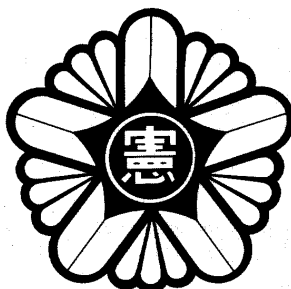
DECISIONS
OF
THE KOREAN CONSTITUTIONAL COURT
(1998. 9. ~ 1999. 12.)



THE CONSTITUTIONAL COURT OF KOREA

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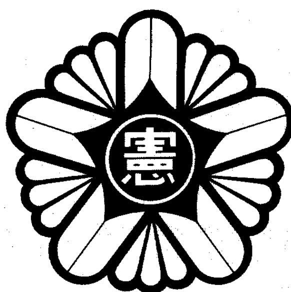

THE CONSTITUTIONAL COURT OF KOREA
2001

PREFACE

The publication of this volume is aimed at introducing to foreign readers those cases decided after August 30, 1998, the final inclusion date for *the First Ten Years of the Constitutional Court*. It is a translation of the Korean language supplement (September 1, 1998 ~ December 31, 1999) to *the First Ten Years of the Constitutional Court*.

This volume contains 18 cases, three full opinions and fifteen summaries.

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

Professor Park Kyung-sin, Handong University, translated the original. Professor Kim Jong-cheol, Hanyang University, proofread the manuscript. The Research Officers of the Constitutional Court provided much needed support. I thank them all.

June 30, 2001

Park Yong-sang
Secretary General
The Constitutional Court of Repulic of Korea

EXPLANATION OF ABBREVIATION & CODES

- KCCR : Korean Constitutional Court Report
- KCCG : Korean Constitutional Court Gazette
- Case Codes
  - Hun-Ka : constitutionality case referred by ordinary courts according to Article 41 of the Constitutional Court Act
  - Hun-Ba : constitutionality case filed by individual complainant(s) in the form of constitutional complaint according to Article 68 (2) of the Constitutional Court Act
  - Hun-Ma : constitutional complaint case filed by individual complainant(s) according to Article 68 (1) of the Constitutional Court Act
  - Hun-Ra : case involving dispute regarding the competence of governmental agencies filed according to Article 61 of the Constitutional Court Act

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

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I. Full Opinions

1. Constitutional Complaint against Article 21 of the Urban Planning Act

[10-2 KCCR 927, 89Hun-Ma214, 90Hun-Ba16, 97Hun-Ba78 (consolidated), December 24, 1998, Full Bench]

Contents of the decision

1. Social accountability[1)] of the right to real property;
2. The nature and limit on restriction of one's right to real property by designation as a development-restricted zone (namely, the Green Belt);
3. The standard of limiting the social restriction on the right to real property;
4. Whether the fall in the land price, caused by the development-restricted zone designation, is justifiable as the result of the social restriction inherent in the right to real property;
5. Constitutionality of Article 21 of the Urban Planning Act;
6. The reason and meaning of the decision of nonconformity to the Constitution;
7. The meaning and legal nature of a compensation statute.

Summary of the decision

1. The constitutional right to property does not mean a guarantee of the land owner's right to make all possible uses of the land to the maximum extent or to use it most economically or efficiently. The legislature can limit certain uses of the land for reason of important public interest. Development of and improvement on the land is permitted within the content and extent of the right to property determined by statutes conforming to the constitution. The right to real property can be imposed heavier obligations and duties than other property rights because of its strong social or public nature.

2. Article 21 of the Urban Planning Act, which designates a

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1). Not in the sense that the society is accountable but in that the right to property is inherently accountable to the society that created it.

development-restricted zone and bans construction therein, specifies generally and abstractly the rights and duties associated with the right to real property according to Article 23 (1) and (2) of the Constitution. It creates the right to real property and at the same time concretizes the social restriction of that right imposed by the mandate of public interest. Although the right to real property can be imposed heavier obligations and duties than other property rights because of its strong social or public nature, the restricting statute must abide by the principle of proportionality, like statutes restricting other basic rights, and must not deny the essential content of the right to property, namely, the right to use, profit from, and dispose of the land.

3. The development-restricted zone designation may make it impossible to use the land as it was used previously or may not leave any feasible use, effectively eliminating all venues to use or profit from it. Such designation exceeds the limit of the social restriction that the landowner must accept.

4. Elimination of development opportunities and the resulting decrease in the land price or the relative slowing of the price increase does fall under the social restriction that the landowner must endure. The expectation that one could use his or her land for construction or development in the future or take advantage of the increase in the land price does not belong in principle to the protected extent of the right to property. As long as the landowner could use, profit from, or dispose of the land in the original condition before the designation, the designation does not exceed the limit of the social restriction that the landowner must accept.

5. The restriction on the right to property by Article 21 of the Constitution, as long as it allows the original use of the land, is merely a constitutional concretization of the social limit inherent in the right to property, which is consistent with the principle of proportionality. If the provision makes such original use impossible and makes any other feasible use or profiting of the land impossible, and yet does not provide compensation, it violates the principle of proportionality and excessively limits the landowner's right to property.

6. The development-restricted zone system in Article 21 of the Urban Planning Act is in principle constitutional. However, it becomes possibly unconstitutional when it imposes a cruel burden exceeding the scope of social restriction on the landowner without any compensation provision. The concrete standard and method of compensation should, by nature, not be determined by the Constitutional Court but determined as a matter of policy by the legislature with the broad legislative-formative power. Until the legislature cures the unconstitutional status of law by making a compensation statute, we leave the above provision formally valid on a decision of noncon-

formity. The legislature has a duty to eliminate the unconstitutional element of the statute as soon as possible. The administrative agencies should not designate a new development-restricted zone until the legislature enacts the compensation statute. The landowner can wait for enactment of the compensation statute and exercise his or her right pursuant to it, but cannot contest the designation itself or the effect of the use restriction or justify his or her conduct violative of the restriction.

7. The legislature, in order to make the limitation on people's right to property conform to the principle of proportionality, must provide for a compensation provision that will alleviate the cruel burdens that the limitation may impose on them. The compensation provisions are required for regulating the right to property for reason of public interest and concretely forming the content of the right to property in Article 23 (1) and (2). Monetary compensation is not the only means to recover the proportionality between the public interest and the restriction on the right to property. The legislature may choose alternative means such as releasing the properties from the development-restricted zone designation, setting up the system of petitioning the state to purchase the properties, and other means of ameliorating the loss.

