Seoul (hereinafter, the "Catholic Foundation") filed an application to the Head of Nowon-Gu, Seoul to build a charnel house for accommodating the remains of as many as 3,000 dead at the second basement of the Taerung Catholic Church located in Gongrung2-Dong, Nowon-Gu, Seoul, which is owned by the catholic foundation.

According to Article 5 of the Old School Health Act (before revised by Act No. 8678, December 14, 2007), in order to protect health, sanitation and environment related to study in a school, the superintendent of the office of education shall establish the school environmental sanitation and cleanup zone(hereinafter, the "cleanup zone") pursuant to the Presidential Decree. In this case, the school environmental sanitation and cleanup zone shall not exceed 200 meters from the boundary line of a school. Also, Article 6, Section 1, Item 3 of the Old School Health Act (revised by Act No. 7700, December 12, 2005, but before revised by Act No. 8678, December 14, 2007) prohibits establishment of charnel facility (hereinafter, the "Instant Provisions"). On December 7, 2005, the Head of the Nowon-Gu rejected the application on the basis of the Instant Provisions which ban establishment of a charnel house within 200 meters from the boundary of a school. Following the rejection, in June 2007, the Catholic Foundation initiated an administrative litigation for requesting cancellation of the rejection. While reviewing the litigation, the Seoul

Administrative Court, sua sponte, requested this constitutional review on the Instant Provisions to the Constitutional Court

Provisions at Issue

Former School Health Act (revised by Act No. 7700 on December 7, 2005, but before revised by Act No. 8687 on December 14, 2007)

Article 6 (Acts Prohibited in School Environmental Sanitation and Cleanup Zone)

(1) No one shall conduct any act or establish any facilities falling under any of the following items in the school environmental sanitation and cleanup zone.

3. A slaughterhouse, a crematorium or a charnel facility

Summary of the Decision

In a 5 to 4 vote, the Constitutional Court held the Instant Provision unconstitutional. The summary of the decision is as follows:

1. Court Opinion

A. Basic Rights to be restricted by the Instant Provisions

The Instant Provisions generally ban establishment and operation of a charnel house within the cleanup zone. The purpose of a charnel house established by a religious organization is to conduct religious functions to honor the memory of the deceased and pray for them to rest in peace. Preventing a religious organization from establishing and operating a charnel house may bring about the problem of restricting its freedom of religion.

Also, preventing an individual or a clan from establishing a charnel house for the family members may cause restriction on the right to pursue happiness. Also, for those who want to operate a charnel house as an occupation, the Instant Provisions may restrict their freedom of occupation, too.

B. Whether the Instant Provisions infringe on the basic rights

The Constitution stipulates that fundamental matters pertaining to educational system including school education shall be determined by Act (Article 31, Section 6). According to this, the State has general and comprehensive right to determine and control educational system as well as responsibility for school education.

Our country has cultural climate and sentiment afraid of corpse or tomb. In consideration of such atmosphere in our culture, the legislature decided to regulate the establishment of a charnel house near school in order to protect educational environment, understanding the possibility that a charnel house near school may cause harmful effect on the culture of aesthetic sentiment of students. Although no scientific reason for shunning charnel facility may be found, we cannot deny the necessity and public interest in such prohibition, as long as there is any possibility for such facility to cause harmful effect on students' emotional development.

It is required for all parties, regardless whether they are public organs such as state or local governmental institutions, private person, family, religious organizations or foundation, to be prohibited from establishing and operating charnel facility within the cleanup zone. Therefore, the blanket prohibition against establishing charnel facility, regardless of its types or the subject to establish or operate such facility, cannot be regarded unreasonable nor beyond the boundary of the legislature's formative power regarding educational environment.

As the sentiment repugnant to charnel facility is derived from the general custom and culture of our society, we cannot say that students may completely overcome such fear when they become college students. Therefore, it is also hard to say that banning on establishment of a charnel house within the cleanup zone around university is unreasonable or unnecessary.

As the prohibition in the Instant Provisions cover only the cleanup zone within 200 meters of school, the possible infringement on the fundamental rights does not seem grave.

Therefore, we don't think that the Instant Provisions violate Article 37, Section 2 of the Constitution, infringing upon the freedom of religion, the right to pursue happiness and the occupational freedom

beyond the necessity for achieving the legislative purpose.

2. Dissenting Opinion of Three Justices

It is hard to assert that a charnel house is definitely a noxious facility that negatively affects education and emotional health of students near it. Rather, charnel facility can be a place where people can contemplate on the life after death and many facets of life, so that it can be positively used as a place for the cultural and philosophical growth of many students. Especially for a charnel house established by a religious organization based upon the religious belief on the afterlife, it has specific characteristics suitable to be a place for meditating on the origin of blessing the deceased and thinking about the life and death.

Of course, we cannot deny the negative effect on students' body and soul when excessively large charnel facility is established and operated or when a charnel house is recklessly managed without considering sanitary condition or environment. But such problems can be precluded by providing regulations on the scale of such facility and the standard for sanitary and environmental conditions in detail by the legislature.

The schools stipulated in the Instant Provisions include university and similar institutions. Considering the physical and emotional maturity of university students, only a slight chance exists for charnel facility to negatively affect the educational environment in university. Nevertheless, the Instant Provisions expansively prohibit such facility from being established in any area near schools including university.

We think the Instant Provisions violate the Constitution, infringing upon the freedom of religion and the right to pursue happiness of the people including the movant at the requesting court.

3. Partially Dissenting Opinion of One Justice

College students are physically and emotionally mature enough to voluntarily make a decision based on their own volition and take the responsibility of their action. Therefore, it is extremely unlike that presence of a charnel house operated by a religious organization will negatively influence their mentality or academic performance. Including

'university, etc.', or, in other words 'schools pursuant to Article 2 of the Higher Education Act' in the scope of 'schools' stipulated in the Instant Provisions of the Act seems not the least restriction necessary to achieve the legislative purpose. Therefore, as the aforementioned part excessively restricts the said movant's religious freedom, I think it runs afoul of the Constitution, in violation of the principle of proportionality.

23. *Joint Punishment of Juridical Persons in Connection with Their Employees' Illegal Acts Case*

[21-2(A) KCCR 77, 2008Hun-Ka14, July 30, 2009]

In this case, the Constitutional Court decided that Article 31 of the Act on Special Cases Concerning Regulation and Punishment of Speculative Acts, which stipulates that a juridical person shall also be subject to fines if its employees engage in unlicensed speculative businesses in connection with the affairs of the juridical person, violates the liability rule drawn from the principles of nulla poena sine lege (no penalty without law) and the rule of law.

Background of the Case

The Act on Special Cases Concerning Regulation and Punishment of Speculative Acts (amended by Act No. 7901, March 24, 2006) provides that the term "speculative acts" refers to acts to provide the profits or losses to properties by collecting goods or benefits on properties from scores of people (hereinafter, referred to as "goods, etc.") and by deciding the benefits or losses under coincidental methods (Article 2), and that any person who wishes to operate a speculative business shall prepare the required facilities, etc. before obtaining permission from the Commissioner of the Local Police Agency (Article 4 Section 1).

However, Article 31 of the Act provides that if the representative of a juridical person, or an agent, a servant or any other employee (hereinafter, "employees, etc.") of a juridical person commits an offense as prescribed in Article 30 in connection with the affairs of the juridical person, not only shall the wrongdoer be punished but the juridical person shall be subject to a fine provided in the same Article (hereinafter, the "Provision").

The movant at the requesting court of this case is YTN Inc., a cable television broadcaster. The said movant's marketing officer Baek ○-beom, without the permission of the commissioner of the competent local police agency, had been running a quiz show on a YTN news

channel from April 2003 to March 2007, transmitting captioned advertising that said those who got answers by making charged calls would win prizes by drawing lots. On charges of running a speculative business to gain profits by inducing viewers through the stated method, movant at the requesting court YTN, along with Mr. Baek, was prosecuted and received a summary order from the Suwon District Court to pay fines. The movant at the requesting court then requested a trial on the summary order and filed a motion to request for a constitutional review of the Provision. The requesting court granted the motion and requested this constitutional review on May 19, 2008, arguing that the Provision violates the rule of liability and, therefore, the Constitution.

Provision at Issue

Act on Special Cases Concerning Regulation and Punishment of Speculative Acts, Etc. (Revised by Act No. 7901, Mar. 24, 2006)

Article 31 (Joint Penal Provisions)

If the representative of a juridical person, or an agent, a servant or any other employee of a juridical person or an individual commits an offense as prescribed in Article 30 in connection with the affairs of the juridical person or the individual, not only shall such offender be punished accordingly, but the juridical person or the individual shall also be subject to a fine provided for in the relevant provisions.

Article 30 (Penal Provisions)

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

1. The person who operates his business without obtaining the permission under the provisions of Article 4 (1) or 7 (2);

Summary of the Decision

In a vote of 6 (unconstitutional) to 1 (concurring) to 2 (dissenting), the Constitutional Court decided that the Provision, which

unexceptionally imposes punishment even on the juridical person that has fulfilled its duty to exercise caution in appointment and supervision and therefore has no liability for its employees' illegal acts, violates the rule of liability and is thus unconstitutional. The reasoning is as follows.

1. Court Opinion

A. Rule of Liability

The criminal punishment, as a restriction of crimes, is in essence the condemnation of negatively judged acts by law and order. Even if an outcome which is assessed negatively by the legal order takes place, the occurrence of the outcome alone cannot be the reason for imposition of criminal punishment as far as the outcome is not attributable to any specific person. This rule of liability, which imposes no criminal punishment without liability, is one of the basic principles of criminal law. It is a principle inherent in a constitutional state and drawn from Article 10 of the Constitution.

B. Necessity for Restrictions of Juridical Persons and the Rule of Liability

With the increase in social activities of juridical persons, incidents of their anti-social violation of interests are also rising. In this context, it is necessary to impose restrictions directly on the responsible juridical persons. Yet, because criminal punishment is the stiffest punishment available to the State, the liability rule derived from constitutional principles concerning criminal punishment - the rule of law and nulla poena sine lege - should be observed insofar as the legislature has opted for "criminal punishment" as the means to penalize a juridical person. According to the Provision, however, once employees, etc. of juridical persons are found guilty of violating Article 30 Section 2 Item 1 of the Act in connection with their work, juridical persons are also immediately subjected to penal provisions that levy fines before being accused of their precise liability with respect to the illegal acts of their employees, etc. This inevitably leads

to imposing criminal punishment even on the juridical persons who have fulfilled their obligation to exercise caution in appointment and supervision and thus are in no way responsible with regard to their employees' illegal acts. Therefore, the Provision contradicts the liability rule and so violates the Constitution.

2. Concurring Opinion of One Justice

When an institution or an employee that is entitled to decide on management policies and major issues of a juridical person or supervise and manage general affairs of a juridical person or an agent entrusted with the aforementioned powers acts within the given competence, the act can be regarded the same as that of the juridical person. In this case, even if the juridical person is held criminally responsible for work-related acts of violation committed by the stated institution, employee or agent, the liability rule would not be violated.

Therefore, the portion of Article 31 of the Act on Special Cases Concerning Regulation and Punishment of Speculative Acts regarding the representative of a juridical person, or an agent, a servant or any other employee of a juridical person entitled to the stated powers does not violate the Constitution. However, punishment of an agent, a servant or any other employee of a juridical person whose competence does not include the aforementioned powers violates the liability rule. Even if the Provision intends to penalize a juridical person for its negligence in the duty of appointment and supervision of its agent, servant or any other employee who are not entitled to the said powers, applying the statutory punishment equally to the principal offender and the juridical person responsible solely for the negligence is hardly considered an imposition of proportional punishment for individual liabilities. The Provision, therefore, is in violation of the Constitution.

3. Dissenting Opinion of Two Justices

In case an employee of a juridical person engages in an unlicensed speculative business, the Provision imposes fines also on the juridical person aside from the employee. This is based on the consideration

that it is difficult to clarify, considering the feature of organizations and work structures of juridical persons, who is responsible for such an act of violation although the juridical person, to which profits are imputed, is highly likely to be accused of causing or reinforcing such an act through toleration and neglect or, in broad terms, a flawed operating system incapable of supervising such an act. Therefore, the Provision is rightfully considered to have reflected the legislators' will to strictly punish the acts of juridical persons in connection with their employees' acts of violation, such as the aforementioned negligence of duty in appointment and supervision.

Meanwhile, the Supreme Court views that the joint punishment of the accountable employee and his/her employer should hold the juridical person, or the employer, responsible for reasons of negligence in appointing and supervising employees, provided that the employer is presumed to be negligent in connection with the employee's act of violation. Even in Japan, where the same joint punishment exists, the conventional wisdom and the position of the Japanese Supreme Court is that the joint punishment of employers "presumes the negligence of juridical persons in not having paid all necessary attention such as through appointment and supervision to prevent illegal acts of their agents or employees".

For this reason, even if the "juridical person's negligence of duties such as appointment and supervision of its employees" is not explicitly written into the Provision, punishment will be imposed only for such responsibilities. Also, the punishment in such cases will be applied according to constitutional interpretation of law. Based on such interpretation, the Provision does not violate the rule of liability.

24. Ordinance Inaction Case

[21-2(A) KCCR 292, 2006Hun-Ma358, July 30, 2009]

In this case, local governments have not enacted any ordinance to determine the "limit of public official who are actually engaged in labor" despite Article 58 Section 2 of the Local Public Officials Act delegates the enactment authority to ordinance. The Constitutional Court held the inaction unconstitutional because the inaction unreasonably neglects the constitutional duty to establish an ordinance, depriving the complainants of the right to collective action.

Background of the Case

The Provision of Article 58 Section 1 of the Local Public Officials Act allows labor campaign to "those who are actually engaged in labor" that shall be defined by a relevant ordinance according to Article 58 Section 2 of the instant Act. The complainants were public officials in technical service, who served at schools in Seoul, Incheon, Gyeonggi-Do, and Jeollabuk-Do as security officers. The respondents have not enacted any ordinance to define the "limit of public officials who are actually engaged in labor" despite of the delegation of Article 58 Section 2 of the Local Public Officials Act. The complainants filed this Constitutional Complaint, alleging that the inaction of respondents infringed on the complainants' basic rights of labor of Article 33 Section 2 of the Constitution.

Summary of the Decision

In a vote of 6 (unconstitutional) to 3 (constitutional), the Constitutional Court held that the inaction of an ordinance is unconstitutional, according to the following reasons.

I. Court Opinion

A. Infringement of basic rights and relatedness

The Act on the Establishment and Operation, etc. of Public Officials' Trade Unions (hereinafter, "public officials' trade union act") allows public officials in technical service and public officials in labor service, among local public officials, to join in a public officials' trade union and to exercise the right to organize and the right to collective bargaining. However, if an ordinance were enacted according to Article 58 Section 2 of the Local Public Officials Act, and the ordinance classified public officials in technical service as "public officials who are actually engaged in labor", the public officers in technical service would be exempted from the application of the Public Officials' Trade Union Act. It implies that public officials in technical service may enjoy the right to collective action, in addition to the right to organize and right to collective bargaining. The above implication indicates the scope of the three basic rights of labor of the complainants, who are public officials in technical service, depends on the ordinance. Therefore, the inaction of the ordinance would be related to the infringement of the basic rights of the complainants.

B. Review on Merits

Article 58 Section 2 of the Local Public Officials Act prescribes that the "limit of public officials who are actually engaged in labor" shall be determined by a relevant ordinance. In other words, the ordinance should be enacted to determine a group of public officials that are allowed to exercise the right to organize, the right to collective bargaining, and the right to collective action. Therefore, local governments would be imposed the constitutional duty to enact an ordinance so that they can provide local public officials that are actually engaged in labor of Article 58 Section 1 of the Local Public Officials Act with the right to organize, the right to collective bargaining, and the right to collective action. Besides, Article 58 of the Local Public Officials Act has been enacted by the legislative decision that the services of the "public officials who are actually engaged in labor" would not be significantly affected by their exercise of the three basic rights of labor, including the right to collective action. The circumstances suggest there are no legitimate reasons to delay the enactment of the ordinance.

Article 33 Section 2 of the Constitution, the provision of Article 58 Section 1 and Section 2 of the Local Public Officials Act ensure local officials, who are eligible to "those who are actually engaged in labor" under an ordinance, of the right to collective action. The inaction of such ordinance implies any local public official cannot enjoy the right to collective action. Therefore, the inaction of this case infringes on the basic right of the complainants, due to the denial of the access to their right to collective action.

2. Concurring Opinion of One Justice

The Constitution imposed the legislative duty to secure the three basic rights of labor on the National Assembly. It would violate the constitutionally-imposed duty if the legislature delegates the authority to determine the scope of "public officials who are actually engaged in labor" to an ordinance, instead of its own initiative. Therefore, the unconstitutionality of the inaction of the relevant ordinance in this case originates from Article 58 Section 2 of the Local Public Officials Act that does not stipulate who can enjoy three basic rights of labor among public officials, but delegates it to a relevant ordinance despite the Constitution requests to determine it by a statute. Therefore, it would not be allowed to request the constitutionality of the inaction of this case, in principle. However, this way of thinking may be against the spirit of the Constitution because the legislative confusion may interrupt the basic three rights of a certain group of public officials, who should enjoy the basic three rights of labor. With this consideration, it shall be decided that the inaction of the relevant ordinance according to Article 58 Section 2 of the Local Public Officials Act is deemed to be a legislative inaction, violating the Constitution.

3. Dissenting Opinion of Three Justices (Dismissal)

Because the inaction of this case infringes on the fundamental rights of "public officials who are actually engaged in labor", the relatedness to the infringement of fundamental rights, which is the justiciability issue of this case, would depend on whether the complainants are

eligible to "public officials who are actually engaged in labor". The complainants are public officials in technical service who serve as school security officers. Their services are not independent and separated from school education, but engaged in the school education services that are required in education activities. The complainants are not, accordingly, the public officials who are engaged in labor in the field of local agencies. Therefore, this complaint does not satisfy the relatedness requirement.

25. Prohibition of Distribution of UCC in Prior-Electioneering

[21-2(A) KCCR 311, 2007Hun-Ma718, July 30. 2009]

In this case, the Constitutional Court held constitutional the part, "the likes", of Article 93 Section 1 of Public Office Election Act ("POEA") that prohibits anyone from distributing or posting etc. certain materials, such as advertisements, photographs, or the likes conveying the import of supporting or opposing candidates in order to influence on election because the challenged provision does not infringe on freedom of election campaign. The unconstitutionality opinion, being the majority, falls behind the quorum of six votes needed for the holding of unconstitutionality.