Dissenting opinion of Justice Cho Seung-hyung

The majority's nonconformity decision violates the explicit provisions of the Constitution in Articles 111 (1) and (5) and the Constitutional Court Act in Articles 45 and 47 (2). It arises out of a confusion between the German system based on the retroactive effect of an unconstitutionality decision and the Korean system based on its prospective effect, and the resulting, uncritical adoption of German precedents. This case should be decided on a simple decision of unconstitutionality.

Dissenting opinion of Justice Lee Young-mo

1. All people have the right to environment (Article 35 of the Constitution) whereby they can live in a healthy and pleasant environment. That right is fundamental to realization of the human dignity and value and the right to pursuit of happiness. The right takes precedence over the economic liberty of exercising the right to private property.

2. Article 21 of the Urban Planning Act is a regulatory legislation necessary for the prevention of environmental pollution harmful

to national security and the preservation of the city's natural surroundings and its living area, and is therefore constitutionally valid. This regulatory provision may limit the use of bare building lots, working together with the change in the circumstances, and may interfere with the use of other properties, but it permits alternative uses that do not discord with its legislative intent and does not limit the owner's right of disposal. Such regulation is by nature a social limitation inherent in the right to property. In balancing the interests, the disadvantages to the property owner are small compared to the contribution to national security and public welfare. The Act is also reasonable and necessary for accomplishment of those legislative purpose, therefore not departing from the requirements for restricting basic rights stated in Article 37 (2) of the Constitution. Furthermore, bare building lots and the property subject to redesignation, compared to other properties within the restricted zone, are not discriminated unreasonably. Hence no violation of the principle of equality.

Provisions on review

Urban Planning Act (enacted by Act No. 2291 on January 19, 1971 and revised by Act No. 2435 on December 30, 1972)

Article 21 (designation of development-restricted zone)

① Minister of Construction and Transportation may designate an area in which urban growth is restricted (hereinafter, “development-restricted zone”) in order to prevent disorderly urban expansion, preserve the natural surrounding, and obtain a healthy living space for the citizens, or upon request of Minister of Defense that urban development needs be limited for a security purpose.

② Inside the development-restricted zone designated pursuant to Article 1, there shall not be any construction or structure erected, any change in the quality and form of the ground, any subdividing, or any urban planning activity that violates the designating purpose. Provided, those who had commenced construction or a project under a proper approval (including when no such approval is required) may continue as specified by presidential decrees.

③ The conduct restricted under Section 2 and other matters necessary for development restriction shall be determined by the decrees of Minister of Construction and Transportation within the scope of the presidential decree.

Related provisions

The Constitution

Articles 23, 35, and 122

Urban Planning Act Enforcement Decree

Article 20 (Restriction of Conduct with the Development-restricted Zone)

① Pursuant to Article 21 (3) of the Act, Mayor or County Supervisor may authorize the following activities. Provided, minor activities specified by the Construction and Transportation Minister's decrees may be engaged in upon notice to Mayor or County Supervisor.

1. Construction or erection of the following buildings and structures, to the extent that does not interfere with the purpose of the zone designation:

A. Construction and erection of structure necessary for public interest;

B. Construction and erection of structure inappropriate to be located in a population-concentrated area and appropriate for being located in a development-restricted zone;

C. Structure deemed necessary for agriculture, forestry, fishery, and other activities not interfering with the purpose of the development restriction designation;

D. Expansion and renovation of the residential structure that existed at the time of the designation;

E. Renovation and reconstruction of the non-residential structure;

F. Rebuilding within two years of those structures previously demolished for the purpose of building community cooperative facilities, public utility facilities, publicly used facilities, and public facilities within the development-restricted zone pursuant to the decrees of Ministry of Construction and Transportation;

G. Construction of buildings and erection of structures deemed necessary for the improvement of the living environment of the residents of the development-restricted zone pursuant to the decrees of Ministry of Construction and Transportation.

2. Change in form and quality of the ground that does not involve much deforestation or excavation of soil and rocks and

does not interfere with the purpose of the zone designation;

3. Subdividing that does not involve new construction or expansion and does not interfere with the purpose of the zone designation.

② The types and sizes of buildings and structures, the minimum area of the building site, the ratio of the building area to the building site area, the ratio of the building area to the site of the ground change, and the standards for subdividing, shall be determined by the decrees of the Minister of Construction and Transportation.

Article 21 (Special Provisions for Previously Begun Construction)

① Those who intend to continue construction or projects (including adding buildings or structures on a lot already improved) pursuant to the proviso of Article 21 (2) of the Act must give the mayor or the county supervisor notice of the construction or project within one month of the zone designation and follow their adjustment.

② If the project in (1) is that of changing the form and quality of the ground and is for the purpose of construction of buildings, those initiating the project must apply for a building license within one month after the construction inspection for the project.

③ [omitted]

Related precedents

1 KCCR 357, 88Hun-Ka13, December 22, 1989

Parties

Complainants

1. Bae Ok-sup and two others (89Hun-Ma214)
   Counsel: Jang Gi-wook
2. Lee Byung-gwan (90Hun-Ba16)
   Counsel: Donghwa Legal Corporation,
   Counsel-in-charge: Lee In-soo and three others
3. Lee Chung-hyung and three hundred and thirty four others (97Hun-Ba78)
   Counsel: Lee Jin-woo
   Designated parties: Lee Chung-hyung and 15 others.

Original cases

1. Seoul High Court 89Gu1928, vacation of the order to demolish (89 Hun-Ba214)
2. Supreme Court 89Nu770, vacation of the order to demolish (90 Hun-Ba16)
3. Seoul District Court 96Ga-Hap90820, damages for loss (97Hun-Ba 78)

Holding

Article 21 of the Urban Planning Act (enacted January 19, 1971 by Act No. 2291, and revised December 30, 1972 by Act No. 2435) is nonconforming to the Constitution.

Reasoning

1. Overview of the case and the subject matter of review

A. Overview of the case

(1) 89Hun-Ma214

Complainants Bae Ok-sup, Kim Sung-bok, and Kim Young-soo built a building without governmental approval between 1978 and 1980 on a development-restricted zone, designated by Notice No. 385 of the Ministry of Construction. When the Inchon Suh-gu District Head ordered the building demolished, pursuant to the Urban Planning Act (enacted January 19, 1971 by Act No. 2291, revised December 30, 1972 by Act No. 2435; the "Act", hereinafter), the complainants sought vacation of the administrative order in the Seoul High Court (89Gu-1928). Then, the complainants requested constitutional review of Article 21 of the Act. When the denial of the requested was delivered on Sep. 5, 1989, they filed this constitutional complaint on the 19th of the Month.

(2) 90Hun-Ba16

Complainant Lee Byung-gwan built a building without governmental approval on a development-restricted zone around 1982, designated by Notice No. 385 of the Ministry of Construction. When the Inchon Buk-gu District Head ordered the building demolished, the complainants sought vacation of the administrative order in the Seoul High Court (88Gu2894) but was denied. The complainants appealed

to the Supreme Court (89Nu770) and then sought constitutional review of Article 21 (1) and (2) of the Act. When denied the request on May 8, 1990, he filed this constitutional complaint.

(3) 97Hun-Ba78

Complainants enumerated on List 3 of the Attachment own properties within the areas designated for development restriction by the Minister of Construction and Transportation pursuant to Article 21 of the Act between July 30, 1971 and December 4 of the same year. The complainants designated the complainants enumerated on List 4 of the Attachment as the designated parties. The designated parties sought compensation for the loss caused by the development-restricted zone designation in the amount of three hundred thousand wons per complainant in the Seoul High Court (96Ga-Hap90820). Pending the trial, the designated parties requested constitutional review of Article 21 of the Act. When they were denied in the request on October 1, 1997 (97Ka-Gi3279), the complainants filed this constitutional complaint.

B. Subject matter of review

The subject matter of review is the constitutionality of Article 21 of the Urban Planning Act (enacted by Act No. 2291 on January 19, 1971 and revised by Act No. 2435 on December 30, 1972) ("the instant provisions", hereinafter) and its content is as follows:

Article 21 (designation of development-restricted zone)

(1) Minister of Construction and Transportation may designate an area in which urban growth is restricted (hereinafter, "development-restricted zone") in order to prevent disorderly urban expansion, preserve the natural surroundings, and obtain a healthy living space for the citizens, or upon request of Minister of Defense that urban development needs be limited for a security purpose.

(2) Inside the development-restricted zone designated pursuant to Section 1, there shall not be any construction or structure erected, any change in the quality and form of the ground, any subdividing, or any urban planning activity. Provided, those who had commenced construction or a project under a proper approval (including when no such approval is required) may continue as specified by presidential decrees.

(3) The conduct restricted under Section 2 and other matters necessary for development restriction shall be determined by the decrees of Minister of Construction and Transportation within the scope of the presidential decree.

2. Arguments of Complainants and other interested parties

A. Complainants' Arguments

(1) Any restriction on people's right to property must be specified by statute and the authority cannot be delegated to other state agencies. The instant provisions do not designate the development-restricted zones by statute but delegates the designating authority to the Minister of Construction and Transportation and its ministerial decrees. Hence a violation of property right in Article 23 of the Constitution. Furthermore, the phrase "prevent disorderly urban expansion" in Article 21 (1) is vague in its meaning, and the phrase "preserve the natural surroundings of a city and obtain a healthy living space for the citizens" is excessively broad and vague, violating the Constitution.

(2) In development-restricted zones, building lots and miscellaneous use areas can be regulated through normal urban planning procedures such as designating them under scenery-regulated areas. Farm lands, instead of being swept under a complete ban, should be approached through regulation of using and selling from the perspective of responding to the changing conditions of farming and using the nation's land resources efficiently. Forests can be designated as a natural park area or a green area to preserve the green environment, thereby preserving and beautifying the natural environment while increasing the disposable land. However, a development-restricted zone, unlike normal urban planning restrictions, operates as a comprehensive ban on the activities concerning the land or surface structures and allows only those activities restrictively permitted by the decrees of the Ministry of Construction and Transportation. Therefore, Article 21 of the Act violates the essential content of the right to property, and restricts a person's property right too excessively in violation of Article 37 (2) of the Constitution.

(3) Article 23 Section 1 of the Constitution protects people's right to property, and Section 3 requires any regulation of the right to property necessary for a public purpose to be justly compensated through statutes. As we saw above, the restriction on the use of the land inside the development-restricted zone is tantamount to a special sacrifice calling for compensation for the loss. However, the Act does not have any compensation provision for the loss caused by development-restricted zone designation under Article 21. Therefore, Article 21, which restricts property right without compensation, violates Article 23 (1) and (3) of the Constitution.

(4) Due to the restrictions on changing the surroundings or the

living environment, the landowners are forced to move out of development-restricted zones. When their financial resources are limited, they may not even be able to sell at a reasonable price in a timely manner. Hence their right to travel and choice of occupations are limited, as well. Therefore, Article 21 violates the development-restricted zone residents' freedom to move one's residence and freedom to choose one's occupation guaranteed under Articles 14 and 15 of the Constitution.

(5) As shown above, the instant provisions infringe on the property right of the owners of the land designated for a development-restricted zone without reasonable basis, and also violate only its residents' freedom of moving one's residence and choosing one's occupation, violating their right to equality of Article 11 of the Constitution.

B. Ordinary courts' reason for denying the request for constitutional review

(1) Seoul High Court's reason for denial (89Hun-Ma214)

The restriction in Article 21 of the Act is pursuant to Article 23 (2) of the Constitution requiring that any exercise of the right to property be consistent with public welfare and is a general restriction that falls within the scope of the restriction inherent in the right to property itself. It is imposed on all uniformly and is not a special sacrifice on some people. Therefore, it needs not be subject to a condition of loss compensation. The instant provisions do not violate Article 23 (3) of the Constitution for reason of not providing for compensation.