Background of the Case

Complainant filed this constitutional complaint arguing that POEA, Article 93 Section 1

infringes on his freedom of political expression by prohibiting him from creating or distributing UCC(User Created Content) that contain the import of supporting or recommending or opposing a political party or candidates or presenting the name of a political party or candidate. The subject matter of this case is whether the part, "the likes", of Article 93 Section 1 of POEA (hereinafter, "Instant Provision") infringes on complainant's basic right. The text of POEA, Article 93 Section 1 is as follows:

Provision at Issue

Public Official Election Act (revised on Aug. 4. 2005 by Act No. 7681)

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

(1) No one shall distribute, post, scatter, play, or run an advertisement, letter of greeting, poster, photograph, document, drawing, printed matter, recording tape, video tape, or **the likes** (*intentionally emphasized*) which contains the contents supporting,

recommending or opposing a candidate or political party(including the preparatory committee for formation of a political party, and the platform and policy of a political party: hereinafter, the same shall apply in this Article), or showing the name of the political party or candidate, with the intention of influencing the election, not in accordance with the provision of this Act, from 180 days before the election day (in the event of a special election, the time when the cause for holding the election becomes final) to the election day. (*proviso below intentionally omitted*)

Summary of the Opinion

In a 3 (constitutional) to 5 (unconstitutional) vote (one justice did not participate in this decision), the Constitutional Court held that the Instant provision is not unconstitutional for the reason below.

1. Constitutionality Opinion of Three Justices

A. Whether the Instant Provision violates the rule of clarity.

POEA, Article 93 Section 1 restrains unlawful electioneering in terms of conveyance of ideas or thoughts in a manner appealing to the visual and auditory senses rather than the type of medium. In this regard, it can be sufficiently assumed that "the likes" set forth in the said Section can be found to be media or means that can deliver ideas or thoughts and media similar to the readable or audible materials enumerated in the said Article 93 Section 1 that contain the contents supporting, recommending or opposing a candidate or political party with the intention of influencing the election. Therefore, the Instant Provision does not violate the rule of clarity.

B. Whether the Instant Provision infringes on freedom of electioneering

The purpose of Article 93 Section 1 of POEA is to increase the freedom and fairness of elections by deterring unfair competition in

electioneering or unbalance among candidates caused by a difference of financial capacity and preventing an outcome harming the tranquility and fairness of the election. The legitimacy of this purpose can be acknowledged and the said Section is an appropriate means for this purpose. Denouncing with personal attacks or slandering the opposing candidates by spreading false information can have a fatal influence on the results of an election, and anonymity and openness of the on-line space can decisively destroy the fairness of the election through exposing voters to false information of impersonating candidates or electioneering of foreigners or those under 19 who are not entitled to cast a vote. Accordingly, it is difficult to resolve this problem with a simple post-election regulation and to find clearly that there are other less restrictive means than Article 93 Section 1. Furthermore, since distribution of UCC (User Created Content) is allowed over a considerable range, such as posting UCC of candidates or prospective candidates (Article 59 of POEA) during the period of election campaign (Article 82-4 Section 4 of POEA), restriction caused by the Instant Provision can be considered as the least restrictive means for the abovementioned purpose. In addition, while public interest in the tranquility and fairness of the election achieved by the Instant Provision is very important and great in the democratic country, restrictions of basic rights resulting from the Instant Provision cannot be found so serious such that the balance of interest could be upset. Therefore, the Instant Provision does not infringe on freedom of election campaign in a manner violating the rule against excessive restriction.

2. Concurring Opinion of One Justice

Article 116 Section 1 delegates the legislative body to concretely form the restriction on freedom of election campaign by prescribing that "fair opportunities should be guaranteed in electioneering, under the supervision of a competent election commission" and be done within the limit articulated by the statutes. It is obvious that restriction of electioneering shall comply with the constitutional idea of guaranteeing basic rights and general constitutional principles. However, if legislators see restrictions on electioneering as necessary

for the fairness and tranquility of the election, considering characteristics of previous elections and other general situations, it should be observed unless it is clearly unreasonable or unfair.

3. Unconstitutionality Opinion of Four Justices

A. Whether the Instant Provision violates the rule of clarity

We cannot find that "the likes" include 'all media or means of conveying ideas or thoughts' just because the activities set forth in Article 93 Section 1 are limited in time and place. It is difficult to ascertain which one among various kinds of media, having different types and impact of expression, can fall into the "the likes" only with the examples of the written documents or graphic materials set forth in the said Section. Therefore, the Instant Provision violates the rule of clarity in the Constitution because the scope and limit of electioneering activities cannot be clarified only with the enumerated examples in the said Article 93 Section 1.

B. Whether the Instant Provision infringes on freedom of electioneering

The legislative purpose of Article 93 Section 1 of POEA can be found legitimate. However, prohibition of distribution of UCC cannot be acknowledged as an appropriate means for this purpose because we can hardly find that distribution of UCC destroys the fairness of candidates or the tranquility of the election. The Instant Provision cannot satisfy the rule of the least restrictive means for basic rights because there are less restrictive means for that purpose. Furthermore, the Instant Provision does not strike the balance of interests because while the fairness of election obtained by unconditional prohibition from distribution of UCC cannot be found to be clear or concrete, the disadvantage to candidates caused by restriction of freedom of election campaign cannot be underestimated. Therefore, the Instant Provision infringes on the freedom of electioneering by violating the rule against excessive restriction.

4. Unconstitutionality Opinion of One Justice

Electioneering through written or graphic materials should be guaranteed as a freedom of political expression. Accordingly, prohibiting this is restricting the freedom of electioneering without justifiable reason, so it is contradictory to the Constitution. The same shall be valid for Electioneering through Distribution of UCC.

26. Nighttime Outdoor Assembly Ban Case

[156 KCCG 1633, 2008Hun-Ka25, September 24, 2009]

In this case, the Constitutional Court held that the Article 10 of the Assembly and Demonstration Act as well as its penalty provision, the Article 23 Item 1 infringe the freedom of assembly when the Article 10 bans outdoor assembly from sunset to dawn with the exception of selective permission by the head of competent police department. The decision, having five votes for unconstitutionality and two votes for incompatibility with the Constitution, was rendered as an incompatibility decision.

Background of the Case

Movant at the requesting court was charged with the violation of "Assembly and Demonstration Act" by allegedly organizing an outdoor assembly from 19:35 to 21:47 on May 9th, 2008. During the trial, the said movant filed a motion to request for the constitutional review of 'Assembly and Demonstration Act, Article 10 and 23 Item 1' claiming that the instant law allows the advance permit for assembly which is prohibited by the Constitution. The trial court granted the motion and requested this constitutional review of the aforementioned provisions on October 13, 2008. The text of the provisions at issue is as follows:

The Provisions at Issue

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

Article 10 (Hours Prohibited for Outdoor Assembly and Demonstration) No one may hold any outdoor assembly or stage any demonstration either before sunrise or after sunset: Provided, That the head of the competent police authority may grant permission for an outdoor assembly to be held even before sunrise or even after sunset along with specified conditions for the maintenance of order if the organizer reports the holding of such assembly in advance with

moderators assigned for such occasion as far as the nature of such event makes it inevitable to hold the event during such hours.

Article 23 (Penal Provisions) Any person who violates the main sentence of Article 10 or ……, shall be punished according to the following classification of offenders:

1. The organizer shall be punished by imprisonment for not more than one year, or by a fine not exceeding one million won;

Summary of the Decision

In a 7 (five votes for unconstitutionality and two votes for incompatibility) to 2 vote, Constitutional Court held the provisions at issue incompatible with the Constitution.

1. Justice Lee Kang-kook, Justice Lee Kong-hyun, Justice Cho Dae-hyen, Justice Kim Jong-dae and Justice Song Doo-hwan's Majority Opinion: Unconstitutionality

Under the Constitution, Article 21 Section 2, the permit system for assembly is prohibited. This principle is the constitutional value-consensus and the decision of the people who possess the power to amend the Constitution. Under this provision, the Constitution sets a clear limitation in restricting basic rights and, therefore, this provision should be the standard of review with a higher priority than the Constitution, Article 37 Section 2 which is the provision regarding statutory reservation.

The 'permit' prohibited by the Article 21 Section 2 of the Constitution means a permit system under which an administrative authority may permit assemblies in certain cases by reviewing the contents, the time and the place of reported assemblies. In other words, it is the system under which all unpermitted assemblies are banned.

The Assembly and Demonstration Act (hereinafter, "ADA"), Article 10 prescribes that, the head of a competent police department, as an administrative authority, may ban an outdoor assembly scheduled either before sunrise or after sunset (hereinafter, "nighttime") as a general

rule with an exception that the authority may decide not to ban it based on the review of the contents of an assembly in advance. Evidently, the Article 10 prescribes a permit system for nighttime outdoor assembly and we cannot read it otherwise. Therefore, it is against the Article 21 Section 2 of the Constitution and the entire Article 23 Item 1 of "ADA" based on it is against the Constitution as well.

2. Justice Cho Dae-hyen and Justice Song Doo-hwan's Supplementary Concurring Opinion

If we hold the provisions at issue against the Article 21 Section 2 of the Constitution, we can solve the constitutional issue by letting lawmakers to delete the exception provision of the Article 10 of "ADA" because, in that way, the administrative authority loses the power to permit nighttime outdoor assemblies in a selective basis. Yet, we still face the issue of substantial infringement of the freedom of assembly without reasonable basis as we allow the general and complete ban of nighttime outdoor assembly under the Article 10 of "ADA". For this reason, we should hold the entire part of the Article 10 against the Article 37 Section 2 of the Constitution.

3. Justice Min Hyeong-ki and Justice Mok Young-joon's Opinion: Incompatibility with the Constitution

(A) When lawmakers enact a law to restrict the freedom of assembly, such action of lawmakers does not fall into the advance permit system which is prohibited under the Article 21 Section 2 of the Constitution. In general, lawmakers may restrict outdoor assembly in terms of time, place and manner. The main text of the Article 10 of "ADA" regulates lawmakers' restriction on time of outdoor assembly while the proviso relieves the severity of the restriction. The contested provision is the time restriction of outdoor assembly and thus not against the principle of "the prohibition of advance permit" promulgated by the Constitution, Article 21 Section 2.

(B) "ADA" Article 10 was enacted to restrict nighttime outdoor

assembly in principle after considering the nature and the distinctiveness of nighttime outdoor assembly from the perspective of the difficulty in maintaining the public order. The legitimacy of legislative goal and the appropriateness of means are thereby approved. Yet, the contested provision bans outdoor assembly in a wide range of timeframe and, in result, makes the freedom of assembly nominal by virtually blocking daytime workers' and students' access to assembly. Further, in a city oriented and industrialized modern society, the nature and the distinctiveness of nighttime in terms of difficulty in maintaining a public order is focused on late night. Since "ADA" prescribes various measures to protect citizen's life and privacy and public order, the legislative goal could be achieved without difficulty even if the prohibited timeframe is not such wide as in the provisions at issue. Nevertheless, the contested provision imposes an excessive restriction to achieve the goal and delegates the power of permission, which was enacted to relieve the excessive restriction as an exception, to an administrative authority. However, such a delegation cannot be found to be an appropriate measure to relieve excessive restriction and, for this reason, the Article 10 of "ADA" violates the principle of the prohibition of excessive restriction and infringes on the freedom of assembly. This finding also applies to the Article 23 Item 1 of "ADA" which is based on the Article 10 of "ADA".

(C) The unconstitutionality of the Article 10 of "ADA" is not found in the restriction of nighttime outdoor assembly itself. In the provisions at issue, the constitutionality and the unconstitutionality are mixed and, therefore, it should be left to lawmakers to decide what nighttime frame shall be restricted to guarantee the freedom of assembly in the least restrictive manner. For this reason, we hold the provisions at issue incompatible with the Constitution and yet maintain its validity through June 30, 2010 until which time lawmakers may revise it. If lawmakers do not revise it until the above said date, it will become invalid as of July 1, 2010.

4. Justice Kim Hee-ok and Justice Lee Dong-heub's Dissenting Opinion: Constitutionality

(A) The content-neural restriction on time and place in the freedom of assembly does not fall into the "permit" system prohibited by the Constitution, Article 21 Section 2 as far as it is enforced with a concrete and clear standard. Whether the Article 10 of "ADA" constitutes the assembly permit prohibited by the Constitution, Article 21 Section 2 should be decided after reviewing the standard of the restriction: whether the standard, as a content-neutral one, is concrete and clear. In restricting the freedom of assembly, the provisions at issue adopt a time standard which is content-neutral, concrete and clear. For this reason, the contested provision does not constitute the "permit" prohibited by the Constitution, Article 21 Section 2.

(B) The Article 10 of "ADA", with a legitimate legislative goal, was enacted to guarantee the freedom of assembly and demonstration and, concurrently, to maintain the public order in a harmonious manner. Since, nighttime outdoor assembly has a high probability to violate the public order by the virtue of 'nighttime' and 'outdoor assembly'. Therefore, the contested provision, which bans nighttime outdoor assembly as a general rule, is found to be an appropriate means to achieve the legislative goal. It is practically difficult to restrict nighttime outdoor assembly by subdividing the restricted time and places more into details. Essential nighttime outdoor assemblies are selectively permitted under the contested provision. Further, alternative channels for communication and public opinion are available. For these reasons, we hold that the Article 10 of "ADA" does not infringe on the freedom of assembly and not violate the Constitution. It is same with the "ADA", Article 23 Item 1 which is based on the contested provision.

5. Type of Decision and the Relation to the Precedent

Five Justices held the provisions at issue unconstitutional while two Justices incompatible with the Constitution. This number satisfies the required number of votes (6) to hold a statute unconstitutional under the Constitutional Court Act, Article 23 Section 2 Item 1. Subsequently, this Court holds the contested provisions unconstitutional and yet maintain their validities through June 30, 2010 until which

time lawmakers may revise the unconstitutional portion of the law because the provisions at isue have the mixed portions of constitutionality and unconstitutionality. If lawmakers do not revise this provisions until the above said date, the provisions will become invalid as of July 1, 2010.

Previously, in 91 Hun-Ba14 (April 28, 1994), the Constitutional Court held the former Article 10 of "ADA (wholly revised to Act No. 4095 on March 29, 1989)" constitutional. The decision of 91 Hun-Ba14 shall be overruled as to the conflicted portion with this decision.

6. Justice Cho Dae-hyen's Non-Applicability Order Opinion

The Article 10 and 23 Item 1 of "ADA" is a criminal statute. If this Court allows the validity of the contested provisions in which the unconstitutional portion is embedded until revision, this Court's decision is deemed to be deviated from the spirit of constitutional review of statute and further against the Constitutional Court Act, 47 Section 2. The application of the provisions at issue should be suspended until revision.

27. *Heavy Taxation on the Acquisition of Deluxe Amusement Center Case*

[21-2(A) KCCR 498, 2007Hun-Ba87, September 24, 2009]

In this case, the Constitutional Court decided that it violates the rule against excessive restriction and principle of equality, thereby violating the Constitution, to apply Article 112 Section 2 Item 4 of the former Local Tax Act that stipulates the heavy taxation on the acquisition of luxury recreation centers to the acquisition not intended to enjoy such deluxe amusement.

Background of the Case

The petitioner, as a redeveloper, acquired the real property of this case to construct a condominium complex. The petitioner declared and paid acquisition tax and special tax for farming and fishing villages with the heavy acquisition tax rate for a hostess bar and the general acquisition tax rate for the rest of area.

The petitioner appealed the above acquisition tax and special tax for agricultural and fishing villages with Mayor of Daegu that eventually rejected the appeal. After the rejection, the petitioner filed the petition to review the appeal with Minister of Government Administration and Home Affairs, and Minister of Government Administration and Home Affairs made a partial correction of the tax payment (hereinafter, the rest of part that have not been corrected with regard to the disposition by declaration and payment will be referred as "the Instant Imposition").

Alleging the instant disposition is illegal, the petitioner brought a case to Daegu District Court for the cancellation of the disposition of acquisition tax, etc. and appealed to the appellate court when the district court rejected it. While the appellate proceeding is pending, the petitioner filed a motion to request for the constitutional review on Article 112 Section 2 Item 4 of the former Local Tax Act (revised by Act No. 7332, January 5, 2005, but before revised by Act No. 7843, December 31, 2005). When the court denied the said motion, the

petitioner filed this constitutional complaint.

Provision at Issue

Former Local Tax Act (revised by Act No. 7332, January 5, 2005, but before revised by Act No. 7843, December 31, 2005)

Article 112 (Tax Rates)

2) Acquisition tax rates in acquiring real estate falling under any of the following items (including cases of acquiring a portion of a villa by dividing it) shall be 500/100 of tax rates prescribed in Section 1. (*Second sentence is omitted*)

4. luxury recreation centers: Buildings and land attached thereto determined by Presidential Decree among buildings used for casinos, amusement and tavern quarters, special bathing rooms or other similar purposes

Summary of the Decision

In a vote of 7 to 2, the Constitutional Court held that it violates the Constitution to apply the above provision where the luxury recreation center was not acquired for the enjoyment of such recreation center, with the following reasons:

1. Court Opinion

A. Rule against excessive restriction

Article 1 of "Presidential Emergency Measure for the Stability of People's Lives (enacted on January 14, 1974 by Presidential Emergency Measure No. 3)", which is the matrix of the challenged provision, declares that the said presidential emergency measure intends to overcome the crisis of the national economy by taking the necessary actions for the stabilization of people' lives through the reduction of taxation for low-income class and the control of extravagance consumption.

The heavy acquisition tax on luxury recreation centers under the

challenged provision purposes the directing function to control the acquisition and enjoyment of deluxe amusement center, in addition to the traditional financing function. Theses purposes would justify the heavy acquisition taxation.

However, the above purpose does not imply that it is the legitimate means to impose the heavy acquisition tax on the acquisition of luxury recreation centers that would not be used for such recreational purposes.

The challenged provision prescribes the heavy acquisition tax on any acquisition of luxury recreation centers, regardless of the acquiring purpose. However, it does not give an enough consideration to minimize damages of the ones who acquire luxury recreation centers without the intent to enjoy such luxury recreation. It would not satisfy the requirement of the least restrictive means.

Further, the public interests designated by the challenged provision would not be achieved by the imposition of heavy acquisition tax on the 'acquisition without the purpose of the enjoyment of luxury leisure', as stipulated by the challenged provision. Accordingly, it would cause the imbalance between public interests and private interests because of the significant restriction on private interests, while no public interests are accomplished.

The challenged provision, therefore, violates the principle against excessive restriction if it applies to the acquisition without the intent to enjoy luxury leisure.

B. Principle of Equality

The challenged provision mainly intends to control the consumption of luxury properties and to promote the people's sound consumption propensity. It suggests that 'acquisition without the purpose of the enjoyment of luxury leisure' is different in nature from the 'acquisition with the purpose of the enjoyment of luxury leisure'.

The imposition of heavy acquisition tax should consider the acquisition purpose, accordingly. It would be unjustified discrimination to apply this challenged provision to the 'acquisition without the purpose of the enjoyment of luxury leisure' regardless of the purpose, thereby violating the principle of equality.

2. Dissenting Opinion of Two Justices (Constitutional)

A. Principle against excessive restriction

Despite the challenged provision intends the directing function, these are nothing but incidental. Rather, the real intention of the challenged provision is the increase of internal revenues through the imposition of heavy tax on the acquisition of luxury properties ('luxury recreation centers') that have the high tax-bearing capacity. Because it accords with the nature of acquisition tax, the purpose of legislation would be justified.