(2) Supreme Court's reason for denial (90Hun-Ba16)

Article 21 (1) and (2) do substantially restrict the landowners' property rights inside the development-restricted zone and do cause special harms in comparison to other property owners. However, the restriction is limitedly applied only "in order to prevent disorderly urban expansion, preserve the natural surroundings, and obtain a healthy living space for the citizens, or upon request of Minister of Defense that urban development needs be limited for a security purpose". Therefore, it is a reasonable restriction consistent with public welfare, and the property owners' loss is an unavoidable consequence to be endured for the sake of public welfare. Therefore, Article 21 (1) and (2) do not violate Articles 23 (3) or 37 (2) of the Constitution for not providing for loss compensation.

(3) Seoul District Court's reason for denial (97Hun-Ba78)

The restriction here does not violate the essential content of the right to landownership. It depends upon the location and function of each property and is therefore not an unfair discrimination against them. As long as such restriction on the right to landownership is within the permitted scope of social regulation, the provisions do not violate the Constitution for not having compensation provisions.

C. Opinions of the Ministry of Construction and Transportation and the Ministry of Justice

(1) The "prevention of urban expansion" specified in the instant provisions means prevention of horizontal expansion and therefore does not limit heightening of the buildings. The purpose of such restriction is aimed at preventing traffic or water supply problems that arise out of expansion of a city, preserving healthy farming and a city's natural surroundings, leaving some lands unused inside the city, and making the urban space for disaster prevention. The provision interpreted thus is not vague.

(2) The development restriction does not ban constructing activities entirely but prohibit only population-attracting facilities, factories, commercial facilities, and other urban constructions in order to prevent unlimited expansion of the city and preserve the environment. Aside the restriction, all other uses are freely allowed as long as permitted by other statutes and regulations. Improvement of an preexisting building and expansion of a residence or a factory are allowed as a matter of principle. It does not infringe on the essential content of landownership and the extent of the infringement does not violate the rule against excessive restriction or the principle of proportionality.

(3) Development-restricted zone designation does not constitute a violation on the essential content of the right to property. It is a restriction that falls under the social limit that landowners must accept for the sake of improving public welfare pursuant to Articles 23 (2) and 122 of the Constitution, and therefore does not give rise to the issue of compensation. Development-restricted zone designation is done as an aspect of urban planning that designates areas for other uses, and does not interfere with the primary functions of the property right, namely, to use, profit from, and dispose of. It limits only the activities that significantly depart from the purpose of the designation, allowing continuation of the residents' daily activities, their making of living, and other preexisting activities that do not violate the purpose of the designation. The land covered by urban

planning accounts for only 13.5% of the national land, but the land covered by development-restricted zones adds up to 5.5%. These numbers bespeak of the fact that development-restricted zone designation does not cause any special loss on the landowners, and therefore the designation is not unconstitutional for reason of not being compensated.

3. Review

A. History and problems of development-restricted zone designation

(1) The Urban Planning Act originally regulated creation and improvement of a city and was aimed at healthy growth of a city and increase of public welfare. It was enacted by Act No. 983 on January 20, 1962, and regulated all matters covered by Imperial Order No. 18 Chosun Urban Street Planning Order of June 20, 1934 except construction.

After the Act was enforced, the government's strong industrialization policy and the consequent thickening of industrial structures concentrated the population around cities and their peripheries, causing rapid urban expansion and urban problems that could not be addressed by the preexisting laws. In order to set up a urban plan that could solve these problems, regulate its details, prevent urban over-concentration or over-growth, obtain empty space needed for creation of a urban environment, and finally protect the private rights, we needed a new urban planning law and the new Urban Planning Act went through total revision on January 19, 1971 by Act No. 2291.

The provisions on development-restricted zoning were newly introduced at the time of the total revision for the purpose of preventing disorderly urban expansion, preserving the natural surroundings of a city, and uphold national defense, and was once revised on December 30, 1972, by Act No. 2435.

Development-restricted zones were gradually expanded in eight phases between July 30, 1971 and April 18, 1977. The land thus designated accounted for 5.4% of the national land and amounts to 5,397.1 ㎢. After that, only the restrictions on the conduct were changed partially. There was no further expansion or change of the zones. Inside the zones, one million people live at the moment.

Many problems follow unplanned and disorderly urban expansion and they are not unique to us but a trans-national problem faced by many countries. In order to preserve and maintain a pleasing urban environment, they are putting into effect their own urban planning

and urban-regulatory laws and policies. Among them, the United Kingdom separated the right of development from that of ownership and made it a public property. Therefore, all constructing activities above or beneath the ground and all substantive changes in the uses of the buildings were allowed only upon governmental approval. Also, certain areas were designated as 'Greenbelt' in order to limit expansion of city streets and protect the suburbs, within which development was strictly limited. This system is very similar to our development-restricted zoning.

(2) Development-restricted zoning contained horizontal expansion of the cities during the high growth periods of 1970s and '80s and contributed to preservation of little green areas remained around Seoul and other major cities. It reserved some lands around the city for future development, making possible a long-term plan to meet the future land needs and thereby making a significant contribution to the healthy growth of the cities.

Suspending or relaxing the development-restricted zoning without any alternative plan will cause land speculation, and will result in overly rapid development of the affected area and mass population influx, bringing about serious side-effects from an urban-environmental perspective.

On the other hand, development-restricted zoning bans those buildings that violate the designation, causing inconvenience in the lives of the residents. It also extinguishes development opportunities and brings down the land prices relatively or slows the increase therein, restricting the particular landowners' property rights. An issue has been raised that, whoever caused or benefited from such designation does not carry any cost and rides free on others' sacrifice, violating fairness and the principle of fair allocation of costs, a mandate of social justice. Furthermore, the zoning was done without thorough advance surveys and evaluations and ended up surrounding the developed areas at the time of the designation. In case of some small to mid-size cities, the zones are too big, undermining sound urban growth and interfering with the balanced development of the national land.

Despite many changes since the time of the designation, the zones were not revised. The increased demand for land was met not by developing the usable land within the zone at cheap costs, but by developing forested or green areas for reason that they are outside the zone and even by filling the silt area.

B. Violation of the right to property

(1) Protection of the right to property and the social accountability inherent in the right to real property

(A) The Constitution states, "all people's right to property are guaranteed. Their contents and limits are prescribed by statute", "exercise of the right to property shall conform to public welfare" (Article 23 (1) and (2)), subjugating property rights and exercise of them to statutory restriction.