This interpretation regarding the legislative purpose does not suggest that the imposition of heavy acquisition tax should depend on the acquiring purpose of luxury recreation centers. Due to the limitation of legislation techniques, acquisition taxes are imposed according to the circumstances at the time of acquisition, not the future circumstances that may be altered. The subjective intention of acquisitors should not affect taxation.

Besides, considering the heavy taxation of the challenged provision regards men of wealth that are capable to acquire luxury recreation centers, the five times higher taxation rate than normal taxation rates would not be arbitrary, beyond the reasonable degree to achieve the purpose.

There would be no significant imbalances between the public interests that secure the finance of local governments through the heavy taxation on the acquisition of luxury properties such as luxury recreation centers under the challenged provision, and the private interests that are restricted by paying the heavy acquisition tax that are significantly more expensive than general acquisition taxes despite it was acquired without the intent to use luxury recreation centers.

Therefore, it would not violate the principle against excessive restriction to apply the

challenged provision to the acquisition without the intent to use luxury recreation centers.

B. Principle of Equality

With regard to the heavy acquisition taxation on luxury recreation centers, the 'acquisition purpose' should not be employed as the standard to classify into "two naturally different comparison groups". Because the challenged provision intends the financing of local governments, which is the traditional function of taxation, the 'acquisition of luxury recreation centers' should be equally treated, regardless of the acquiring purpose.

Therefore, the challenged provision does not violate the principle of equality despite it may be applicable to the acquisition without the purpose to use luxury recreation centers.

28. Private Taking Case

[21-2(A) KCCR 562, 2007Hun-Ba114, September 24, 2009]

In this case, the Constitutional Court held that the contested provision, which is the part of a 'project operator' in Industrial Sites and Development Act, Article 22 Section 1 stipulates that private corporations may expropriate properties that are necessary for industrial complex developments, referring Article 16 Section 1 Item 3 of the Act, did not infringe on the right to property etc.

Background of the Case

Governor of Chungnam Province, on July 31, 2004, approved and announced the development project of 'Second Tangjeong General Local Industrial Complex', encompassing 2,113,759㎡ of Tangjeong-Myeon, Asan City and designating ○○ Electronics as a project operator. Petitioners were owners of lands that were located in the development area. ○○ Electronics attempted the negotiation to purchase the lands with petitioners. When the negotiation was failed, however, it initiated the condemnation proceeding with Chungnam Province Land Tribunal. On May 22, 2006, Chungnam Province Land Tribunal ruled to condemn the lands and buildings. Petitioners filed a case seeking to cancel the above taking disposition of Chungnam Province Land Tribunal in Daejeon District Court on July 24, 2006 (Daejeon District Court, 2006 Gu-Hab 2239). While the case is pending, petitioners also filed a motion to request for the constitutional review on the part of 'project operator' (hereinafter, the "Instant Provision") of Article 22 Section 1 of the 'Industrial Site and Development Act' (hereinafter, "ISDA") with regard to ISDA, Article 16 Section 1 Item 3, alleging the Instant Provision that permits private corporations to expropriate lands necessary for industrial complex developments infringed on the right to property (Daejeon District Court, 2005 Ah 163). After the motion was denied on September 19, 2007, petitioners filed this constitutional compliant on October 29, 2007.

Provision at Issue

Industrial Sites and Development Act (Revised Dec. 29, 1995 by Act No. 5111)

Article 22 (Land Expropriation)

(1) A project operator (excluding a project operator under the provisions of Article 16 (1) 6; hereafter the same shall apply in this Article) may expropriate or use land, buildings, things fixed to the land, rights thereto excluding ownership, mining claims, fishery rights, or rights concerning the use of water (hereinafter, referred to as "land, etc."), which are necessary for executing the industrial complex development project concerned.

Article 16 (Operators of Industrial Complex Development Projects)

(1) An industrial complex development project shall be implemented by a person who is selected according to the development plan as designated by the authority to designate industrial complexes from among persons falling under any of the following subparagraphs:

1.~2. (*intentionally omitted*)

3. A person who wishes to install facilities adequate for the relevant development plan and to move therein, or a person who is deemed capable of developing an industrial complex in accordance with the relevant development plan, if such person meets the requirements prescribed by Presidential Decree;

Summary of the Decision

The Constitutional Court, in a 8 to 1 vote, held that the part of a 'project operator' under Article 22 Section 1 of the 'Industrial Site and Development Act' with regard to Article 16 Section 1 Item 3 of the Act, stipulating that private corporations may expropriate properties that are necessary for industrial complex developments, does not infringe on the right to property, thereby not violating the Constitution, for the following reasons:

1. Court Opinion

A. Whether private corporations can be eligible to expropriate for

industrial complex developments

Article 23 Section 3 of the Constitution stipulates the possibility of the expropriation of properties under the condition of just compensation, not limiting the eligibility for expropriation. This provision focuses on whether the taking complies with public necessity, and whether the compensation for the taking is just, not on whether the person exercising eminent domain power should be a governmental body or a private corporation. There would be not significant differences in determining public necessity and condemnation scope in the event of either a public institute, such as the State, may directly take properties or a private corporation may take properties under the condition of the permit of a public institute. Therefore, there would be no reasons to limit the eligibility for takings into a public institution, such as the State.

The development of industrial complexes may require a large-scale capital investment in these days. If a project operator of industrial complex developments is limited only to the State or local governments, limited budgets may cause difficulties in promoting the development project. If public development system is the only available option, development of industrial complex is likely to end up wasting resources due to imbalance of demands for development. On the other hand, if a corporation is allowed to develop an industrial complex directly, it would promote the participation of corporations. Therefore, it would be implied that it is not unconstitutional to stipulate that a private corporation can be qualified as a project operator, and it is reasonable for legislators to enact the instant provision that allows private corporations to take lands required to implement the project.

B. Whether the Industrial Complex Development Project satisfies the Public Necessity

The legislative purpose of the instant provision is to contribute to the sound development of national economy by promoting the balanced national land planning and steady industrial development through the smooth supply of industrial location and reasonable

industrial arrangement, proposing to stimulate the industry decentralization and to activate local economy. If industrial location is smoothly supplied, it would promote the construction of industrial complex that would lead economic development and growth. Besides, the economic growth through the development of industrial complex has been the fundamental foundation of the social and cultural development of our society. Considering that economic growth has significantly improved the living standard of the national community, the importance of industrial complex developments would be ascertained.

It should be considered that the provisions of the Act regulate the project operator that conduct the industrial complex development project lest the initial public interests that are expected to be achieved through the construction of industrial complex can be neglected because of over-focusing on profits of private corporations. Therefore, the instant provision would satisfy the requirement of "public necessity" under Article 23 Section 3 of the Constitution.

C. Whether the Principle of Prohibition of Excessive Restriction is violated

The above discussion on the public necessity of the instant provision suggests the legislative purpose of this instant provision. Under the instant provision, a project operator may purchase lands at the market place despite the negotiation for taking the lands is failed with land owners. Because it promotes the smooth proceeding of the project, the instant provision would be an efficient means to accomplish the legislative purpose. The instant provision cannot be found to excessively restrict the right to property of petitioners considering provisions stipulating as follows: a project operator is obliged to negotiate faithfully with land owners and interested parties with regard to the compensation for the lands; the right of repurchase would be arisen if the designated lands are exempted from the industrial complex or lose the value as an industrial complex; project operators are required to pay just compensation to the those whose land was taken; the proceeding for condemnation should correspond to the principle of due process; our legal system provides substantial legal remedies, such as administrative proceedings, for the possible errors in

the condemnation disposition; and the scope of condemned lands should not be unreasonably broad beyond the necessity. Considering the importance of public interests, which are sound development of the National economy, decentralization of industry, and stimulation of local economy, it cannot be found that the instant provision disregard the balance between public interests and private interests.

D. whether the Principle of Equality is infringed

The instant provision allows eminent domain power without requiring certain prerequisites for taking lands prior to condemnation, while other Acts prescribe some requirements. However, the instant provision, unlike other Acts, pursues public interests, such as the development of industrial complexes, growth of national and local industry, creation of jobs, decentralization of industry, and balanced development of national lands. In addition, the Act imposes the obligation to negotiate faithfully with land owners and interested parties on a project operator. Therefore, the instant provision is not arbitrarily discriminative and does not violate the principle of equality.

2. Dissenting Opinion of One Justice

The expropriation by a private corporation demands intensive legislative measures to secure the public necessity of the taking and to revert the benefits from taking to the public in order to justify such expropriation, because it is more difficult to promote public interests through a private taking, compared to a public taking where the State leads the condemnation to benefit the public. For instances, some institutional arrangements, such as measures to guarantee continuous restitution of the development benefits caused by such expropriation or public use the business profit derived from such expropriation or the mandatory job quota system providing for local residents should be added, thereby sharing the fruits of expropriation with all members of the community including the ones taking and being taken. Without these legal and systematic remedies, private takings pertinent to the instant provision, would not comply with the value of the guarantee of the right to property of our Constitution.

Even if a private corporation is given the eminent domain power under the instant provision, it would be possible to find solutions to minimize the danger to lose the ownership of lands only with the project operator's unilateral mind, such as the legal requirement to set the certain ratio of land purchasing prior to condemnation proceedings. Since such legislative consideration on modifying the loss of the property right of land owners lacks in the instant provision, it does not conform to the spirit of the prohibition of excessive restriction of the Constitution.

29. *Constitutional Complaint against Reducing Time Limit for Inmate Video Visit Case*

[21-2(A) KCCR 725, 2007Hun-Ma738, September 24, 2009]

In this case, the complainant who is a prison inmate filed this constitutional complaint against the warden of the Daejeon Prison, arguing that the warden's practice of reducing time limit for inmate video visit to less than 10 minutes per each session for seven times is excessive restriction on the right to interview and communicate and therefore, violates the rule against excessive restriction stipulated in Article 37, Section 2 of the Constitution, infringing upon the complainant's human dignity and value and the right to pursue happiness.

Background of the Case

After the 'management system of unattended inmate visit' which allows inmates to communicate with their visitors including family members without the attendance of a correction officer was introduced into the Daejeon Prison on April 2, 2007. The warden of the Daejeon Prison reduced the time limit for video visit to less than 10 minutes per each session for seven times, which was shorter than before the introduction of such management system. Against this practice, the complainant filed this constitutional complaint.

Subject Matter of Review

Subject matter of this case is whether the practice of reducing time limit for inmate video visit to less than 10 minutes per each session for seven times by the warden of the Daejeon Prison infringes on complainant's basic rights guaranteed by the Constitution.

Summary of the Decision

In a unanimous vote of all Justices, the Constitutional Court held

the warden's practice of giving less than 10 minutes for a video visit session does not infringe on complainant's basic rights. The summary of the decision is as follows:

1. The practice of imposing time limit on video visit in this case had already been terminated when this constitutional complaint was filed. Therefore, the justiciable interests of the complainant who asks for judgment on the aforementioned practice to us also evaporated. However, given the current situation regarding meeting room facilities in correctional institutions and the number of correction officers in charge of inmate visit, it is also expected that such practice of imposing less than 10 minutes for each video visit session may reoccur in the future. Also, as the reduction of time limit for video visit, adding yet another restriction on the basic rights including the right to interview and communicate of the inmates whose basic rights are already restricted as confined in correctional faculties, is a very important issue in relation to the basic treatment of inmates, constitutional clarification for the limitation bears significant meaning for the protection of the constitutional order.

2. The basic rights, including physical freedom, of the inmate incarcerated for the execution of punishment of restricting physical freedom are inevitably limited by the confinement and the fundamental rights whose protection presuppose contact with outside world or require active assistance from correctional facilities are substantially restricted for the purpose of correction. Also, the inmates incarcerated for the execution of punishment of restricting physical freedom upon final sentencing has the status distinguished from that of the detainees. Thus, in relation to the inmates, Article 54 of the former Enforcement Decree of the Criminal Administration Act prescribing "a prisoner's interview with a visitor is limited to 30 minutes" should be regarded as a non-mandatory provision which allows the correctional facility to provide the inmates and their family with appropriate protection of the right to interview at discretion. Therefore, the time limit imposed on the inmate visit is a matter within the discretion of the related administrative offices including the warden to the extent that such disposition does not infringe upon the fundamental aspect of the right

to interview and communicate.

3. The practice of the warden in this case permitting less than 10 minutes for each video visit session for seven times is reasonable restriction within the boundary of the necessary minimum degree, pursuant to the administrative purpose to equally and reasonably guarantee other inmates or detainees the right to interview and communication in consideration of the human resources and facilities of the Daejeon Prison at that time. Therefore, the practice of the warden in this case does not seem to excessively restrict the complainant's right to interview and communicate. Consequently, the warden's reducing time limit for video visit in this case does not violate the rule against excessive restriction, going beyond the administrative discretion, and therefore, does not infringe upon the complainant's basic rights guaranteed by the Constitution, such as human worth and dignity and the right to pursue happiness.

30. *Competence Dispute between the National Assembly Members and the National Assembly Speaker*

[21-2(B) KCCR 14, 2009Hun-Ra8 · 9 · 10 (consolidated), October 29, 2009]

Background of the Case

(1) The plaintiffs are the National Assembly members belonging to the opposition party, including Democratic Party, and the respondents are the Speaker and the Vice-Speaker (hereinafter, the "Speaker", the "Vice-Speaker" respectively).

(2) Respondent, the Speaker, announced to submit legislative bills related to the press, including the proposed partial revisions to the Broadcasting Act, which had proceeded with difficulties in the negotiation between the ruling party and the opposition party, ex officio to a plenary session at approximately 11:00 on July 22, 2009. At 15:35 on the same day, the other respondent, Vice-Speaker, convened the 283rd extraordinary session, according to the delegation of the Speaker that could not enter into the assembly hall due to the blockade of plaintiffs.

At 15:37 on the same day, the Vice-Speaker introduced the proposed revisions to the Act on the Freedom of Newspapers, etc. and Guarantee of their Functions (hereinafter, "the Newspaper Bill"), the said partial revised Broadcasting Act, and the proposed partial revisions to the Act on Internet Multimedia Broadcasting Business (hereinafter, "the Multimedia Bill") together. He also declared to replace the assessment report and proposal enunciation with terminal assembly records and materials, without interpellations and debates.

(3) With regard to the Newspaper Bill that was proposed by Assemblyman Kang, Seung-kyu and other 168 assemblymen of the Grand National Party, it was passed by 152 approval votes, 0 opposition votes, and 10 abstention votes, out of the enrollment of 294 members and presence of 162 members of the National Assembly. Accordingly, the Vice-Speaker proclaimed the passage of the

Newspaper Bill.

(4) The Vice-Speaker proceeded to take a vote on the partial revised Broadcasting Act also proposed by Assemblyman Kang, Seung-kyu and 168 assemblymen of the Grand National Party. After a few minutes, he declared to "close the vote", and the vote-closing button was pressed. At that time, the scoreboard of electronic vote showed 142 approval votes, 0 opposite votes, and 3 abstention votes, out of the enrollment of 294 members and presence of 145 members of the National Assembly.

The Vice-Speaker referred the said Broadcasting Act to a revote, saying that 'the bill proposed by Kang, Seung-kyu and other 168 assemblymen shall be voted again', and 'it will be revoted because of the failure of vote due to the lack of presence quorum'. When the end of vote was declared, and the voting board showed 150 approval votes, 0 opposite votes, and 3 abstention votes, out of the enrollment of 294 members and presence of 153 members of the National Assembly, the Vice-Speaker announced the passage of the bill of the said Broadcasting Act (hereinafter, "the Broadcasting Bill").

(5) The vote on the Multimedia Bill was followed. Because 161 approval votes, 0 opposite votes, and 0 abstention votes out of the presence of 161 members of the National Assembly were appeared as the voting result, the Vice-Speaker announced its passage. He also introduced the proposed partial revisions to the Financial Holding Companies Act (hereinafter, the "Corporation Bill") that was proposed by Park, Jong-hee and other 168 assemblymen, around 16:12 on the same day. The Corporation Bill was put to a vote that resulted in 162 approval votes and 3 abstention votes out of the presence of 145 members of the National Assembly. The bill was announced for its passage, and the session adjourned around 16:16 on the same day.

(6) On the day, the chair of the Assembly Hall had been surrounded by guards and assemblymen of the Grand National Party to prevent some assemblymen of the opposition party, such as Democratic Party, from occupying the chair. Assemblymen belonging to the opposition party and assemblymen belonging to the Grand

National Party were tussling with one another due to the opposition party members' attempt to occupy the platform with a shout of 'proxy vote to be void'.

(7) The Newspaper Bill, Broadcasting Bill, Nespaper Bill and Corporation Bill (hereinafter, the "Instant Bills") were sent to the Government on July 27, 2009. After the presentation to State Council on July 28, 2009, these bills were promulgated on July 31, 2009.

(8) Plaintiffs filed this competence dispute adjudications seeking to declaratory judgment of infringement on their rights and nullity of the promulgation of the Instant Bills against Speaker and Vice Speaker, arguing that the Respondent Vice-Speaker violated the 'principle not to deliberate the same measure twice during the same session' by putting the said Broadcasting Act to the revote at the assembly meeting of July 22, 2009, and infringed their' rights to review and vote on the bills that are specified by the Constitution and the National Assembly Act by omitting the assessment report, proposal enunciation, interpellations, and debates in reviewing and voting the Instant Bills, by proclaiming the passages of the Instant Bills despite the issue of proxy vote was raised out of the voting process of the Newspaper Bill.

Subject Matter of Review

Subject matter of this case is whether the respondent Vice Speaker's announcement of the passage of the Instant Bills in the 2nd plenary meeting of the 283rd extraordinary session convened around 15:35 on July 22, 2009, infringes the plaintiff's right to review and vote on bills and whether the said announcement of the passage of the Instant Bills is void.

Summary of the Decision

The Constitutional Court decided that the plaintiffs' rights to review and vote on the Instant Bills were infringed by the declaration of

passages, by a 7 to 2 vote with regard to the Newspaper Bill and by a 6 to 3 vote with regard to the Broadcasting Bill, that was occurred in the 2nd assembly meeting of the 283rd extraordinary session convened around 15:35 on July 22, 2009. However, the Court denied the claim to seek the declaratory judgment of annulment of the announcement of passage by a 6 to 3 vote with regard to the Newspaper Bill and by a 7 to 2 vote with regard to the Broadcasting Bill.

Regarding the passage announcement of the Multimedia Bill and the Corporation Bill in the assembly meeting, the Court denied the claim to seek the declaratory judgment of infringement on the rights in a 5 to 4 vote.

The reasons are followed as below:

1. Justiciability in Competence Dispute against the Vice-Speaker

The competence dispute should be filed against the Speaker that is authorized to introduce bills and proclaim the passages because the legally competent institution that caused dispositions or inactions can be a respondent of competence dispute. Despite the Vice-Speaker acting on behalf of the Speaker can declare the passage of bills (Article 12 Section 1 of the National Assembly Act), he is not legally liable for the declaration of the passage of bills. Therefore, the dispute against the Vice Speaker in this case does not satisfy justiciability requirements because it was brought against a person who cannot be a respondent (hereinafter, 'respondent' means the Vice-Speaker acting on behalf of the 'Respondent Speaker').

A. Concurring Opinion of Justice Cho Dae-hyen

The issue of this case is the entire process of the review and vote of the National Assembly. In this case, the dispute should be brought against the National Assembly Speaker who represents the National Assembly, not the Vice-Speaker.

2. A. Whether it is possible to waiver of the right to review and vote on bills

The right to review and vote on bills of assemblymen should not be waived because it is the fundamental authority to carry out the legislative activities that are the essential function of the National Assembly, which is the national institution elected by the People.

B. Justiciability of competence dispute filed by assemblymen who disturbed the meeting

This competence dispute case has the nature of the public dispute to protect the competence order under the Constitution and the decision making system of the National Assembly. Therefore, this dispute would not be injusticiable due to the abuse of the right to bring an action in a court, despite some of the plaintiffs disturbed the respondent's presiding of the meeting and interfered the voting of other assemblymen, while attempting to accomplish their political intentions.

(1) Partial Dissenting Opinion of Justice Lee Dong-heub

Some of the plaintiffs had not exercised their rights to review and vote on the bills despite they could have exercised the rights. Rather, they actively disturbed the respondent's presiding and other assemblymen's rights to review and vote on the bills, with the intent to interfere entirely. Therefore, the plaintiffs do not satisfy the justiciable interest as the pre-requisite of competence dispute, and therefore this part of this dispute should be dismissed.

3. Whether the Passage Announcement of the Newspaper Bill Infringed on the Rights of Review and Vote on the Bills of the National Assembly Members

A. Illegality of the process of enunciation of the proposal

(1) Opinion of Legality of Justice Lee Kang-kook, Lee Kong-hyun, and Cho Dae-hyen

The enunciation of proposals descried in the National Assembly Act presumed that the National Assembly members that participate in the deliberation and voting on bills should know the intents and contents of the proposed bills. Because the intents and contents of the Newspaper Bill was reasonably expected to be known to the National Assembly members at the time of deliberating and voting on the bill, the proposal regarding the Newspaper Bill would be presumed to be explained. Therefore, there had been no infringement on the plaintiffs' rights to review and vote on the bills, violating Article 93 of the National Assembly Act that prescribed the explanation of proposal.

(2) Opinion of Legality of Justice Min Hyeong-ki, Lee Dong-heub, and Mok Young-joon

The procedural requirement was not satisfied because the Newspaper Bill was input only in the electronic deliberation system, not in the session progress system at the time of the declaration of the opining of the vote on the bill. However, the plaintiffs could understand the contents of the Newspaper Bill through the electronic deliberation system, and the proposal of the bill was input in the meeting progress system before the voting was actually opened. Under the extremely disorderly circumstances, it would be within the discretion of the right to preside deliberation of the Speaker that the respondent preceded to the voting process under the presumption of the validity of the above explanation of the proposal. Therefore, the plaintiffs' rights to review and vote on the bill under Article 93 of the National Assembly Act were not violated.

(3) Opinion of Illegality of Justice Kim Hee-ok, Kim Jong-dae, and Song Doo-hwan

The proposal of the bill should be explained in a simple way that should be equivalent to the direct explanation of a proposer if a general 'oral explanation' is altered, before proceeding to the deliberation and voting because the explanation is the essential condition of the decision for interpellations, deliberations, and votes. In this case, the Newspaper Bill was input into the meeting progress

system about 30 seconds earlier before the actual opinion of the vote upon the declaration of voting. It does not satisfy the 'explanation of the proposal' specified by the National Assembly Act. In other words, the respondent made an error by declaring to open the vote on the bill that had not been considered by the committee, without the explanation of the proposer. Therefore, the provision of article 93 of the National Assembly Act was violated, infringing on the plaintiffs' rights to review and vote on the bills.

B. Illegality of the Process of Interpellation and Debate

(1) Opinion of Illegality of Justice Lee Kang-kook, Cho Dae-hyen, Kim Hee-ok, Song Doo-hwan

The deliberation process is the essential part of the legislative proceeding under the parliamentarism. Article 93 of the National Assembly Act stipulates that the deliberation is required in the legislative proceeding unless special occasions, and especially for the bill that was not considered by the committee, interpellations and deliberations should not be omitted in the decision at the meeting, securing the debate process on the bill.

The respondent introduced the Newspaper Bill and other bills en bloc, and declared to open the vote on the Newspaper Bill that was not reviewed by the committee, following the announcement to omit the process of interpellation and deliberation. After about 11 minutes from the declaration of vote, the Newspaper Bill was input in the meeting progress system, and then after about 30 seconds, the vote poll was open. Under these circumstances of the session, it was literally impossible for the plaintiffs to prepare to request for interpellation and deliberation before the declaration for voting. In addition, Article 110 Section 2 of the National Assembly Act does not allow interpellation and deliberation after the declaration for voting, therefore, the opportunity of interpellation and deliberation was deprived de facto by the respondent's declaration for voting without the prior presentation of the bill.

With these circumstances, the plaintiffs were not guaranteed the opportunity to request to deliberate on the Newspaper Bill in prior.

Therefore, the respondent's session presiding that omitted the process of interpellation and deliberation violated Article 93 of the National Assembly Act, infringing on the plaintiffs' rights to review and vote on the bills.

(2) Opinion of Illegality by Justice Kim Jong-dae and Lee Dong-heub

In the session, the Speaker took a vote on the bill that was directly introduced to the assembly session without the consideration by the committee, omitting the process of interpellation and deliberation without checking or mentioning the request of interpellation and deliberation. Such presiding of the session deprived the plaintiffs of the opportunity to deliberate on the bill, beyond the reasonable discretion of the presiding authority of the Speaker, which is not justified. Therefore, the plaintiffs' rights to review and vote on the bills were infringed.

(3) Opinion of Legality of Justice Lee Kong-hyun, Min Hyeong-ki, Mok Young-joon

It is the rule that the Speaker should preside over the process of interpellation and deliberation after confirming whether there are interpellations, proceeding to the deliberation after checking there are no interpellation requests and proceeding to the vote after checking there are no deliberation requests. However, if there are no requests, interpellation or deliberation may be omitted.

The respondent declared to vote without the interpellation and deliberation, not confirming whether there are requests for interpellation or deliberation on the Newspaper Bill, under the presumption that there are no interpellations or deliberations because of the plaintiff's disturbance at the session where the session could not be proceeded ordinarily. Considering these circumstances and autonomy granted for the National Assembly, the respondent had not committed any clear error, violating the plaintiffs' rights to review and vote on the bills.

C. Whether the Freedom and Fairness of Voting Was Infringed, Whether the Infringement Affected the Fairness of the Vote Result, If Any, and Whether the Principle of Majority Was Violated in the Voting Process

(1) Opinion of Illegality of Justice Lee Kang-kook, Lee Kong-hyun, Cho Dae-hyen, Kim Hee-ok, Song Doo-hwan

The majority rule, described by Article 49 of the Constitution, assumes that it can secure the fairness and legitimacy of the legislative process by the National Assembly. The right to vote, granted for the National Assembly members who consist of the National Assembly, is the fundamental element of the right of legislation of the National Assembly, which confirms the final decision of the National Assembly through the exercise and confirmation of the rights of vote of all assemblymen. Therefore, if the freedom and fairness of voting are infringed and the infringement affects the legitimacy of the voting result, such voting process violates the majority rule specified by Article 49 of the Constitution and Article 109 of the National Assembly Act and infringes on the rights to vote on the bills of the National Assembly members.

Because of the disordered circumstances of the session at the time of voting on the Newspaper Bill and the blind point of the current electronic voting system, the respondent could not establish the minimum order for the voting process, and could not take any action to block illegal votes and vote disturbances. As a result, the freedom and justice of voting on the Newspaper Bill was significantly infringed by abnormal voting during the voting process of the Newspaper Bill, such as default voting by the unauthorized, illegal conducts doubted as unauthorized or proxy vote, and the disturbance against voting.

The circumstances at the time of voting on the Newspaper Bill and the degree and frequency of the voting conducts that are doubted as illegal suggest that the substantial disorder and unfairness during the voting process may affect the legitimacy of the voting result that reflects the illegal voting occurred in the extremely disordered circumstances and votes which cannot be reasonably classified whether it is legitimate or not.

Therefore, the declaration of passage of the Newspaper Bill infringed on the rights to vote on the bills of the plaintiffs, violating Article 49 of the Constitution and Article 109 of the National Assembly Act.

(2) Opinion of Legality by Justice Min Hyeong-ki, Lee Dong-heub, and Mok Young-joon

In order to prove that the respondent's declaration of passage of the Newspaper Bill infringed on the plaintiffs' rights to vote on the bill, the voting on the Newspaper Bill should be proceeded under the extremely disordered circumstances, and abnormal voting conducts should affect the voting result and infringe the voting value of the plaintiffs. However, the evidence presented in this case is not sufficient to prove the infringement on the plaintiffs' rights to vote on the bills.

(3) Opinion of Legality by Justice Kim Jong-dae

The Constitutional Court that respects the autonomy of the National Assembly should rely on the records of the session, unless there are exceptional reasons, in finding the facts of the session presiding with regard to the Speaker's declaration of passage of the bill. Therefore, unless the unauthorized or proxy vote, alleged by the plaintiffs, is recorded in the session records and unless there are exceptional circumstances, the Court should assume that the session of the National Assembly had been duly progressed.

4. Whether the Declaration of Passage of the Broadcasting Bill Infringed on the Rights to Review and Vote on the Bills of Members of the National Assembly

A. The Illegality of the Process of Enunciation of the Proposal

After the Broadcasting Bill was input in the session progress system, the voting on the bill was declared, and such condition was maintained. Therefore, the enunciation of the proposal, required by the

National Assembly Act, could be assumed.

B. The Illegality of the Process of Interpellation and Debate

(1) Opinion of Legality of Justice Lee Kang-kook, Lee Kong-hyun, Kim Hee-ok, Min Hyeong-ki, and Mok Young-joon

With regard to the Broadcasting Bill, the plaintiffs had the sufficient opportunities to request the interpellation or debate, before the passage of the bill was declared. Therefore, it is assumed that there had been no requests of interpellation or debate and the decision of the respondent who progressed the session should be respected, if such requests were not clearly filed.

In addition, because the normal session progress was impossible at the time of this case, it would not violate Article 93 of the National Assembly Act that the respondent did not actively took the floor to confirm whether there are no requests of interpellation and debate prior to the voting on the bills.

(2) Opinion of Illegality of Justice Cho Dae-hyen and Song Doo-hwan

The substantial guarantee of the opportunity of interpellation and debate consists of the fundamental element of the right to review and vote on the bill, deriving from the principle of parliamentary democracy.

With regard to the Broadcasting Bill, the plaintiffs were not provided the time to prepare the request of interpellation or debate and, as a matter of fact, could not request to interpellate and debate the bill that should have been fully figured because it was not checked whether there are requests of interpellation and debate or not. Therefore, it can be presumed that the plaintiffs were not provided the opportunity of interpellation and debate.

The declaration of omitting interpellation and debate, due to the disorder of the session, by the respondent who are not authorized to omit the interpellation and debate at his will is beyond the limit of autonomy in session progress because such declaration, regardless of

its validity, may make interpellation and debate unattainable.

(3) Opinion of Illegality by Justice Kim Jong-dae and Lee Dong-heub

Same as the opinion with regard to the Newspaper Bill

C. Whether the 'principle not to deliberate the same measure twice during the same session' was violated

(1) Opinion of Illegality by Justice Cho Dae-hyen, Kim Jong-dae, Min Hyeong-ki, Mok Young-joon, and Song Doo-hwan

Article 49 of the Constitution and Article 109 of the National Assembly Act stipulates the attendance quorum and approval quorum for the passage, in row. According to these provisions, 'the attendance of a majority of all the assemblymen on the register' is not distinguished in its nature of the provision and the effect of the deficit from 'the concurrent vote of a majority of the assemblymen present'.

If an assemblyperson objects to a certain bill, such opposition can be expressed through either the voting against the bill at the session or being absent from the session. Therefore, there are no reasons to distinguish 'the attendance of a majority of all the assemblymen on the register' from 'the concurrent vote of a majority of the assemblymen present' in their meanings and effects regarding the legislative decision.

In the case of electronic voting, the vote proceeding is closed in substance when the voting result is aggregated with the Speaker's declaration of closing vote. Therefore, a bill would be rejected if the aggregated voting result shows either the approval less than a half of the attended assemblymen or the attendance less than a half of the enrolled assemblymen.

Because the first vote on the Broadcasting Bill was closed without the attendance of a majority of all the assemblymen on the register, the Bill should be assumed as being rejected by the legislative decision. Therefore, it would infringe on the rights to vote of the

plaintiffs in violation of the the 'principle not to deliberate the same measure twice during the same session' (Article 92 of the National Assembly Act) that the respondent put to a revote, ignoring the above result, and declared the passage of the bill according to the result of the following revote.

(2) Opinion of Legality of Justice Lee Kang-kook, Lee Kong-hyun, Kim Hee-ok and Lee Dong-heub

The voting quorum of 'the attendance of a majority of all the assemblymen on the register' described by Article 49 of the Constitution and Article 109 of the National Assembly Act regards the voting prerequisite for the valid legislative decision, which should be distinguished, in its legal nature, from the 'concurrent vote of a majority of the assemblymen present' that declared the principle of majority regarding the decision making method. Therefore, the legislative action that lacks the voting quorum would not be valid.

It is the practice of the National Assembly as well as the legal principle implied by the comparative law study that voting quorum is regarded as the prerequisite of the valid legislative decision. Otherwise, the voting may be possible only with the presence of a few members, and such voting would be automatically rejected even without aggregating the result, thereby violating the principle of representative democracy.

The voting on the Broadcasting Bill was closed with the lack of the voting quorum with regard to the requirement of the majority attendance out of the enrolled members, therefore, the effect of the legislative decision on the bill would not be valid. Accordingly, it would not be the violation of the 'principle not to deliberate the same measure twice during the same session' for the respondent to declare the passage of the Broadcasting Bill according to the result of the revote.

5. Whether the Declaration of Passage of the Multimedia Bill and Corporation Bill Infringed on the Right to Review and Vote of the National Assembly Members

30. Competence Dispute between the National Assembly Members and the National Assembly Speaker

A. Enunciation of the Proposal and Proceeding of Interpellation and Debate

Same as the judgment of the above Broadcasting Bill (the part of 4. A. & B.)

B. Whether the revision to the Corporation Bill falls into the revision to a bill prescribed in Article 95 of the National Assembly Act

The National Assembly Act does not limit the scope of the revision to a bill, but it stipulates that revision means the reflection of some ideas to the original bill by adding, deleting, or changing. Therefore, it would be the concurrence for revision under the National Assembly Act unless the revision altered the original intent and changed to the different meanings.

6. Whether the claim to seek the declaratory judgment of annulment of the announcement of passage of the Nespaper Bill is upheld

A. Opinion of Denial of Justice Min Hyeong-ki and Mok Young-joon

Because the declaration of passage of the Newspaper Bill did not infringe the rights to review and vote of the plaintiffs, the the claim to seek the declaratory judgment of annulment of above announcement, which should have infringed the plaintiffs' rights to review and vote on the bills, does not have standing grounds.

B. Opinion of Denial of Justice Lee Kang-kook and Lee Kong-hyun

If a competence dispute reveals unconstitutional or illegal conditions, the Constitutional Court should respect the autonomy of the plaintiffs in eliminating such conditions. Therefore, the Court would decide the effects of a disposition according to its discretion in deciding the validity or legitimacy only if there are exceptional circumstances that require the constitutional commitment to recover the order of power.

On the ground of the respect for the autonomy of the National Assembly with regard to the legislative power, the Constitutional Court confirms the infringement of the rights in this case. However, the Court leave the correction issue of unconstitutional or illegal conditions occurred by the infringement to the respondent.

C. Opinion of Denial of Justice Kim Jong-dae

As long as the respondent's declaration of passage is not the administrative disposition that can be disputed in litigation seeking void or nullity, the Constitutional Court can have the jurisdiction to confirm the infringement of the plaintiff's rights to review and vote by the respondent in this competence dispute that occurred dispute between the National Assembly Members and the National Assembly Speaker with regard to the legislative decision process. However, the post action following the declaration of passage of the bill would belong to the jurisdiction of the National Assembly that is granted the autonomy in the legislative decision.

D. Opinion of Denial by Justice Lee Dong-heub

The validity of the declaration of passage of the bill, in this case, would be determined by whether there is an error that clearly violated the provisions of the Constitution regarding the legislative process.

In this case, the Newspaper Bill was passed by the concurrence of overwhelming majority out of the presented members. Therefore, even though the respondent's progress regarding interpellation and debate violated the legislative proceeding specified by Article 93 of the National Assembly Act during the legislative deliberation process, the declaration of passage would not be void because it did not clearly violated the provisions of the Constitution, such as the majority rule (Article 49 of the Constitution) and the rule of open session (Article 50 of the Constitution).

E. Opinion of Uphold of Justice Cho Dae-hyen and Song Doo-hwan

The Newspaper Bill does not satisfy the substantial requirements of

the representative system that regards the voting of the National Assembly as the will of the people because it was put to a vote without the enunciation of proposal, interpellation, or debate that should not be omitted at the session of the National Assembly despite it was not reviewed by the Committee. Therefore, the voting of the National Assembly regarding the Newspaper Bill would be not regarded as the will of people, thereby being void. In addition to the process of interpellation and debate that should not be omitted, there are fairness issues of the voting process and the fidelity issue of the voting result in the case of the Newspaper Bill. These issues, being considered together, would consist of the significant ground to be void.

F. Opinion of Uphold by Justice Kim Hee-ok

The competence dispute system intends the separation of powers through the control of the national authority, development of democracy in substance through the protection of minority, preservation of the Constitutional order, and protection of authority of competent national agencies. Article 61 Section 2 and Article 66 Sections 1 & 2 of the Constitutional Court Act also imply that the competence dispute has the both nature of objective resolution for the constitutional order and the subjective resolution for the national agencies. Therefore, the claim to seek the declaratory judgment of annulment of the announcement of the Newspaper Bill should be upheld because the respondent's declaration of passage of the Newspaper Bill had been found to be a violation of the Constitution and the National Assembly Act.

7. Whether the claim to seek the declaratory judgment of annulment of the announcement of passage of the Broadcasting Bill is upheld

A. Opinion of Denial of Justice Lee Kang-kook, Lee Kong-hyun, and Kim Hee-ok

As reviewed in above, because the declaration of passage of the Broadcasting Bill did not infringe on the plaintiffs' rights to review

and vote on the bills, the instant declaration does not have grounds to stand for the request to confirm the invalidity that requires the infringement of the plaintiffs' rights.

B. Opinion of Denial by Justice Min Hyeong-ki, Lee Dong-heub, and Mok Young-joon

Article 66 of the Constitutional Court Act states that it is within the discretion of the Constitutional Court whether it confirms the infringement of competence only, or extends to confirm the nullification or validity of a disposition which becomes the cause of action. For the fundamental principles of the legislative process of the National Assembly, our Constitution establishes the 'Majority Rule' in Article 49 and the 'Open Session Rule' in Article 50. Accordingly, the effect of the declaration of passage of the bill would depend on whether there are clear errors to violate the Constitution during the legislative process.