Property rights, before being recognized and protected by a legal order, must be formed by the legislature. In other words, the right to property, in absence of formative statutes, exists only as factual dominion over the objects, and, unlike other basic rights, earns its right-like status only by becoming concretized through statute. The legislature, in forming the content of the right to property concretely through statute, must consider together the constitutional guarantee of that right (Article 23 (1)) and the public interest and other elements of the social accountability inherent in that right (Article 23 (2)), and adjust the two interests to achieve a harmony and balance.

(B) On the other hand, the right to property in reality forms the economic conditions that the people, as the subjects of basic rights, need for autonomous realization of humane livelihood. Therefore, the right to property forms the material basis for realization of individual freedom. Freedom and right to property are complementary and inseparable. The freedom-guaranteeing function of the right to property is an important standard in setting the limit of its socially bound nature, namely, how much the right to property can be restricted.

The permitted scope of restriction on the right to property depends on the meaning that the object of that right holds to its subjects individually, and also to the society as a whole. The more socially bound the object is and the more important its function is, the more broadly legislative restriction is permitted. In other words, if the use or disposal of a specific property right does not remain in the domain of the owner's personal life but influences the lives of many, the legislature has a broader authority to regulate that individual's property right for the sake of the interest of the community.

(C) The right to land ownership is a right to own a particular portion of the space continuum. The value of each property is determined by the social circumstances of its location, and its use must be subject to a requirement that it be harmonious with the use of its neighboring property.

However, land cannot be produced or substituted and has a limited supply. The disposable land is in an absolute shortage in com-

parison to the population. All people depend their production or living upon reasonable use of the land. Its social function and national economic implications require that the right to landownership be treated differently from other property rights and built in it the stronger element of public interest. (1 KCCR 357, 88Hun-Ka13, December 22, 1989)

The Constitution considers the above said feature of land in stating, "The state may impose on land, by statute, those restrictions and obligations that are necessary for efficient and balanced use, development and preservation of the national land, the basis for all people's production and living" (Article 122), granting the legislature a broad legislative-formative power.

(2) Restriction on the right to landownership by the instant provisions

(A) Development-restricted zoning pursuant to the instant provisions is a part of the land use plan that results from urban planning carried out on urban areas, and a form of restriction on land use that operates through designation of the areas for certain uses. The instant provisions ban all building, structures, change in form and quality of the ground, subdividing, and urban planning activities from development-restricted zones, except the activities begun pursuant to governmental approval prior to the zone designation, which are not consistent with the zone designation (Article 21 (2)).

(B) Articles 17 and 18 of the Act specify 'use areas' or 'use districts' whereby all land uses are allowed except enumerated ones that violate the purpose of the designation. The instant provisions instead flatly ban all uses except the ones maintaining or improving upon the status quo, constituting a much severer limitation on conduct. The purpose of development-restricted zoning is to limit urban development (Article 21 (1)). It is hard to imagine any constructing activity that does not violate the designation purpose. Therefore, the land inside the zone is subject to a strict limitation that only the preexisting uses can be continued.

However, the land can be used in the same manner as at the time of the designation. Therefore, what is restricted is one part of the right to landownership, namely the right of use. All uses, existing at the time of the designation, are in principle permitted continued, and all improvements on the preexisting uses are exceptionally permitted. Only future uses in violation of the designation purpose are banned.

(3) Constitutionality of the instant provisions

(A) The legislature, through the instant provisions, determine the rights and duties vis-à-vis the right to landownership in abstract and general terms. The provisions determine the content and limit

of the right to property to be protected by a legal order, and concretize the social limit in the right to property mandated by public interest (Article 23 (1) and (2) of the Constitution)

The constitutional right to property is not meant to guarantee for the owner the maximum possible, the most economic or the most efficient use. The legislature may regulate use of each piece of land in light of its special features for reasons of important public interest. Therefore, development or building upon land is possible only within the scope and limit of the right of property demarcated by statutes conforming to the constitution. Due to the strong social and public nature of the right to landownership, heavier restrictions and obligations can be imposed on it than on other property rights. However, the statutes restricting the right to landownership must abide by the rule against excessive restriction (principle of proportionality) and must not extinguish the essential content of that right, namely the right to use, profit, and disposal.

A concrete means to achieve public interest must have a legitimate purpose and must conform to the principle of proportionality, the mandate of the rule of law. In other words, the means chosen by the legislature must be appropriate for accomplishing and facilitating the legislative purpose (appropriateness of means) and be least restrictive of basic rights among the equally appropriate means to accomplish the legislative purpose (minimum restriction). Finally, there must be an appropriate relationship of proportionality between the extent of restrictions on basic rights and the weight of the public interest accomplished (balancing of interests).

(B) Then, we shall in turn examine whether the above principles were complied by the instant provisions.

1) Normal situations where land can be used in the preexisting way after the designation

The landowner can continue use the land in the same manner despite the zone designation. According to the regulations of the Act, the properties already developed at the time of the designation can be expanded or renovated. The instant provisions impose on the landowners a duty to maintain the status quo and a duty not to change, and otherwise allow them to continue using the land as they were before. Therefore, they set the content and limit of the right to property consistently with the principle of proportionality. We shall examine the issue in more detail below:

A) Legitimacy of the legislative purpose

Containing a city's horizontal expansion, controlling its functions, preserving its natural surroundings, and thereby improving the quality of life of the citizens, is a mandate of universal public interest and

also a duty of the state. On the other hand, the need to limit development in certain areas for national security purposes cannot be denied in light of the current state of the sharp South-North division.

Therefore, the restriction on the right to landownership by the development-restricted zoning is a response to the mandate of public interest, and it has a legitimate legislative purpose.

B) Appropriateness of means, minimum restriction, balancing of the interests

The instant provisions, as a matter of principle, enacts a comprehensive ban on all buildings, structures, changes in form and quality of the ground, subdividing, and urban planning activities that depart from the designating purpose (Article 21 (2)) and no doubt contribute greatly to the accomplishment of the legislative purpose. The instant provisions are an appropriate means.

Complainants, however, argue that they are an overly restrictive means because the laws on farm land preservation and use, natural parks, or forestry, or the 'area' or 'district' designation under the Urban Planning Act can accomplish the goal of containing urbanization. A development ban by district designation, goes beyond these alternatives and is an excessive restriction on the right to use the land. They argue, they are not an appropriate means. However, the purpose of the development-restricted zoning is to preserve the shape, form, and use patterns of the land at the time of the designation and thereby suppress its urbanization. A selective, partial, or exception-making restriction cannot be expected to achieve the purpose efficiently. The instant provisions' comprehensive ban is the minimum necessary for accomplishment of the legislative purpose.