Despite the declaration of passage of the Broadcasting Bill by the respondent violates the National Assembly Act, thereby infringing on the rights to review and vote of the plaintiffs, the error would not sufficient to hold the declaration of passage as null or void.

C. Opinion of Denial of Justice Kim Jong-dae

With the same reasons specified in the the claim to seek the declaratory judgment of annulment of the announcement of passage of the Newspaper Bill, this part of this dispute should be denied.

D. Opinion of Uphold of Justice Cho Dae-hyen and Song Doo-hwan

With regard to the Broadcasting Bill, there are significant procedural errors that infringed on the rights to review and vote on the bills by omitting the process of interpellation and debate. Therefore, the declaration of passage would be void, considering the violation of Article 92 (the rejected bill rule) of the National Assembly Act together.

31. Report of the Number of Cases Accepted and the Amount of Case Acceptance by Attorneys Case

[157 KCCG 2008, 2007Hun-Ma667, November 26, 2009]

In this case, the Constitutional Court held that Article 28-2 of the Attorney-at-Law Act, which stipulates that any attorney shall report the number of cases accepted and the amount of case acceptance handled by him/her in the preceding year to the local bar association, does not infringe on complainant's basic right.

Background of the Case

Complainants are attorneys-at-law. According to the old Attorney-At-Law Act (hereinafter, the "Act"), when an attorney submits a letter of designation of counsel to a public agency such as the courts, he/she should in advance go through the local bar association with which he/she is affiliated. In addition to this, Article 28-2 of the Act (hereinafter, the "Instant Provision") which was newly inserted by Act No. 8321 on Mar. 29, 2007 also adds that "any attorney-at-law, any law firm (with limited liability) and any law firm association shall report the number of cases accepted and the amount of case acceptance, which are handled by him/her or it and is paid to him/her or it in the preceding year, to the local bar association with which he/she or it is affiliated not later than the end of January, every year". Also, in case of violating the provision, the Act also provides that such an attorney will be subject to imposition of discipline or penalty. At this, the complainants filed this constitutional complaint, arguing that the Instant Provision which mandates attorneys to report their confidential business information such as the number of cases accepted and the amount of case acceptance to a third party like the local bar association infringes on their freedom of business, right to privacy, right to assist client and right to equality.

Provisions at Issue

Former Attorney-at-Law Act (revised by Act No. 8321 on Mar. 29,

2007, but before revised by Act No. 18991 on Mar. 28, 2008)

Article 28-2 (Report of the Number of Cases Accepted and the Amount of Case Acceptance)

Any attorney-at-law, any law firm (with limited liability) and any law firm association shall report the number of cases accepted and the amount of case acceptance, which are handled by him/her or it and is paid to him/her or it in the preceding year, to the local bar association with which he/she or it is affiliated not later than the end of January, every year.

Summary of the Decision

In a vote of 5 (constitutional) to 4 (unconstitutional), the Constitutional Court held the Instant Provision does not infringe on compalinants' basic right. The summary of decision is as follows:

1. Court Opinion

A. Whether the Instant Provision infringes on freedom of business

The Instant Provision makes it possible for attorneys to control themselves with respect to payment of taxes through the self-organizing association with which the attorneys themselves are the members, by enabling the local bar association to supervise the member attorneys' case acceptance. And the legislative purposes of the Instant Provision are to reduce the possibility of tax evasion by attorneys and to consolidate public trust in the overall tax administration through this self control mechanism. Such legislative purposes are for the public welfare and therefore legitimate as stipulated in Article 37 of the Constitution. Also, requiring attorneys to report the number of cases accepted and the amount of case acceptance to the local bar association with which he/she is affiliated for guaranteeing transparency in attorney's case acceptance is also the appropriate means to achieve the legislative purposes.

The Instant Provision simply requires attorneys to submit information regarding case acceptance once a year and does not interfere with the

core right to decide included in the freedom of business. Also, local bar associations are established to instruct and supervise attorneys and the Attorney-at-Law Act stipulates various provisions that enable local bar associations to exercise concrete and abstract control over the member attorneys by itself. In addition, the Act imposes a duty to keep the information obtained during the conduct of the affairs under the Instant Provision confidential. Moreover, other professionals such as certified public accountants have long been reporting case acceptance information pursuant to the internal rules of the competent association. And the numbers of cases accepted had been reported even before the Instant Provision was introduced. Considering all the aforementioned facts, the Instant Provision neither limits the complainants' freedom of business more than necessary nor disregards the balance between public and private interests. Therefore, the Instant Provision does not fail to strike the balance between legal interests.

B. Whether the Instant Provision violates the right to equality

Considering that our society strongly requires an attorney, whose mission is to protect basic human rights and realize social justice, to possess not only professional skill but also social responsibility and professional ethics as an legal expert with public nature; that the Act only imposes penalty, not criminal punishment for the violation of the Instant Provision; and that certified judicial scriveners are also subject to the discipline including penalty in case of violation of such duty, although the Instant Provision imposes duty on attorneys and provides somewhat heavier punishment for them than other professionals in case of violation of the duty, there exist legitimate reasons for this difference. Therefore, it is hard to say that the Instant Provision arbitrarily discriminates attorneys from other professionals in similar fields, and thereby infringes on the right to equality.

C. Whether the Instant Provision infringes upon the right to privacy

In general, economic or occupational activities are conducted through interaction among many parties on the premise of complex social relationship. Particularly, attorney's job contains characteristics of public

nature far more than any other occupational activities. Given this, the information regarding the number of cases accepted and the amount of case acceptance cannot be considered as falling into the attorney's zone of privacy. Therefore, the Instant Provision does not violate the complainants' right to privacy.

2. Opinion of Unconstitutionality of Four Justices

A. Since attorneys already submit an income statement which contains detailed information regarding the number of cases accepted and the amount of case acceptance along with filing value added taxes, the tax imposing authorities can obtain enough information about attorney's case acceptance through this process. Nevertheless, due to the Instant Provision, the tax imposing authorities receive the information from the local bar association once again, which is obviously redundant as it overlaps the content of the income statement submitted along with filing value added taxes. Therefore, subjecting attorneys who fail to report their business information regarding case acceptance to penalty by the Instant Provision violates the rule of the least restrictive means, which is one of the elements of the rule against excessive restriction provided in the Constitution, because it imposes a duty on the citizens and provides sanctions for the failure to perform the duty even thought it is possible for the legislator to choose a less restrictive means or even to impose no duty in order to accomplish the legislative purpose.

B. Although the attorney's job bears the characteristics of public nature, attorneys are also the subject of private economic activities. Therefore, even though it is proper to have different standards of review or balance of legal interests for such information containing both public and private nature at the same time, especially when it comes to the part with private characteristics, it is reasonable to acknowledge that this private part falls into the category of the right to privacy and accordingly, to guarantee the protection of the corresponding basic right. Since the Instant Provision merely requires additional and redundant information overlapping with the already existing information required by the tax imposing authorities, it

restricts the right to privacy beyond the necessary level allowed in the Constitution.

32. *Case on Request to be Visited by Counsel in the Defendant's Waiting Room*

[21-2(B) KCCR 288, 2007Hun-Ma992, October 29, 2009]

In this case, the Constitutional Court denied the complaint, stating that the escorting correctional officer's denial of a defendant's request to be visited by his counsel while waiting in the defendant's waiting room located next to the courtroom did not infringe on the defendant's right to counsel.

Background of the Case

The complainant was arrested on charges of setting fire to a car on March 30, 2007 and put into detention starting from April 4, the same year at the Ulsan Detention Center. He was then prosecuted in Ulsan District Court on April 20, 2007.

The second session of the defendant's first instance trial was scheduled in Courtroom 101 on June 19, 2007 at around 4:30 p.m., and the complainant who was waiting at the defendant's waiting room beside the courtroom requested the escorting correctional officer Kim ○-ho to allow a visit by the defense counsel. Kim ○-ho denied the request, saying that a counsel visit was not permitted in the defendant's waiting room.

The complainant argued that his right to counsel as provided in Article 12 Section 4 of the Constitution was violated by the denial of his request for a counsel visit by correctional officer Kim ○-ho and filed this constitutional complaint on September 4, 2007.

Subject Matter of Review

Subject matter of this case is whether the escorting correctional officer's denial of a defendant(complainant)'s request to be visited by his counsel while waiting in the defendant's waiting room located next to the courtroom infringes on the complainant's basic right.

Summary of the Decision

The Constitutional Court denied (two supplementing and two dissenting opinions) the constitutional complaint, in which the complainant claimed that his right to counsel was violated when, while waiting for his trial in the defendant's waiting room next to the courtroom, the escorting correctional officer refused to allow his request to be visited by his counsel of defense.

1. Court Opinion

An arrested defendant's right to be visited by and communicate with counsel does not exist independently but is relevant within the overall system of criminal procedures that enables appropriate execution of state punishment and protection of defendants' human rights. In that sense, the right of arrested defendants to be visited by and communicate with counsel must be guaranteed to the utmost, provided that it can be restricted in order to serve the said purpose of criminal procedures. Yet, even in this case, such restriction should strictly follow the principle of proportionality and maintain impartiality according to general elements such as time, place, and method.

The complainant requested correctional officer Kim ○-ho a visit by his defense counsel 20 minutes before the opening of his trial while waiting at the room assigned for arrested defendants located next to the courtroom. At that time, 14 persons including the complainant were waiting, and 11 of them were violent criminals with charges of attempted murder, injury resulting from a rape, etc. Meanwhile, there were only two correctional officers working in the defendant's waiting room, including Kim ○-ho. The complainant requested that he be visited by his counsel neither through a written form nor oral communication, and the correctional officers were not even able to figure whether the requested counsel was in the courtroom.

In this context, if the correctional officers were to allow the visit of counsel regardless of the counsel visit procedures regulated by the Safe Custody Rule, they would have no other way than to enter the courtroom and summon the counsel, after which a space has to be

secured where confidentiality and safe custody and control is guaranteed, before permitting the visit. However, if a correctional officer nevertheless proceeds to take measures as such to arrange a defense counsel's visit to the complainant, it cannot be excluded that such action may pose a critical risk to correctional administration such as safe custody and control of other defendants.

In consequence, considering the given time and place, the complainant's request for a counsel visit goes beyond the practical scope of the right to be visited by and communicate with counsel enjoyed by arrested defendants. Therefore, correctional officer Kim ○ -ho's denial of the complainant's request is hardly an unconstitutional exercise of public power that violates the complainant's fundamental rights.

2. Concurring Opinion of Two Justices

The consultation and communication between the arrested defendants and counsels should be fully guaranteed even within the court. However, since such consultation and communication affects care, custody, and control of arrested defendants within the court, minimum procedures such as the counsel's official request for a visit is required for the sake of safe custody and control.

It is our reality that ordinary courts are not equipped with the facilities that guarantee the defendant's right to consult and communicate with counsel within the court, so the courts are required to make efforts to substantially ensure the said defendant's right, which is one of the major fundamental rights, by securing a counsel visit room within the court for arrested defendants. Also, in case it is difficult to immediately obtain the manpower and facilities for substantial guarantee of the defendant's right to consult and communicate with counsel, utmost consideration should be given to protect it within the current circumstances of manpower and facilities.

3. Dissenting Opinion of Two Justices

In case the detained offender or the defendant is under investigation or trial, the necessity for the assistance of counsel is particularly

evident. The right to counsel should be guaranteed to the detained offenders or defendants insofar as counseling service is needed as such, and their right to counsel cannot be restricted for reasons of obstruction to safe custody and control of detainees, investigation, or trials.

Yet, Article 275 of the Safe Custody Rule (Ministry of Justice Instruction No. 520) allows for restriction of their basic right to counsel for the convenience of safe custody and control of inmates, investigation procedures, or proceedings, and this violates Article 12 Section 4 of the Constitution.

The complainant is an arrested defendant who requested to be visited by his counsel in the defendant's waiting room next to the courtroom but had the request denied. It is particularly important for the arrested defendants to receive assistance from counsels right before the trial, and denial of such right is evidently a violation of their rights to counsel. Therefore, the Court shall find that the denial of complainant's request for a visit of his counsel infringed on his right to counsel and, furthermore, declare that, pursuant to Article 75 Section 5 of the Constitutional Court Act, Article 275 of the Safe Custody Rule violates Article 12 Section 4 of the Constitution.

33. Restriction on Prisoner's Right to Vote Case

[21-1(B) KCCR 327, 2007Hun-Ma1462, October 29, 2009]

This case deals with constitutionality of a provision of the Public Official Election Act which stipulates that 'a person who is sentenced to imprisonment without prison labor or a heavier punishment, but whose sentence execution has not been terminated shall be disfranchised'. Regarding this, the Constitutional Court denied the constitutional complaint against the aforementioned provision in a vote of 5 (unconstitutional) to 3 (denial) to 1 (dismissal). Despite the majority of five justices rendered a decision of unconstitutionality, the constitutional complaint was denied as the Court failed to meet the quorum requirement of more than six justices required to hold the constitutional complaint.

Background of the Case

The former portion of Article 18, Section 1, Item 2 (hereinafter, the "Instant Provision") stipulates that "a person who is sentenced to imprisonment without prison labor or a heavier punishment, but whose sentence execution has not been terminated shall be disfranchised". Complainant was sentenced to one and half year in prison for violation of the Military Service Act. While being imprisoned, he tried to cast a vote in the presidential election held on December 19, 2007 but failed. At this, the complainant filed this constitutional complaint against the Instant Provision, arguing that the Instant Provision infringes his basic rights including the right to vote. The text of Instant Provision is as follows:

Provision at Issue

Public Official Election Act

Article 18 (Disfranchised Persons)

(1) A person falling under any one of the following subparagraph, as of the election day, shall be disfranchised: (revised by Act No. 7189 on Mar. 12, 2004; Act No. 7681 on August 4, 2005)

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

Summary of the Decision

1. Court Opinion

A. Filing Period Issue

The Instant Provision limits the right to vote of 'a person who is sentenced to imprisonment without prison labor or a heavier punishment, but whose sentence execution has not been terminated as of the election day'. Therefore, the basic rights including the right to vote would be considered as being infringed by the Instant Provision only when a specific cause of action for such violation arises. And in this case, the specific cause of action arises from the election day. As the complainant filed this constitutional complaint within 90 days from the election day, he does not exceed the designated filing period.

B. Violation of the Principle against Excessive Restriction, etc.

Given the importance of the right to vote as a pivotal means to realize popular sovereignty and representative democracy in a democratic nation, the question as to whether the right to vote is excessively restricted or not should be scrutinized under the strict review of proportionality pursuant to Article 37, Section 2 of the Constitution, from the viewpoint of the principle of universal suffrage and its limitation.

The deprivation of the right to vote by the Instant Provision, as one of the criminal sanctions, functions as retribution to the crime committed by the criminal. Moreover, such deprivation by the Instant Provision, apart from imposition of life sentence or prison sentence, can help citizens including the prisoners themselves to cultivate responsibility as a citizen and improve respect to the rule of law.

Such purposes of the Instant Provision are legitimate and imposing restriction on the prisoner's right to vote is one of the effective and appropriate means to achieve the purposes.

The Instant Provision imposes overall and uniform restriction on the right to vote of a person who is sentenced to imprisonment without prison labor or a heavier punishment, but whose sentence execution has not been terminated. In other words, such restriction extends to those who negligently commit a crime without knowledge or intention to undermine law and order of the community. Also, the right to vote of a parolee, who is released from the prison and returns to the society prior to the completion of sentence after successfully going through the parole review committee's examination on the overall circumstances including motive for the crime, possibility of recidivism, etc., is limited under the Instant Provision as well. Further, the Instant Provision also restricts the right to vote of the prisoners who are sentenced to short term imprisonment for negligence nothing to do with any crime against the nation that denies the constitutional order. Such extensive restriction, however, seems not compatible with the election system in a democratic nation that strives to accomplish the community order through free participation of various people in the election process whose backgrounds or ideologies are diverse, on the basis of a pluralistic worldview. Therefore, the legislators should carefully impose restriction on the right to vote only in a limited situation, considering the importance of such right. Nevertheless, the Instant Provision easily and uniformly limits the prisoner's right to vote simply by establishing the standard of 'a person who is sentenced to imprisonment without prison labor or a heavier punishment, but whose sentence execution has not been terminated', without carefully contemplating 'the relation between the type, content or degree of illegality of each crime and the restriction on the prisoner's right to vote'. Therefore, the Instant Provision violates the rule of least restrictive means.

Also, the Instant Provision restricts the right to vote too broadly, regardless of the direct relation between the characteristics of a crime and restriction on the right to vote, and therefore, the prisoner's private interests or the public value in the democratic election system infringed by the Instant Provision outweigh the public interest of

'punishing a person who commits a felony and improving citizen's respect to the rule of law' intended to be achieved by the Instant Provision. As a result, the Instant Provision fails to strike balance between the conflicting legal interests in relation to restriction of the basic rights.

C. Conclusion

The Constitutional Court should hold the constitutional complaint, and declare the Instant Provision unconstitutional as it infringes on the prisoner's right to vote in violation of Article 37, Section 2 of the Constitution and on the prisoner's equality right in violation of the principle of universal suffrage stipulated in Article 41, Section 1 and Article 67, Section 1 of the Constitution.

2. Denial Opinion of Three Justices

The nature of Instant Provision is to criminally punish a felon who commits an anti-social crime. The issue of how to punish a crime, or in other words, the choice of types and scope of statutory punishment, should be decided by the legislature, considering various aspects related to not only the nature of crime and protected legal interests but also our history and culture, the situation at the time when the statute was legislated, citizens' value system or legal sentiments in general and the criminal policy to prevent crimes. In this regard, broad legislative discretion should be acknowledged. Therefore, the Court should keep this in mind while reviewing constitutionality of the Instant Provision.

According to the Korean Criminal Act, imprisonment without prison labor is a sentence imposing serious restriction on the prisoner's basic rights including the liberty of body by confining a criminal in prison for at least one month. And this sentence is graver than that of disqualification or suspension of qualification which limits the right to vote or the right to be elected. And, our Constitution stipulates that a judge may be removed from office by a 'sentence of the imprisonment without prison labor or a heavier punishment' and the State Public Officials Act provides that a public officer who is sentenced to

'imprisonment without prison labor or a heavier punishment' may be removed from office. Also, statutory provisions specifying qualification of professionals such as lawyer stipulate certain grounds for disqualification in case those professionals are sentenced to 'imprisonment without prison labor or a heavier punishment'. Therefore, the standard of 'a sentence of the imprisonment without prison labor or a heavier punishment' is important enough to justify such restriction on the basic rights. Moreover, as the Instant Provision is applicable to prisoners who are sentenced to 'imprisonment without prison labor or a heavier punishment', not to persons who are under the suspension of the execution of punishment, preventing the prisoners who are sentenced to such grave punishment from exercising the right to vote during the period of execution of punishment does not seem excessive beyond necessary degree to achieve the legislative purpose.