Land is our workplace and living space. Landownership serves an important social function. Obtaining healthy living space for urban residents, the majority of the people, and national security are weighty public interests. Guaranteeing the landowners the continued use of the land and banning merely a new development are not excessive or unilateral against them but fall within the scope of the social limit that the landowners must endure.

Therefore, the instant provisions satisfy a relationship of proportionality between the public interest to be accomplished and the extent of the restriction on the right to landownership on balance.

C) Finally, evaporation of development opportunities, and the resulting fall in prices or the relatively slow increase in the prices, also fall under the social limit to be borne by the landowners. Expectation of or confidence in the possibility of developing one's own land for future construction or development and the related rise in the land prices are not within the protected area of the right to prop-

erty. As long as the landowners can use, profit from, and dispose of the land in the manner that it was at the time of the zone designation, simple restriction on the use does not go beyond the social limit inherent in the right to property. There is no cruel burden that goes beyond this inherent limit.

D) However, even if the restriction on the right to landownership arising out of the zone designation is within the scope of the social limit inherent in the constitutional right of property, the zone designation will violate fairness and the mandate of social justice if it does not impose any burden on the residents *within* the city who benefit from it and yet imposes all the burdens on the landowners inside the zone. In order to ease the burden on the landowners inside the zone and restore fairness, it is desirable to grant them various benefits such as tax credits and recover the development profit from the beneficiaries.[2)]

2) Exceptional situations where land cannot be used in the preexisting way or cannot be used in any way

A) However, it is different when the zone designation forecloses the preexisting use of the land or nearly all uses to amount to forfeiting the right of use and profit. In that situation, the burden more cruel than can be justified by the socially bound nature of the right of property imposed on the landowners, and is constitutionally permissible only when the legislature ameliorates its effects by providing for compensation.

Therefore, although the instant provisions in principle aim to concretize constitutionally the social limit inherent in the right to landownership, they are unconstitutional when they overly burden the landowners without any compensation, exceeding the scope of the social limit. In this situation, the legislature must enact compensation provisions for the special burden in order to satisfy the principle of proportionality and thereby cure the constitutional defects of the statute.

B) A question of when the special property loss above and beyond the social limit inherent in the right to landownership arise cannot be determined by a uniform rule but through comprehensive review of the objective conditions of the land (the classification under the official records, the actual conditions of the land). However, the following two perspectives are generally important:

Firstly, whether the land can be used for the previously legal use. The constitutional guarantee of the right to property, most of

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2). The beneficiaries here are the residents within the city who benefited from the environmental consequences of the development-restricted zone designation near the city.

all, protects the landowners from a change in the legal order that may otherwise suddenly destroy or decrease the value they had added or created on the land in reliance on the preexisting legal order. If the new law bans the preexisting use, the right to the previously permitted use must be able to maintain itself against the new provision attempting to change the use of the land. Therefore, the legislature cannot foreclose the preexisting use without compensation. In other words, the legally permitted use of the land constitutes the condition of the land. Its location and natural condition do not bind the condition of the land. The landowner's right of property is the right to that condition. Therefore, when the previously permitted use of the land is banned, such ban exceeds the social limit that all people must accept.

Secondly, if the restriction forecloses all possible uses of the land and effectively forfeits the right of use and profit, it has caused a special property loss beyond the permitted scope. If a landowner does not have any meaningful private use of the land, the land belongs to him only in name but is effectively cut off from his ownership. Such restriction exceeds the social limit to be borne by all people.

In sum, if the zone designation forecloses the preexisting uses or all possible uses effectively blocking all the venues to use or profit from the land, the ownership remains only in name and becomes vacuous. Such result exceeds the social limit that the landowners must accept.

C) Using the above standard, the following illustrations show when special property loss takes place.

① Bare building lots

Those properties classified as bare building lots at the time of the zone designation cannot be developed at all, even in a way consistent with the preexisting classification and the conditions of the land. The land-related official records that classify a property as a building lot already gave rise to the landowner's right to use it as a building lot. And the present condition of the land at the time of the zone designation is consistent with such classification, i.e., it was left bare for future construction. Then, the right to use it for that purpose cannot be confiscated without compensation. In this case, the zone designation itself imposes an effective forfeiture on the landowner's right to use the land at all. Unlike other lots that can be used as previously used, this case presents a burden exceeding the scope of the social limit inherent in the right to land ownership.

② Forfeiture of the preexisting use due to the change in the circumstances

The land previously used for farming may no longer be able to

use for the same purpose after the zone designation because the consequent urbanization of the surrounding area may have polluted the farm or blocked irrigation routes. In the sense that the preexisting use is impossible or has become significantly difficult, the situation gives rise to an equally cruel burden as in the case of bare building lots. Even after the zone designation brought about changes in the surrounding area and made it impossible to continue the preexisting use, the change in quality or form of the land is in principle banned under the statute.

3) Sub-conclusion

Finally, the instant provisions' restriction of the right of property is a constitutional, and proportional concretization of the social limit inherent in the right of property so long as it allows the continued use of the land consistent with the original land classification and conditions. However, if it bans such use or is so exceptional as to effectively forfeit the right of use and profit, it violates the principle of proportionality and excessively abridges the landowner's right of property.

Therefore, the legislature, in order to make the instant provisions constitutional, must enact compensation provisions to address the exceptional situation and alleviate the cruel burden exceeding the permitted scope. Such compensation provisions are necessary provisions when the legislature forms the content of the right to property and regulates it for the sake of public interest in accordance with Articles 23 (1) and (2) of the Constitution.

The means to restore the proportionality between public interest and the infringement on the right to property does not have to be monetary compensation. The legislature may release the land from the zone designation, grant the landowners the right to request the state to purchase the land, or use other means to alleviate the loss. The legislature has a broad freedom of formation in choosing the appropriate 'means' to accomplish the 'end' of adjusting or alleviating the cruel burden.

C. Violation of the right to equality and etc.

(1) The extent of restriction vis-à-vis the zone designation varies significantly from one landowner to another depending on "whether the land can be used for the purpose for which it was classified and consistently with its conditions." The instant provisions uniformly restrict all landowners without any compensation. They violate the equality principle requiring 'treating equals equally and unequals unequally', which in this case would require accommodating the excep-

tional situations that require compensation and taking into the varying degree of property loss for each landowner.

(2) Complainants also argue that the instant provisions use concepts that are too broad and vague in relation to their legislative purpose. However, the legislative purposes can be easily interpreted from the instant provisions, i.e., to suppress land use in a city's certain peripheral areas, contain the city's geographical and horizontal expansion, preserve the natural surroundings in the areas, and maintain a healthy living space for its residents. From this, one can obtain an objective standard that excludes administrative authorities' arbitrary application of law. Hence no violation of the rule of clarity.

Also, complainants argue that the instant provisions leave the zone designation to administrative authorities and therefore violate Article 23 of the Constitution. However, as said above, the standard is clear for administrative or judicial application of the provisions. The legislature could delegate the enforcement of the law and the resulting infringement on basic rights to administrative authorities. The complainants' claim is without basis.

D. Reason for a decision of nonconformity to the Constitution

(1) When a statute or a statutory provision is unconstitutional, the normativity of the Constitution must be defended by invalidating the statute or provision. However, despite the unconstitutionality of the instant provisions, we find it not desirable to immediately extinguish their legal force for the following reasons.

Firstly, the zone designation itself is part of the process of concretely realizing the socially bound nature of the right to landownership, and therefore it is in principle constitutional. It is unconstitutional merely because it does not compensate even in an exceptional situation of imposing a cruel burden on some landowners. It is desirable to maintain the statute until it is brought to compliance with the Constitution by the legislature.

Secondly, as said before, the Constitutional Court cannot uniformly determine the concrete standard and method of measuring and compensating the cruel burden. The legislature itself must gather all the concrete and objective data and determine for individual properties. The instant provisions can be cured in several different ways, such as monetary compensation, dezoning, or public purchase.

Choosing in which legislative form, for whom, and how compensation is most desirably and reasonably provided for is the legislative policy task for the legislature that has a broad legislative-

formative power, not one for the Constitutional Court.

(2) The Constitutional Court leave the instant provisions valid at least formally because the Court cannot restore a constitutional state of affairs by simply eliminating the instant provisions from the legal system and only the legislature can do so through legislative revision. Therefore, this decision of nonconformity is accompanied by a duty for the legislature to cure the defect promptly. The legislature must not leave in tact the instant provisions that do not provide compensation for the exceptional situation of cruel burdens above and beyond the scope of the social limit and thus violate the Constitution, and has a duty to eliminate the unconstitutionality by restoring the proportionality between the provisions' legislative purpose and the guarantee of the right of property by legislating compensation provisions.

The zone designation can be compensated for only after comprehensive and thorough on-site surveys of individual properties, procurement of financial resources, and careful adjustment of various competing interests. It will be difficult to legislate the compensation provisions in a short period. However, some landowners have suffered under the cruel burden for long time without compensation since the first zone designation. In light of that, the legislature must enact the compensation provisions as soon as possible.

(3) The Court's decision of nonconformity in principle bans further application of the unconstitutional law, like a decision of unconstitutionality. Administrative authorities shall not designate any new development-restricted zone pursuant to the instant provisions before the legislature enacts compensation provisions.

However, even if we shall discuss separately whether the landowners, having carried the cruel burdens in the past, can wait for the compensation provisions to be legislated and then exercise their rights, they can by no means contest the validity of the zone designation itself or justify their conduct violating the zone designation.

4. Conclusion

Therefore, the instant provisions are unconstitutional but will be valid formally until the new compensation provisions are enacted. This decision is pursuant to the consensus of all justices except Justice Cho Seung-hyung and Lee Young-mo, whose dissenting opinions follow.

5. Justice Cho Seung-hyung's dissenting opinion

The majority does not overrule the precedents concerning a de-

cision of nonconformity to the Constitution. (1989.9.8, 88Hun-Ka6; 1991.3.11, 91Hun-Ma21; 1993.3.11, 88Hun-Ma5; 1994.7.29, 92Hun-Ba49, et al.; 1995.9.28, 92Hun-Ka11; 1995.11.30, 91Hun-Ba1, et al.; 1997.3.27, 95Hun-Ka14; 1997.7.16, 95Hun-Ka6, et al.; 1997.8.21, 94Hun-Ba19; 1998.8.27, 96Hun-Ka22, etc.). I dissent for reason that we should depart from the above precedents and issue a simple decision of unconstitutionality in this case. The reason for the departure was detailed in the dissenting opinions attached to the 92Hun-Ka11 Patent Act Article 186 (1) decisions on constitutional review on request, the 91Hun-Ba1 Income Tax Article 60 and the former Income Tax Article 23 (4) decisions on constitutional complaints, and is repeated in summary as follows:

Firstly, a decision of nonconformity violates the letter of Articles 111 (1) (i) and (v) of the Constitution and Articles 45 and 47 (2) of the Constitutional Court Act.

Secondly, the above precedents and the majority adopt the German Constitutional Court's precedents. However, we and Germany have different legal systems and we cannot wholly adopt them.

The German Constitutional Court Act, after nonconformity decisions were established through precedents, did provide an indirect statutory basis for them in its fourth revision in 1970. Even before the revision, Article 78 stated, "when the Federal Constitutional Court is convinced that federal law is not conforming to the Basic Law, or that state law is not conforming to federal law, the Court declares the law invalid." The Court invalidates the law only when it is 'convinced' of the law's nonconformity. Therefore, the provision can be interpreted that, when there is merely an opinion of nonconformity, or when consideration of the vacuum in law that may arise out of invalidation undermines 'conviction', the Court may issue other decisions (constitutionality or nonconformity). However, our Constitutional Court Act provides only for review of the constitutionality, i.e., "constitutionality" or "unconstitutionality" only, and does not have any provision that can be interpreted to satisfaction as authorizing the Court to issue a decision other than the above two when it strongly believes that immediate invalidation is impossible due to other considerations. Our Constitution or the Constitutional Court Act does not even use the phrase "nonconforming".

Germany in its Constitutional Court Act Article 79 recognized the retroactive effect of the Court's decisions. To the contrary, we recognize only the prospective effect of the Court's decisions unless they are on criminal provisions.