The prisoner's disadvantage of being unable to exercise the right to vote due to the Instant Provision is merely one of the effects of the disqualification or suspension of qualification which is a less severe sentence than that of imprisonment without prison labor. The period during which the right to vote is limited does not uniformly apply to all the prisoners, but proportionally apply on the basis of each prisoner's sentence, or in other words, depending on the degree of one's criminal liability. The public purposes to be achieved by the Instant Provision including 'criminally punishing a person who commits a felony and improving citizen's respect to the rule of law' do not seem to be dwarfed by the prisoner's disadvantage that the right to vote is limited during his/her sentence execution period. Therefore, the Instant Provision strikes the balance between legal interests.

Consequently, as the Instant Provision neither violates the rule against excessive restriction stipulated by Article 37, Section 2 of the Constitution nor infringes on the complainant's right to vote and equality, the constitutional complaint in this case should be denied for lack of cause.

3. Dismissal Opinion of One Justice

As the Instant Provision reflects the effect of Article 43, Section 2 of the Criminal Act (a person who is sentenced to imprisonment for a

limited term or imprisonment without prison labor for a limited terms shall be under suspension of qualifications including suffrage and eligibility under public Act.), the cause of action for infringement on the basic rights, such as limiting the right to vote, is also considered to arise when the sentence is finalized, like in Article 43, Section 2 of the Criminal Act. This constitutional complaint, however, was filed after the lapse of one year since the final sentence was announced and therefore, time barred under Article 69, Section 1 of the Constitutional Court Act. Therefore, this constitutional complain should be dismissed.

34. Participatory Trial Case

[21-1(B) KCCR 493, 2008Hun-Ba12, November 26, 2009]

In this case, the Constitutional Court ruled that, with respect to Article 46 Section 5 of the Act on Citizen Participation in Criminal Trials providing that the jurors' verdict and opinions shall not be binding on the court, the people's right to participate in trials is not guaranteed by the Constitution as the right to trial. The Court also found that Article 5 Section 1 of the Act that limits the scope of cases eligible for participatory trials and Section 2 of Addenda of the Act that stipulates the applicable time of the participatory trials do not violate the Constitution.

Background of the Case

The complainant was prosecuted on February 8, 2007 on charges of violating the Punishment of Violences, Etc. Act (mob assault or infliction of injury with deadly weapons or other dangerous articles) and the Control of Firearms, Swords, Explosives, Etc. Act and defamation. Convicted and sentenced to four years in prison, the complainant appealed to the Seoul Eastern District Court. With the case of appeal pending, the complainant filed a motion requesting constitutional review of Article 5 Section 1, Article 46 Section 5, and Addenda Section 2 of the Act on Citizen Participation in Criminal Trials (hereinafter, the "Participatory Trial Act"), arguing that they infringed on his right to trial, right to equality, etc. When the motion was denied, however, he filed a constitutional complaint with the Constitutional Court. The provisions subject to review are as follows:

Provisions at Issue

Act on Citizen Participation in Criminal Trials (Act No. 8495, enacted June 1, 2007)

Article 5 (Eligible Cases)

(1) A case enumerated in any of the following subparagraphs shall be eligible for a participatory trial (hereinafter, referred to as "eligible

case"):

1. The latter part of Article 144 (2) of the Criminal Act Criminal Act (homicide in the course of committing special obstruction of public duty); the latter part of Article 164 (2) of the aforesaid Act (homicide by committing arson on present living buildings, etc.); the latter part of Article 172 (2) of the aforesaid Act (homicide by burst of an explosive object); the latter part of Article 172-2 (2) of the aforesaid Act (homicide by discharge of gas, electricity, or other utilities); the latter part of Article 173 (3) of the aforesaid Act (homicide by committing obstruction to supply of gas, electricity, or other utilities); the latter part of Article 177 (2) of the aforesaid Act (homicide by inundation of present living buildings, etc.); the latter part of Article 188 of the aforesaid Act (homicide by committing obstruction of traffic); the latter part of Article 194 of the aforesaid Act (homicide by poisoning drinking water); Article 250 of the aforesaid Act (murder, killing ascendant); Article 252 of the aforesaid Act (murder upon request or with consent); Article 253 of the aforesaid Act (murder upon request by fraud); Article 259 of the aforesaid Act (homicide by inflicting bodily injury, homicide of ascendant in the course of inflicting bodily injury); the part referring to Article 259 in Article 262 of the aforesaid Act (homicide by committing violence); the latter parts of Article 275 (1) and (2) of the aforesaid Act (homicide by abandonment); the latter parts of Article 281 (1) and (2) of the aforesaid Act (homicide by arrest or confinement); Article 301 of the aforesaid Act (bodily injury by or resulting from rape); Article 301-2 of the aforesaid Act (murder or homicide by committing rape); the parts referring to Articles 301 and 301-2 in Article 305 of the aforesaid Act (bodily injury by or resulting from sexual intercourse with, or sexual abuse to, a minor or murder or homicide by commission of sexual intercourse with, or sexual abuse to, a minor); Article 324-4 of the aforesaid Act (murder or homicide of hostage); Article 337 of the aforesaid Act (bodily injury by or resulting from committing robbery); Article 338 of the aforesaid Act (murder or homicide by committing robbery); Article 339 of the aforesaid Act (robbery and rape); Article 340 (2) and (3) of the aforesaid Act (bodily injury by or resulting from piracy and murder, homicide and rape by committing piracy); and the latter part

of Article 368 (2) of the aforesaid Act (homicide by commission of aggravated destruction and damage);

2. Article 2 (1) 1 of the Act on the Aggravated Punishment, etc. of Specific Crimes (bribery); Article 4-2 (2) of the aforesaid Act (homicide by committing arrest or confinement); subparagraph 1 of Article 5 of the aforesaid Act (loss to the national treasury); Article 5-2 (1), (2), (4), and (5) of the aforesaid Act (kidnapping and abduction); Article 5-5 of the aforesaid Act (bodily injury by or resulting from commission of robbery, robbery and rape); Article 5-9 (1) and (3) of the aforesaid Act (retaliatory crimes); Article 5 (4) 1 of the Act on the Aggravated Punishment, etc. of Specific Economic Crimes (acceptance of property in breach of good faith); Article 5 of the Act on the Punishment of Sexual Crimes and Protection of Victims thereof (aggravated robbery and rape); Article 6 of the aforesaid Act (aggravated rape); Article 9 of the aforesaid Act (bodily injury by or resulting from rape); and Article 10 of the aforesaid Act (murder or homicide by committing rape);

3. Cases specified by the Rules of the Supreme Court among cases under jurisdiction of a collegiate panel under Article 32 (1) 3 of the Court Organization Act;

4. Cases of an attempt of, abetment, aiding, preparation, or conspiracy to commit an offense under any provision of subparagraphs 1 through 3;

5. Cases falling under any provision of subparagraphs 1 through 4 and Article 11 of the Criminal Procedure Act, in which related cases are joined together for trial as a single case.

Article 46 (Presiding Judge's Explanation, Deliberation, Verdict, and Discussion)

(5) No verdict and opinions under paragraphs (2) through (4) shall be binding on the court.

ADDENDA

(2) (Applicability) This Act shall apply to the first case prosecuted by the public prosecutor after this Act enters into force.

Summary of the Decision

In a unanimous opinion, the Constitutional Court declared the provision subject to review constitutional according to the following reasons:

1. Article 46 Section 5 of the Participatory Trial Act

With respect to whether the right to trials involving citizen participation is ensured as part of the right to trial, the Korean Constitution has no written regulation to guarantee thereof, unlike the United States, where the right to jury trial is guaranteed as a constitutional right under the U.S. Federal Constitution and its Amendments. The Korean Constitution only provides in Article 27 Section 1 that, "All citizens shall have the right to trial in conformity with the Act by judges qualified under the Constitution and the Act".

Since the aforementioned right to trial by judges qualified under the Constitution and the Act mainly concerns trials by career judges, it is not to be considered that the right to participatory trial is protected by Article 27 Section 1 of the Constitution that provides for the right to trial.

2. Article 5 Section 1 of the Participatory Trial Act

Article 5 Section 1 of the Participatory Trial Act stipulates the scope of eligible cases, which mostly involve violent crimes entailing severe statutory punishment and exclude relatively light statutory punishment such as property crimes that constitute a large portion of criminal cases. This reflects the consideration that material and personnel conditions are not so easily met from the start in preparing for trials with citizen participation, which differ from the existing criminal trials, and thus the purpose is found to be legitimate.

Furthermore, it is reasonable that, given the stated circumstances, the eligible cases are confined to felony cases whose defendants more favor citizen participation and which draw public attention, and the possibility remains that the scope of eligible cases may be extended by Supreme Court Rules, etc. after positive and empirical research to involve other crimes. Therefore, the provision is not in violation of

the complainant's right to equality.

3. Addenda Section 2 of the Participatory Trial Act

Insofar as the right to participatory trial is not guaranteed under the Constitution, whether citizen participation in trials will be allowed and specifics such as time and scope of the trials are, in general, matters of extensive legislative discretion for legislators to decide. Section 2, Addenda of the Participatory Trial Act decides the applicable time of participatory trials according to whether the case was prosecuted upon the Act's entry into force, considering the need to limit eligible cases due to workload and judicial economy, etc. Therefore, the legitimacy of the purpose is achieved.

Furthermore, the adjudication procedures of courts are initiated and the offender assumes the status of a party to the case, namely defendant, upon the filing of prosecution by prosecutors. By all accounts, this provision that uses the standard of the time of prosecution in deciding the applicability of the Act is considered a reasonable means to serve the purpose. Therefore, this provision does not infringe on the equality right of the complainant either.

35. Sexual Intercourse under Pretence of Marriage Case

[158 KCCG 2157, 2008Hun-Ba58, 2009Hun-Ba191 (consolidated), November 26, 2009]

In this case, the Constitutional Court held unconstitutional the portion of Article 304 of the Criminal Act which provides that 'a person who induces a woman who is not prone to an obscene act into sexual intercourse under pretence of marriage' is guilty on the grounds that it infringes on men's right to sexual self-determination, right privacy in violation of the principle against excessive restriction.

Background of the Case

Petitioners were respectively indicted for allegedly tricking a woman not prone to an obscene act into sexual intercourse by falsely agreeing to marry her in violation of Article 304 of the Criminal Act. According to Article 304 of the Criminal Act, a person who induces a female who is not prone to an obscene act into sexual intercourse under pretence of marriage or through other fraudulent means (hereinafter, the "engagement fraud"), shall be punished by imprisonment for not more than two years or by a fine not exceeding five million won. Regarding this, the petitioners filed a motion respectively with presiding criminal courts to request for the constitutional review of the said Article during their trials. Petitioners, having been denied the said motion by the criminal courts respectively, filed these constitutional complaints with this Court pursuant to Article 68 Section 2 of the Constitutional Court Act, arguing that the portion of 'a person who induces a woman who is not prone to an obscene act into sexual intercourse under pretence of marriage' (hereinafter, the "Instant Provision") infringes on their fundamental rights. The text of the Instant Provision is as follows:

Provision at Issue

Criminal Act (enacted on Sep. 18, 1953 by Act No. 293, and revised on Dec. 29, 1995 by Act No. 5057)

Article 34 (Sexual Intercourse under Pretence of Marriage)

A person who induces a female who is not prone to an obscene act into sexual intercourse under pretence of marriage or through other fraudulent means, shall be punished by imprisonment for not more than two years or by a fine not exceeding five million won.

Summary of the Decision

In a vote of 6 (unconstitutional) to 3 (constitutional, including supplementary opinion by one justice), the Constitutional Court held that the Instant Provision violates the Constitution. The summary of the decision is as follows:

1. Court Opinion

The legislative purpose of the Instant Provision cannot be regarded legitimate for the following reasons: first, it is totally within the realm of privacy for a man to have a sexual relationship with a female partner, against which the state's interference should be as minimal as possible if no coercion or violence is involved. Moreover, such a relationship usually has a tendency to be exaggerated. Therefore, the Criminal Act does not punish a pre-marital sex relationship, and in this regard, there is also no reason to punish the ordinary conduct of inducing a partner into a pre-marital sex relationship. Second, if a woman, after voluntarily deciding to have a pre-marital sex relationship with a man who demands it, later asks the court to punish him arguing her decision was made by mistake, that is an act of denying her own right to sexual self-determination. Also, under the Instant Provision, the subject of protection is limited to women who have no habit of acting obscenely while all other women who have sexual relationships with multiple partners are stigmatized as 'women who are prone to an obscene act' and excluded from the protection, which ends up forcing sexual ideology based on patriarchy and moralism on women. In this regard, the Instant Provision not only runs afoul of the state's constitutional duty to create and maintain a gender equal society (Article 36, Section 1 of the Constitution), but

also denies women's right to self-determination regarding sexual activity under the guise of protecting women, by treating them as not being mature enough to have the capacity to voluntarily make such a decision. Therefore, the right to sexual self-determination to be protected by the Instant Provision goes against women's dignity and value.

As our society has gone through changes in public legal awareness regarding sex and marriage, there seems no pressing need to provide criminal protection for a woman who mistakenly enters into a pre-marital sex relationship with a male partner. It is at the heart of people's privacy to have any kind of sexual or romantic relationships whatsoever and such relationships should be regulated by law only when the private relationships are known to the public and clearly proven to exert an evil influence on society. Also, in modern criminal jurisprudence, there is a growing tendency to avoid criminalizing activities related to people's private lives. Furthermore, the crime of engagement fraud has been abolished in many countries and, for example, Japan, Germany and France have no statutory provision that stipulates such a crime. Also, such criminal punishment, while losing its effectiveness as a penalty imposed by the state, increasingly brings about side effects. Given all the aforementioned aspects, criminally punishing a person who induces a woman into sexual intercourse under pretence of marriage fails to follow the rule of appropriateness of means and the rule of the least restrictive means to achieve the legislative purpose.

The Instant Provision excessively restricts men's fundamental rights such as the right to sexual self-determination, the right to privacy, by subjecting sexual relationships within the zone of privacy to criminal punishment. But the public interest of protecting a woman without habit of acting obscenely who enters into sexual intercourse with a cause mistakenly perceived by her, which drastically loses its effectiveness in this modern society, does not seem to outweigh the importance of the infringed fundamental rights. In this regard, it fails to strike a balance between legal interests.

Therefore, the Instant Provision goes against the Constitution, as it excessively restricts men's right to sexual self-determination, right to privacy in violation of the rule against excessive restriction stipulated

in Article 37 Section 2 of the Constitution.

As for the Constitutional Court Decision of 99Hun-Ba40, 2002Hun-Ba50 (consolidated) that declared Article 304 of the Criminal Act to be constitutional on October 31, 2002, is hereby overruled inasmuch as it conflicts with the Holding of this decision.

2. Opinion of Constitutionality of Three Justices

Protection under the Instant Provision extends exclusively to women because it is perceived by the legislators that when a woman induces a man into sexual intercourse under pretence of marriage, the man's right to sexual self-determination is less likely to be infringed. Considering the physical difference and the ethical and emotional perception gap toward sexual intercourse between men and women, it is hard to conclude that the legislative decision is based on illegitimate gender discrimination, imposes the old patriarchal value of chastity or forces women to keep their virginity before marriage.

Having sexual intercourse with a female partner under pretence of marriage is conduct that infringes on other people's legal interest, going beyond the acceptable boundary of the right to self-determination. Therefore, the Instant Provision cannot be regarded as infringing on the right to sexual self-determination of a man who induces a female not prone to an obscene act into sexual intercourse under pretence of marriage. Also, a man's conduct of lying to a woman about marriage without intention to do so does not fall into the category of privacy to be protected by Article 17 of the Constitution. Therefore, as long as a man engages in a wrongful conduct of inducing a woman into sexual intercourse under pretence of marriage, in spite of the fact that it is the woman's fault for failing to recognize her partner is telling a lie, it is still required to impose criminal punishment on such a conduct.

When a woman files a charge against a man for allegedly deceiving her into having sexual intercourse under pretence of marriage, such a case should be regarded as becoming an issue of disturbing social order, beyond the zone of privacy and inherent limitation of fundamental rights. In this stage, therefore, the need to maintain social order is far more important than the need to protect private life of the

parties to the case. Also, when an individual's private life infringes upon other's legal interests, such infringement becomes an issue outside the zone of privacy and inherent limitation of fundamental rights and therefore, such a case should be considered beyond the coverage of protection under Article 17 of the Constitution within this limit. In this regard, punishing a man who commits a crime of engagement fraud does not seem to fail to strike balance between legal interests.

As the Instant Provision is enacted to provide punishment only for a case where a clear causal relationship between the conduct of having sexual intercourse under pretence of marriage and the consent to sexual intercourse and the sexual intercourse is established, thereby being legitimate in its purpose, it cannot be considered as violating the principle of equality.

3. Concurring Opinion to the Opinion of Constitutionality by One Justice

The Instant Provision is not meant to punish the private conduct of sexual intercourse itself, but rather, it is related to a case where a woman, who is damaged by deception or fraud committed by her male partner, actively requests the court to review the case and punish the male partner (engagement fraud is a crime subject to victim's complaint). Therefore, this is simply not a case of relationship of utmost intimacy between man and woman within the zone of privacy any more, but a case in which state intervention can be allowed.

It is still not safe to say that no woman in our society need constitutional or legal protection and consideration any more. Rather, as we understand that there are still a small number of women who need to receive constitutional or legal protection and consideration in our society as ever, it seems too early to repeal the Instant Provision at this point of time.

The Instant Provision only punishes the anti-social conduct of a man who deceives a woman into sexual intercourse under pretence of marriage without true intent to do so, considering her as a mere object to satisfy sensual pleasure. Therefore, simply recognizing the Instant Provision to infringe on the men's right to sexual

self-determination, without consideration of the aforementioned aspect, will result in acknowledging the freedom of deception, fraud or defraudation in sexual relationship, which is clearly unjustifiable and unacceptable.

36. Granting a Private Developer to Claim Transfer of Land from Private Owner Case

[158 KCCG 2169, 2008Hun-Ba133, November 26, 2009]

In this case, the Constitutional Court held that the first sentence of Article 18-2 Section 1 of the former Housing Act (revised by Act No. 8239 on January 11, 2007 but before revised by Act No. 8657 on October 17, 2007) cannot be regarded as infringing on the essential aspects of petitioners' property right or violating the rule against excessive restriction, and therefore does not violate the Constitution.

Background of the Case

Petitioners are the co-owners of a lot and a house built thereon located in ○○-Dong, △△-Gu, Daegu Metropolitan City, which was acquired around December 2005. On January 22, 2007, a development company obtained approval for its construction project plan on 337 lots including the aforementioned lot from the Mayor of Daegu Metropolitan City, pursuant to Article 16 of the Housing Act. The company, which had asked the petitioners to sell the lot but failed to reach an agreement, filed a claim against the petitioners seeking to transfer the lot, pursuant to Article 18-2 of the Housing Act. While the litigation was pending, the petitioners filed a motion to request for the constitutional review of Article 18-2 of the Housing Act, arguing that the provision was unconstitutional as it infringed on the essential aspects of petitioners' property right and ran afoul of the principle of just compensation (2008KaKi1735), but the motion was denied. At this, the petitioners subsequently filed this constitutional complaint with the Court on November 5, 2008. The provision at issue is as follows:

Provision at Issue

Former Housing Act (revised by Act No. 8239 on January 11, 2007 but before revised by Act No. 8657 on October 17, 2007)

Article 18-2 (Claim for Sale, etc.)

(1) Any project undertaker who obtains approval for his project plan pursuant to the provisions of Article 16 (2) 1 may file a claim against an owner of a site (including buildings thereon; hereafter the same shall apply in this Article and Article 18-3) that the former has not secured the ground of use (excluding anyone who has continued to hold the ownership of the site for 10 years prior to the date on which the district-based planning area is determined and published. In this event, in calculating the period of holding the site, if the owner of the site has acquired the ownership by inheritance from the lineal descendant or ascendant or the spouse, the period of holding the site by the inheritee shall be added up) among the sites for the relevant housing construction for selling the site at the market price. In this case, such project undertaker shall negotiate with the owner of the site subject to the claim for its sale for the period of not less than three months.

Summary of the Decision

In an opinion of 8 to 1, the Constitutional Court held constitutional the first sentence of Article 18-2 Section 1 of the former Housing Act which authorizes a private developer to claim transfer of the land (amended by Act No. 8239 on January 11, 2007 but before amended by Act No. 8657 on October 17, 2007). The summary of decision is as follows:

1. Court Opinion

By granting a private developer to claim transfer of the land necessary for its housing construction project, the first sentence of Article 18-2 Section 1 of the former Housing Act (revised by Act No. 8239 on January 11, 2007 but before revised by Act No. 8657 on October 17, 2007, hereinafter the "Instant Provision") forces the landowner to sell its land and involuntarily transfer of the land, which in fact amounts to land expropriation. Therefore, the issues in this case are 1) whether there is any public necessity to authorize a developer to transfer land; 2) whether the landowner is justly

compensated; and 3) whether the Instant Provision excessively restricts or infringes on the essential aspects of the freedom of contract and the property right.

In this case, as the Instant Provision's allowing a private developer to buy land necessary for its housing construction project is to achieve the public interest of facilitating completion of the construction project approved pursuant to the district unit planning, the legislative purpose is considered legitimate and the element of public necessity for lawful expropriation deems to be satisfied. Further, granting the private developer to the right to file a claim transfer of land against the owner at market price is an appropriate means to achieve the aforementioned purpose, given the fact that in order to acquire some parcels of adjacent land necessary for construction of more than 20 houses, it is necessary to provide a certain measure to acquire such land within the district unit planning zone. The Instant Provision is a system of expropriation of private property less severe than a general taking as it strictly regulates the requirement for the right claim transfer of land from owners. Moreover, in relation to the exercise of this right, the Instant Provision sufficiently guarantees the interests of the related landowners and minimizes the possibility of infringing on their basic right. Therefore, the Instant Provision does not violate the *principle of least restrictive means*. Also, *it cannot be said that the* Instant Provision infringes on the essential aspects of the landowner's property right regarding the land against which the claim is filed, because under the Instant Provision, the developer who can claim transfer of land should provide adequate compensation for the landowner based on the fair market price of the property, which guarantees just compensation. Moreover, the Instant Provision strikes an appropriate balance between legal interests because the public interest to facilitate a construction project pursuant to the district unit planning surpasses the private interest expected to be restricted by the Instant Provision, considering the facts that the right to land, different from other property rights, is far more strongly related to the public interest concerns; that the development project constructing more than 20 dwelling units assumes strong public nature even conducted by a private developer; and that parcels of adjacent land are indispensible to such a development project.

For the forgoing reasons, the Instant Provision neither infringes on the essential aspects of the petitioners' property right nor violates the principle against excessive restriction.

2. Dissenting Opinion of One Justice

Given the Instant Provision forcibly deprives a landowner of the property right against his/her will, the right to claim transfer of land provided in the Instant Provision essentially belongs to the type of expropriation stipulated in Article 23 Section 3 of the Constitution. Different from a governmental taking in which the State is the main party that takes private property and spreads the benefits to the public as a whole, however, when a private company becomes the main party expropriating private property, there should be more intensive legislative measures by which the public necessity of such expropriation is secured and the benefits from it can be reverted to the public, in order to justify such expropriation. For example, some institutional arrangements, such as measures to guarantee continuous restitution of the development benefits caused by such expropriation or public use the business profit derived from such expropriation, should be added, thereby sharing the fruits of expropriation with all members of the community including the ones taking and being taken. As long as the exercise of the right to claim transfer of land by a private developer takes the characteristics of expropriation by a private party, legal and institutional complementary measures should be accompanied in order to make such expropriation comply with the constitutional value of guaranteeing property right.

Furthermore, even in a situation where the right to claim transfer of land, i.e., the power of eminent domain, is inevitably granted to a private party, such a right should be exercised as minimized as possible, only to achieve the legislative purposes of the Instant Provision and prevent damage of activities, so called albaggi in Korean (meaning "planting of golden egg"), pursuing unjustifiable profit taking advantage of the needy condition of the developer, stubbornly refusing to sell land at a reasonable price hoping for a higher level of compensation later on. This requirement is normative demand originated from the principle of least restrictive means of rule

against excessive restriction. The Instant Provision, before being revised, prevented an exercise of the right to claim purchase of land against those who had continued to hold the title of the site for three years prior to the date on which the district-based planning area was determined and published. However, after the revision to the Instant Provision, the three year period was extended to ten years. This extension of period, however, seems likely to unnecessarily expand the scope of exercising the right to claim transfer of land against those who have nothing to do with the activities (what is called albaggi in Korean) pursuing unjustifiable profit. In this regard, the Instant Provision cannot be acknowledged as complying with the spirit of the rule against excessive restriction.

As such, the Instant Provision, which fails to provide the aforementioned legal and institutional complementary measures while easily granting a private party the power of eminent domain, infringes on the constitutionally guaranteed property right and therefore, violates the Constitution.

37. *Constitutional Complaint against Legislative Omission regarding Withdrawal of Life Sustaining Treatment*

[21-2(B) KCCR 647, 2008Hun-Ma385, November 26, 2009]

In this case, a constitutional complaint was filed by a patient herself and her son and daughters, asking for constitutional review of legislative omission of not providing an Act regarding withdrawal of life sustaining treatment, etc. Regarding the filing by the patient herself, the Constitutional Court rendered a decision of dismissal on the ground that "the constitutional complaint is not justiciable because the legislative omission does not fall under the 'non-exercise of governmental power' stipulated in Article 68 (1) of the Constitutional Court Act. Although the right of self determination on withdrawal of life sustaining treatment is one of the basic rights guaranteed by the Constitution, it is difficult to conclude that the state is obligated to legislate the 'Act on withdrawal of life sustaining treatment, etc.' to protect the right". Also, regarding the filing by the son and daughters of the patient, the Constitutional Court rendered a decision of dismissal on the ground that "there is no self-relatedness to the infringement of the fundamental right by the legislative omission, and therefore, the filing is not justiciable".

Background of the Case

Complainant Kim Ok-kyung is a patient who has been in a permanent vegetative state since suffering brain damage caused by hypoxia and has received medical treatment such as administration of antibiotics, artificial feeding and hydration solution, etc. (hereinafter, "life sustaining treatment"). Other complaints are her son and daughters.

Kim's son and daughters demanded the medical staff to halt any medical treatment for her, refusing to receive meaningless treatment of life extension, but the demand was refused by the hospital. Upon this, the complainants (including the special representative on behalf of Complainant Kim Ok-kyung) filed this constitutional complaint on May 11, 2008, arguing that "in case where it is possible to confirm the

intent of a dying patient, such as Complainant Kim in this case, to refuse to receive meaningless life sustaining treatment, a basic right to die a natural death should be acknowledged, and the complainants' human value, right to pursue happiness, property right, etc. are infringed by the legislature's omission to enact a related law to protect this right".

Summary of the Decision

In a unanimous vote (one concurring opinion), the Constitutional Court dismissed the constitutional complaint. The summary of decision is as follows:

1. Court Opinion

A. Whether the self-relatedness of comatose patient's children who filed the constitutional complaint can be acknowledged

In this case, the 'non-exercise of governmental power', which is the subject matter of review in this case, is the omission to legislate the 'Act on withdrawal of life sustaining treatment, etc.' The subject that is directly affected by the aforementioned legislative omission or legislation of the Act as fulfillment of the duty to legislate is a patient who would die if the life sustaining treatment is withdrawn or withheld. The children of such a patient have interests in the aforementioned legislative omission in that they have to endure emotional distress as watching 'the patient helplessly lying down on the bed and waiting for death without having a chance to die a natural death due to the futile life sustaining treatment' and possibly bear the economic burden to pay the medical bill as a person under duty to support the patient. It seems reasonable, however, that such emotional distress or economic burden should be deemed as only an indirect and factual interest. Therefore, the constitutional complaint filed by the children of the patient under life sustaining treatment is not justiciable as it is not directly related to the infringement on their own basic right.

B. Whether the legislative omission presented by the patient herself falls under the non-exercise of government power

Only when the legislature does not carry out the delegated legislation to make laws which is clearly stipulated in the Constitution in order to protect basic rights, or only when the legislature does not take any legislative action even in the case where the state becomes obligated to take action or protect certain category of people's basic rights which are created through the interpretation of the Constitution, the legislative omission can be a subject matter of a constitutional complaint as 'non-exercise of government power' under Article 68 (1) of the Constitutional Court Act. It seems that, however, there is no constitutional provision that explicitly delegates the legislation of the 'Act on withdrawal of life sustaining treatment, etc.' for the dying patients. Therefore, the issue in this case is whether the state is evidently obligated to legislate the 'Act on withdrawal of life sustaining treatment, etc.' under the interpretation of the Constitution. In relation to this, it is also required to review the question as to whether the dying patient's right of self-determination on withdrawal of life sustaining treatment is one of the constitutionally guaranteed basic rights. Further, on the basis of the premise that such a basic right is acknowledged, it is also needed to review the question as to whether the State has the duty to legislate 'Act on withdrawal of life sustaining treatment, etc.' to protect the right.

(1) Whether the dying patient's right of self-determination on withdrawal of life sustaining treatment is one of the constitutionally guaranteed basic rights

'Withdrawal of life sustaining treatment, or in other words, the self determination to shorten one's own lifespan' conflicts with the constitutional value of protecting the 'right to life'. Here, the 'dying patient' whose self-determination on withdrawal of life sustaining treatment is at issue means a patient who 'is medically unable to regain his/her consciousness, to recover the loss of function of important organs related to life and therefore it is evident that the

patient will end his/her life within short time considering the patient's physical condition', or namely, who is 'in a irrecoverable stage of death'. As the 'dying patient' can only extend his/her life with the help of medical equipments and probably become unable to extend his/her life even with the help of medical equipments as finally being in the irrecoverable stage due to the loss of other functions of body, the life sustaining treatment for the 'dying patient' is, medically speaking, a mere continuation of meaningless intrusion upon a person's body without any possibility of effective cure of disease. Moreover, such treatment can be regarded not as preventing the process of death from starting, but as artificially extending the final stage of death during the process of death which has already been started in natural condition. Therefore, although the decision and actual practice of withdrawing life sustaining treatment shorten patient's lifespan, this cannot be deemed a suicide as arbitrary disposal of life. Rather, this corresponds to the human value and dignity in that such practice is to leave one's life at the hand of the nature, freeing the dying patient from non-natural intrusion on body.

Therefore, a patient can be regarded as being able to make a decision to deny or cease life sustaining treatment to keep one's dignity and value as human being when facing death and inform the medical staff of his/her decision or wishes in advance before being unable to communicate, and such a decision should be protected as one of the aspects of the self-determination right guaranteed by the Constitution.

(2) Whether the legislature is obligated to enact the 'Act on withdrawal of life sustaining treatment, etc.' under the interpretation of the Constitution

Disputes over withdrawal of life sustaining treatment can be resolved by a court trial and the right of self-determination on withdrawal of life sustaining treatment can be effectively protected by the requirements and procedures for allowing the withdrawal set by the court trial, although not perfect. Also, since the issue of choosing to cease life sustaining treatment and die a natural death through exercising the right to self determination is related to the constitutional

value system of protecting the right to life and it is a matter of grave importance in connection with not only law and medical science but also religion, ethics and further, philosophical discussion of human existence, it requires a sufficient social consensus. Therefore, the legislation of an Act related to this issue should be possible only after the social discussion on this becomes mature, yields a public consensus and then the legislature recognizes such necessity as a result. Also, the National Assembly has discretion to decide which of the options including 'presenting norms and standard through a court trial' or 'legislation' would be desirable as a means to guarantee the 'right of self-determination on withdrawal of life sustaining treatment', which is an issue of legislative policy.

Therefore, under the interpretation of the Constitution, it is difficult to conclude that the state has an obligation to legislate the 'Act on withdrawal of life sustaining treatment, etc.'

(3) Conclusion

After all, since the constitutional complaint by the patient herself against the legislative omission to provide the 'Act on withdrawal of life sustaining treatment, etc.' is considered to be filed against a matter for which the state does not have the duty to legislate, not falling under the 'non-exercise of governmental power' stipulated in Article 68 (1) of the Constitutional Court Act, it is non justiciable.

2. Concurring Opinion of One Justice

The core element of the right of self determination derived from Article 10 of the Constitution is autonomy and the autonomy is premised on the fact that an individual can make an informed decision among many possible alternatives, sufficiently understanding the meanings of each alternative.

When a patient is finally in the irrecoverable stage waiting for upcoming death, however, it is hard or impossible to identify the patient's decision on withdrawal of life sustaining treatment. It is also doubtable that, at the point of withdrawal of life sustaining treatment, patients can make a choice between life and death by themselves with

sufficient understanding of the meanings of the two alternatives, or can make an autonomous decision to pull the plug. In this case, the issue is whether withdrawal of life sustaining treatment objectively corresponds to the patient's best interest in light of the patient's set of values and beliefs in general. After all, in the case of a dying patient, since it is hard to connect withdrawal of life sustaining treatment with the existence of a prior medical instruction by the patient, the right of self-autonomy under the Constitution may not be an issue to be considered here.

An issue of ceasing life sustaining treatment for a dying patient in the irrecoverable stage requires a social consensus, considering not only the patient's intent but also the medical care system and social insurance system to relieve economic and emotional burden of patient's family members and the standard and procedures for preventing withdrawal of life sustaining treatment from being misused or abused in order to protect our precious life as the very source of human existence. Namely, this issue should be solved not by considering the patient's right to self determination on one's own life, which is not even guaranteed by the Constitution, as an absolute standard but by the legislature's enactment of a relevant law on the basis of a public consensus formed through discussion and deliberation by the community members.

Therefore, the constitutional complaint filed by the patient herself should be dismissed on the ground that there is no possibility of infringement on the basic rights.

38. Pretrial Detention Credits after Making an Appeal Case

[21-2 KCCR 710, 2008Hun-Ka13, 2009Hun-Ka5 (consolidated), December 29, 2009]

Both Article 482 Section 1 of Criminal Procedure Act (revised by Act no. 8496 on June 1, 2007), stipulating the inclusion of pretrial detention credits after filing an appeal and Article 482 Section 2 of Criminal Procedure Act (revised by Act No. 7225 on October 16, 2004) does not prescribe the detention credits after filing an appeal until the withdrawal of the appeal. Such exclusion from regular penalty is not compatible with the Constitution by excessively restricting the freedom of body without rationality and legitimacy, violating the constitutional principle of the presumption of innocence, due process, and equality. The abovementioned provisions shall be applicable until the revision by the Legislature.

Background of the Case

The movant at the requesting court(case 2008Hun-Ka13) and the defendant of the underlying case(case 2009Hun-Ka5) withdrew appeal respectively while it is pending, after they are sentenced of imprisonment with the inclusion of pretrial detention credits at the first criminal trial. However, there are no provisions regarding the calculation of pretrial detention credits in the case of the withdrawal of appeal because of the expiration of the term for appeal. The requesting courts requested this constitutional review of Article 482 Sections 1 and 2 of Criminal Procedural Act (hereinafter, combined two Sections referred as the "Instant Provisions"), granting the movant's motion(2008Hun-Ka13) or sua sponte(2009Hun-Ka5), which regards the calculation of pretrial detention credits but do not stipulate the inclusion of pretrial detention credits after making an appeal until withdrawing it, thereby the pretrial detention credits being excluded from regular penalty.

[The Instant Provisions]

Criminal Procedure Act (revised by Act no. 8496 on June 1, 2007)

Article 482 (Calculation in Number of Detention Days, etc. Pending Judgment after Appeal)

(1) The whole number of days of detention pending judgment subsequent to the application for appeal shall be included in the calculation of the regular penalty, in the following cases:

1. In cases where application for appeal has been made by a public prosecutor; and

2. In cases where application for appeal has been made by a person other than a public prosecutor, and the original judgment is quashed.

Criminal Procedure Act (revised by Act No. 7225 on October 16, 2004)

(2) The whole number of days of detention before final and conclusive judgment during the period for which the application for appeal is filed (excluding the number of days of detention subsequent to the application for appeal) shall be included in the calculation of the regular penalty.

Summary of the Decision

The Constitutional Court decided the Instant Provisions are incompatible with the Constitution with an 8 (unconstitutional, including one dissenting opinion regarding the holding expression) to 1 (constitutional) vote for the following reasons.

1. Court Opinion

Because suspects or defendants prior to conviction are not guilty under the constitutional principle of the presumption of innocence, they should not be disadvantaged physically and spiritually from the perspective of law and fact by being treated as the convicted. Especially, pretrial detention is identical to imprisonment from the perspective of suspects or defendants whose freedom of body is infringed. Therefore, the entire credits should be included in the regular penalty under the principle of human rights and fairness. Thus, the detention after making an appeal until its withdrawal should be

included in regular penalty as long as it is categorized as pretrial detention. However, the Instant Provisions exclude the detention after filing an appeal until its withdrawal from regular penalty, thereby infringing on the freedom of body, which is one of the most fundamental rights among the basic rights.

Besides, while the entire pretrial detention credits are included if a defendant under custody makes an appeal but receives the decision of dismissal, according to the 2007Hun-Ba25 decision of this Court, delivered on June 25, 2009, the detention credits would not be included if a defendant under custody makes an appeal and withdraws it, because the Instant Provisions do not prescribe the calculation of the detention period after making an appeal until its withdrawal. Therefore, a defendant under custody who withdraws an appeal would be unfairly discriminated against a defendant under custody whose appeal is dismissed.

As a result, the exclusion of pretrial detention credits after filing an appeal until withdrawing it excessively restricts the freedom of body without rationality and legitimacy, violating the constitutional principle of the presumption of innocence, due process, and equality. Therefore, the Instant Provisions that prescribe the 'inclusion of pretrial detention credits after making an appeal', but do not stipulate pretrial detention credits after making an appeal until withdrawing an appeal violates the Constitution.

We declare the decision of incompatibility with the Constitution to prevent legal vacuum for the instant nullification of the provisions by the decision of unconstitutionality. The Instant Provisions shall be applicable until the Legislature revised the provisions to accord with the Constitution.

2. Dissenting Opinion of One Justice on the Type of Holding

The decision of unconstitutional on statutes, which makes a statute null, should specify the unconstitutional part of the statute when it declares unconstitutional.

Because the current regulation of the Instant Provisions is not incompatible with the Constitution, the statue that is not unconstitutional would be declared unconstitutional, if we declare the

Instant Provisions incomparable with the Constitution. Therefore, we should not declare the existing substances of the Instant Provisions incompatible with the Constitution.

Because the unconstitutionality of the Instant Provisions is located in the failure of the inclusion of pretrial detention credits, from filing an appeal until withdrawal of the appeal, to the sentence, we should hold that "the failure of the inclusion of the pretrial detention credits from filing an appeal until withdrawal of the appeal, to the sentence of the Instant Provisions is against the Constitution.

3. Dissenting Opinion of One Justice

It is within the broad discretion of the Legislature whether the pretrial detention credits should be included to the sentence. Because it would be not unconstitutional unless the legislation clearly abuses the discretion, it is not logical that the inclusion of the entire pretrial detention credits to the sentence can only protect the human rights. The pretrial detention credits from filing an appeal to the withdrawal of the appeal can be regarded as the terms not including to the sentence because the Legislature considers them as the liable terms of the defendant.

With these reasons, it would be not clearly unfair and unreasonable abuse of discretion of the Legislature in enactment to exclude the pretrial detention credits from filing an appeal to its withdrawal from the sentence. Therefore, Article 482 Section 2 of the Criminal Procedure Act would not violate the principle of equality because defendants under custody who withdraw appeals are not arbitrarily discriminated, without sound grounds, against defendants under custody whose appeals are dismissed.

Besides, considering that the pretrial detention according to law and due process under the Constitution does not infringe on the freedom of body, the disadvantages by the pretrial detention should not be regarded as the sacrifice of defendants. Therefore, Article 482 Section 2 of the Criminal Procedure Act that excludes the pretrial detention credits, from filing an appeal to the withdrawal of the appeal, from sentence does not infringe on the freedom of body.

39. Case on Prohibition of Assemblies Near the National Assembly

[21-1(B) KCCR 745, 2006Hun-Ba20 · 59 (consolidated) December 29, 2009]

In this case, the Constitutional Court decided that the portion of Article 11 Item 1 of the Assembly and Demonstration Act concerning the "National Assembly building", which provides that no person may hold any outdoor assembly or stage any demonstration anywhere within a 100-meter radius from the boundary of the office building, is not in violation of the Constitution.

Background of the Case

The petitioners were prosecuted on charges of holding assemblies within the 100-meter radius from the boundary of the National Assembly building and convicted in the court of first instance. They appealed the case and filed a motion to request for the constitutional review of the underlying Article 11 Item 1 of the Assembly and Demonstration Act, arguing that the provision violated the freedom of assembly and thus the Constitution. However, when the motion was denied, they filed this constitutional complaint.

Provision at Issue

Assembly and Demonstration Act (later revised by Act No. 7123 on Jan. 29, 2004 and wholly revised by Act No. 8424 on May 11, 2007)

Article 11 (Places Prohibited for Outdoor Assembly and Demonstration)

No person may hold any outdoor assembly or stage any demonstration anywhere within a 100-meter radius from the boundary of the following office buildings or residences:

1. The National Assembly building, all levels of courts, and the Constitutional Court;

Summary of the Decision

In a vote of 5 (constitutional) to 4 (unconstitutional), the Constitutional Court ruled that the portion of the "National Assembly building" of Article 11 Item 1 of the Assembly and Demonstration Act does not violate the Constitution for the following reasons:

1. Court Opinion

The provision at issue absolutely bans the outdoor assembly or demonstration near the National Assembly, which may directly renounce the members of the National Assembly, etc., impose psychological pressure through threats, or cause difficulty in the access to the National Assembly. Such prohibition ensures free access to the National Assembly building and the safety of its facilities and is considered as an adequate means to serve the legitimate legislative purpose. Meanwhile, given its particularity and importance, the constitutional jurisdiction exercised by the National Assembly requires special and sufficient protection. However, the general regulations prescribed by the Assembly and Demonstration Act or ex-post regulations under the Criminal Act alone cannot serve as the effective means to protect the competence of the National Assembly.

In addition, it is hardly the case that there is a less restrictive means other than the challenged provision, and having no exception is not considered a violation of the rule of the least restrictive means given the function and role of the National Assembly. Furthermore, the private interest abridged by the challenged provision is nothing but a spatial restriction in limited scope - restriction of holding assemblies near the National Assembly, whereas protecting the competence of the National Assembly is definitely important in terms of representative democracy. As the resulting decline in the effectiveness of assemblies and demonstrations and restriction on freedom concerned are therefore acceptable, the balance of interest is not found to be disrupted. For this reason, the contested provision is not in violation of the rule against excessive restriction and thus the freedom of assembly.

2. Dissenting Opinion of Four Justices

Sending a message or exercising political pressure by holding an assembly is necessary and worthwhile in itself in today's pluralistic democracy, and there is no constitutionally-justified need to prohibit any influence of political and collective expression on members of the National Assembly. Nevertheless, the challenged provision established a no-assembly zone without questioning the practical danger of assemblies or demonstrations near the National Assembly and the possibility of violence. This measure lacks the legitimacy of the legislative purpose or serves as an inadequate means to fulfill the legislative purpose. Meanwhile, insofar as the general regulations set forth in the Assembly and Demonstration Act and provisions restricting violence under the Criminal Act exists, the legislative purpose of protecting the function of the National Assembly can be served without difficulty even without the prior restriction of the exercise of the freedom of assembly itself. In this sense, designation of such a prohibited area is an excessive regulation of basic rights and thus violates the rule of the least restrictive means. In addition, the challenged provision is problematic in the sense that it provides no exception to ease the restriction on basic rights even in cases with small possibility of violation of legal interests. It is undoubted that the protection of the function of the National Assembly as a constitutional control body represents public interest of very particular importance, but the contested provision, by imposing full-fledged restriction even on the peaceful and justifiable assemblies, shows no effort for balancing the conflicting legal interests in consideration of specific circumstances. Hence, the balance of interests is hardly achieved. In consequence, the instant provision breaks the rule against excessive restriction by overly regulating the freedom of assembly and therefore is in violation of the Constitution.

3. Concurring to Dissenting Opinion of One Justice

Insofar as the official duties of the National Assemblymen are not obstructed, the people's freedom of speech should be allowed not only in the vicinity of but also within the National Assembly.

4. Dismissal Opinion of One Justice

It is not that the challenged provision bans assemblies and demonstrations within the boundary of the National Assembly building. In the area within the boundary of the National Assembly building, the autonomy of the management authority over self-regulated order takes precedence over the intervention of public power. Therefore, the provision at issue does not apply to some of the complainants who held assembly within the boundary of the National Assembly, and their complaint challenging the constitutionality of the said provision is not justiciable since it involves a law not applicable to the underlying case.

40. Case on Reversion of the Political Fund to the Nation Coffers

[21-2(B) KCCR 846, 2007Hun-Ma1412, December 29, 2009]

In this case, the Constitutional Court held unconstitutional the part of 'a candidate for an intra-party competition for the presidential election' in Article 21, Section 3, Item 2 of the former Political Fund Act (hereinafter, the 'Instant Provision') which requires a candidate for an intra-party competition for the presidential election to return the total amount of political support money received from a supporters' association to the Nation Coffers when he/she is no longer eligible to maintain the relevant supporters' association due to his/her withdrawal of the intra-party competition, on the ground that it infringes the complainant's basic rights including the right to equality and freedom of election.

Background of the Case

On August 21, 2007, the complainant registered as a candidate for an intra-party competition to elect a candidate of the United New Democratic Party for the 17th Presidential Election (hereinafter, the 'candidate for an intra-party competition for the presidential election'). On August 27, 2007, the complainant designated and established supporters' association after registering himself as a candidate for the intra-party competition for the Presidential Election. The association raised the political support money of 294,518,594 won in total and contributed 275,000,000 won to the complainant from August 28 to September 15, 2007.

The complainant, however, resigned as a candidate for the intra-party competition for the Presidential Election on September 17, following the public opinion favoring a single candidate within the political party to which he belonged. As a result, on the same day, the complainant lost qualification for maintaining the supporters' association, and thereby the association was dissolved.

According to Article 21, Section 2, Item 2 of the former Political Fund Act, when a candidate becomes no longer eligible to maintain the relevant supporters' association, the total contributions from the

supporters' association should revert to the Nation Coffers. In relation to this, the complainant filed this constitutional complaint on December 13, 2007, arguing that the Instant Provision infringes on the right to equality and the right to hold public office guaranteed by the Constitution.

Provision at Issue

Former Political Fund Act (before revised by Act No. 8880 on February 29, 2008)

Article 21 (Disposal of Residual Property, etc. in Case of Dissolution of Supporters' Association, etc.)

③ Notwithstanding the provisions of Sections (1) and (2), when a candidate for an intra-party competition in a presidential election, a candidate for a party representative competition or a preliminary candidate to run in an election for National Assembly members is no longer eligible to maintain the relevant supporters' association (excluding the time when they fail to win in an intra-party competition to elect a candidate to run in elections for public office or in the competition to elect the party representative), the residual property falling under any of the following items shall revert to the Nation Coffers on or before the time when the accounting report provided for in the provisions of Article 40 is made:

2. Designated authorities of supporters' associations:

The total amount of support payments contributed by supporters' association (in the case of his death, refers to the balance of the expenses that are spent on or before the time when he dies).

Summary of the Decision

In a unanimous vote (including two concurring opinions), the Constitutional Court rendered a decision of unconstitutionality regarding the Instant Provision. The summary of decision is as follows:

1. Court Opinion

A. Whether the right to equality is infringed

The Article 21, Section 3, Item 2 of the former Political Fund required a candidate for an intra-party competition for the presidential election who did not or did not have a chance to participate in an intra-party competition to return all the support money received from the supporters' association to the Nation Coffers, while requiring a candidate for an intra-party competition for the presidential election who has participated in the competition but failed to win to return only the remaining money, subtracting already spend money for competition from the total amount of the received money (the parenthesized part of the said Article).

In a case where a candidate for an intra-party competition for the presidential election registered as a candidate and launched election campaign, it cannot be denied that the candidate, although giving up participating in the competition, should be regarded as participating in a political process which has an important meaning to realize the representative democracy. Therefore, a candidate for an intra-party competition for the presidential election who withdrew the competition should be subject to the legislative purpose of providing relevant political funds, and the discriminatory treatment against such a candidate by collecting the total amount of money contributed by the supporters' association, as opposed to a candidate who participated in the competition, cannot be regarded as being founded on a reasonable ground.

Candidates for an intra-party competition for the presidential election may give up participating in the competition depending on various circumstantial changes such as trends in public opinion and changes in political landscape or economic situation. Also, it is absurd to strictly require them to participate in the competition without an exception regardless of such unavoidable circumstantial changes or, from the beginning require that only those who are certainly going to participate in the competition in any case can be candidates for an intra-party competition for the presidential election. Especially, the procedures for the Presidential Election, even it is an intra-party competition for it, necessarily include competitions and compromises between political powers. Some of the candidates may decide not to

participate in the intra-party competition as a result of competition and compromise during the highly political procedures or in some cases, may decide to withdraw the competition due to the pressure from public opinion.

Meanwhile, considering the facts that a designated person should be in charge of accounting on the revenue and expenditure of political funds and accounting report system has been maintained with the purpose of preventing abuse of the supporters' association system, abuse of the supporters' association seems to be prevented in most part even when a candidate who withdraw the intra-party competition is required to return only the remaining money after subtracting campaign funds spent during the election campaign for intra-party competition.

After all, the Instant Provision violates the complainant's right to equality because, in relation to the reversion of already used supporting money, the Instant Provision discriminates a person who lost intra-party competition for the presidential election from a person who withdrew it, and such discriminatory treatment does not have any legitimate ground.

B. Whether the freedom of election campaign and the right not to run for election (freedom of withdrawing from public official election process) are infringed

As election campaign naturally requires campaign fund, restriction on the use of campaign fund results in restriction on election campaign itself. The Instant Provision, when the candidate received political support money from legally organized supporters' association and legally and legitimately used them, restricts the freedom of election campaign, since it requires the total amount of support money including the legally used campaign money to revert to the Nation Coffers for the cause of the candidate's non-participation in the intra-party competition.

Requiring a candidate for an intra-party competition for the presidential election to return the total amount of support money to the Nation Coffers, even when the candidate legally designated a supporters' association and received supporting money used for the

election campaign, due to the candidate's non-participation in the intra-party competition is grave restriction on the freedom of campaign election.

A candidate for an intra-party competition for the presidential election has the freedom to resign as a candidate when it is decided that a chance of wining the competition is very low, or due to economic · political reasons or other circumstantial changes such as health problem. However, due to the Instant Provision, people who participate in the election process as candidates for an intra-party competition for the presidential election are seriously restricted to exercise their right to resign as a candidate halfway through. Such restriction on political decision making process of candidates for an intra-party competition for the presidential election is not harmonized with the purposes of the system of candidate for an intra-party competition for the presidential election and the system of supporters' association, hampering healthy development of free democratic politics.

As a result, the Instant Provision prevents support money from being used for election campaign without legitimate grounds, and therefore, infringes on people's political rights including the freedom of election campaign and the freedom to quit election campaign.

2. Concurring Opinion of Two Justices

In order for the complainant to argue that his basic rights are infringed by the Instant Provision, it should be shown that the Instant Provision currently and directly infringes on his relevant basic rights. In this case, however, if a candidate for an intra-party competition for the presidential election participates in the competition with real intention to win the race, there would be no reason for the candidate to be reluctant to use the support money in the fear of the money's reversion to the Nation Coffers in case of the candidate's withdrawal from the competition. Therefore, the possibility that the Instant Provision would directly constraint the use of campaign fund for the intra-party competition for the presidential election seems very low. Even though a candidate for an intra-party competition for the presidential election is hesitant to spend campaign money bearing the Instant Provision in mind, such hesitation is only resulted from actual

or economic consideration, and therefore, it is improper to think that the Instant Provision would infringe on the freedom of election campaign of a candidate for an intra-party competition for the presidential election.

Rather, it should be said that the Instant Provision violates the Constitution because it infringes on the complainant's right to withdraw his candidacy for the intra-party competition or in other words, the negative right to run for election, in violation of the principle of proportionality under the Constitution.

Notes on Translation

* K.K.M. : Constitutional Research Officer Kim Kyong Mok
S.M.Y. : Constitution Researcher Shin Mi Yong
K.I.T. : Constitution Researcher Kim Ik Tae
Y.S.Y. : Constitution Researcher Ye Seung Yeon
C.S.H. : Constitution Researcher Cho Soo Hye
C.J.U. : Choi Jie Un, International Affairs Division
K.M.J. : Kim Mee Jung, Former Public Information Division

□ Full Opinions

	Title	Translator
1	Restriction on Right to Prosecute Offenders of Traffic Accidents Causing Serious Injury Case	C.J.U.
2	Case on 50 Times Administrative Penalty Fee for Violators of Public Official Election Act	C.S.H.
3	Reversion of a Public Auction Deposit to the Nation Coffers Case	C.S.H.
4	Wartime Reinforcement Military Practice of 2007 Case	K.I.T.
5	Partial Credit on Pretrial Detention Case	K.I.T.
6	Joint Punishment on Juridical Person with the Emplpyee thereof Case	C.J.U.
7	Nighttime Outdoor Assembly Ban Case	K.I.T.
8	Restriction on Prisoner's Right to Vote Case	Y.S.Y.

□ Summaries of Opinions

	Title	Translator
1	Assessment of Litigation Costs by a Judicial Assistant Officer Case	C.S.H.
2	Restriction on Right to Prosecute Offenders of Traffic Accidents Causing Serious Injury Case	C.J.U.
3	Infringement of Right to Equality for Severely Disabled Candidates Running for Public Office	Y.S.Y.
4	Authorization Requirement for Establishment of Law Schools and Limitation of Total Number of Admitted Students Case	K.K.M.
5	Suspension of Veteran's Retirement Pension Benefits Case	C.S.H.
6	Case on 50 Times Administrative Penalty Fee for Violators of Public Official Election Act	K.K.M.
7	Judgment of Unconstitutionality on Municipal Ordinance regarding Electroal Districts and Seats of City and Gun Council of Chungcheongnam-Do	K.I.T.
8	Resident Recall against the Head of Local Government Case	C.S.H.
9	Reversion of a Public Auction Deposit to the Nation Coffers Case	C.S.H.
10	Prohibition on Registering Trademarks Identical with or Similar to a Nullified Trademark Case	C.J.U.
11	The Provision Restricting Contribution in Public Official Election Act	K.I.T.
12	Compulsory Allocation of High School Student Case	Y.S.Y.
13	Competence Dispute over Inspection of Autonomous Affairs of Local Government Case	Y.S.Y.
14	Ban on Internet Distribution of Obscene Materials Case	C.J.U.
15	Advance Report Duty for Outdoor Assembly Case	K.I.T.

	Title	Translator
16	Standard Korean Language Case	Y.S.Y.
17	Wartime Reinforcement Military Practice of 2007 Case	K.I.T.
18	Partial Credit on Pretrial Detention Case	K.I.T.
19	Case on Prohibition of Succeeding Local Council Seats Reserved for Proportional Representation in the Event of Vacancies Occurring from Election Crimes	C.J.U.
20	Definition of Abduction Victims Case	C.S.H.
21	Case on Prohibition of Succeeding National Assembly Member Seats Reserved for Proportional Representation in the Event of Vacancies Occurring Within 180 Days Prior to the Term Expiration Date	C.J.U.
22	Prohibition of Establishing Charnel House within the School Environmental Sanitation and Cleanup Zone Case	Y.S.Y.
23	Joint Punishment of Juridical Persons in Connection with Their Employees' Illegal Acts Case	C.J.U.
24	Ordinance Inaction Case	C.S.H.
25	Prohibition of Distribution of UCC in Prior-Electioneering	S.M.Y.
26	Nighttime Outdoor Assembly Ban Case	K.I.T.
27	Heavy Taxation on the Acquisition of Deluxe Amusement Center Case	C.S.H.
28	Private Taking Case	C.S.H.

	Title	Translator
29	Constitutional Complaint against Reducing Time Limit for Inmate Video Visit Case	Y.S.Y.
30	Competence Dispute between the National Assembly Members and the National Assembly Speaker	C.S.H.
31	Report of the Number of Cases Accepted and the Amount of Case Acceptance by Attorneys Case	Y.S.Y.
32	Case on Request to be Visited by Counsel in the Defendant's Waiting Room	C.J.U.
33	Restriction on Prisoner's Right to Vote Case	Y.S.Y.
34	Participatory Trial Case	C.J.U.
35	Sexual Intercourse under Pretence of Marriage Case	Y.S.Y.
36	Granting a Private Developer to Claim Transfer of Land from Private Owner Case	Y.S.Y.
37	Constitutional Complaint against legislative omission regarding withdrawal of life sustaining treatment	Y.S.Y.
38	Pretrial Detention Credits after Making an Appeal Case	C.S.H.
39	Case on Prohibition of Assemblies Near the National Assembly	C.J.U.
40	Case on Reversion of the Political Fund to the Nation Coffers	Y.S.Y.