Therefore, in Germany, a decision of unconstitutionality will cause greater consequences due to the vacuum in law than in Korea, and

therefore, a decision of nonconformity had to be established by precedent. In our system, where the decisions have only prospective effects, the vacuum or confusion in law or other phenomena disrupting the legal stability is not likely to happen. Therefore, there is no need to adopt German precedents even at the expense of violating the letter of our Constitution and laws.

Thirdly, Germany's precedential and legislative history shows that their precedents do not violate the letter of the Constitution or the Constitutional Court Act and the interpretations have statutory bases (Articles 78 and 79 before the fourth revision). The precedents were also necessary to remedy the serious vacuum in law that may arise in a system that fully recognizes the retroactive effects of unconstitutionality decisions. They were later vindicated by legislative follow-up. This history is not applicable to us, who do not have provisional bases and necessity for such precedential development. Despite that, the Constitutional Court has issued decisions of nonconformity for ten years and deserves criticism that it irresponsibly adopted German precedents without serious study, analysis, and evaluation.

Fourthly, the legislative intent behind Articles 45 and 47 of the Constitutional Court Act reflects our twenty-seven-years-long experience of having witnessed democracy's regression under authoritarian regimes, and is committed to exclude any temporary application of unconstitutional laws from the authoritarian past, which may mean its rationalization. Therefore, the intention was to allow the Court to 'uphold if constitutional' and 'strike down if unconstitutional' but prohibited it from issuing any other decision. In order to abate the shock arising out of the vacuum in law, we recognized only the prospective effects of the Court's decisions. In light of this legislative intent, a modified decision such as that of nonconformity shall never be permitted.

Therefore, this decision of nonconformity violates the Constitution, and the precedents must be overruled. We shall issue a decision of unconstitutionality.

6. Justice Lee Young-mo's dissenting opinion

The majority opinion can be summarized as follows:

> The instant provisions are constitutional as applied to the lands that can be used in the same manner as before. However, they do not provide compensation for bare building lots and the properties that cannot be used according to the original land classification and its land conditions due to the changes following the zone designation. They constitute an excessive restric-

tion on the right to property, departing from the principle of proportionality. Also, they violate the equality principle in comparison to the burdens they impose on other lot owners in the zone.

For following reasons, I cannot concur.

A. Article 23 (1) of the Constitution declares a guarantee of private property but specifies that its content and limits be determined by statute. Section 2 of the Article states that the right to property must be exercised according to public welfare. The social limit on the property right can be endured by the people as long as it is appropriate for public welfare. Therefore, no issue of compensation arises as long as the restriction does not arise or is not interpreted to arise to the level of complete deprivation.

However, the landowner must be free to use and dispose of the land. The two elements form the core of the institutional guarantee of private property.

(1) Let us first examine whether the restriction on bare building lots constitutes infringement on the core content of the land use.

The Urban Planning Act (the Act, "hereinafter") Article 21 (2) states, "Inside the development-restricted zone . . ., there shall not be any construction or structure erected, any change in the quality and form of the ground, any subdividing, or any urban planning activity that violates the designating purpose" and Section 3 states, "The conduct restricted under Section 2 and other matters necessary for development restriction shall be determined by the decrees of Minister of Construction and Transportation within the scope of the presidential decree."

Pursuant to the statutory delegation, Article 20 (1) (i) of the Enforcement Decree of the Act (revised by Presidential Decree No. 15799, 1998.5.19.) provides that Mayor or County Supervisor may authorize construction of buildings and structures on bare building lots if it does not interfere with the designating purpose. The structures thus permitted are: a) Construction and erection of structure necessary for public interest; b) Construction and erection of structure inappropriate to be located in a population concentrated area and appropriate for being located in a development-restricted zone; c) Structure deemed necessary for agriculture, forestry, fishery, and other activities not interfering with the purpose of the development restriction designation; d) Rebuilding within two years of those structures previously demolished for the purpose of building community cooperative facilities, public utility facilities, publicly used facilities, and public facilities within the development-restricted zone pursuant to the decrees of Ministry of Construction and Transportation; e) Buildings and structures deemed necessary for improvement of the

living conditions of the residents inside the zone.

These buildings and structures cover almost all construction activities except for new construction of urban-type structures such as residential, commercial, and factory buildings. The use of bare building lots is prohibited only in these exceptions. (Article 7 of the Enforcement Rule promulgated pursuant to the Enforcement Decree (1998.5.19. Ministry of Construction and Transportation Order No. 133) specifies in detail the types and sizes of buildings and structures permitted on bare building lots.)

(2) Let us then examine whether the restriction making the continuation of the preexisting use impossible due to changes in circumstances requires compensation.

After the zone designation, if the land cannot be used in the same manner as before, the landowner can maintain an action against those who interfere with the use consistent with the land classification and conditions, and obtain injunction or damages. The instant provisions themselves are not related to the state of affairs.

The development-restricted zone is part of an urban planning program. If changed circumstances do not permit the continued use, the landowner can obtain approval from Mayor or County Supervisor for changing the quality and form of the land, as long as the change does not interfere with the designating purpose or involves substantial soil or rock excavation or deforestation. (Enforcement Decree Article 20 (1) (ii), Enforcement Rule Article 8 (1)). In other words, the land can be developed into building lots, farms, or public use lands depending on its location and contour. What is prohibited is formation of city streets involving residential, commercial, and industrial structures (Furthermore, the rules and regulations are being revised continuously in order to accommodate the changes in the surrounding areas and the inconvenience to the zone residents' living.)

(3) Even the lands inside the urban planning zone are banned some construction activities in some designated areas and districts for the purpose of facilitating the city's healthy growth and promoting public peace and welfare. (Articles 1 and 4 of the Act) The areas in which construction and other activities are banned or regulated: a) residential, commercial, industrial, and green area designation (Article 17); b) scenic preservation, beautification, height, fire prevention, preservation, airport and facility preservation district designation (Article 18); c) factories, schools, and central wholesale facilities, and other special facilities regulation zone (Article 20); d) designation of the city street formation control zone (Article 20-2); e) the detailed plan zone designation for the purpose of normalizing the land use and managing the functions, looks, and environment of the

city efficiently (Article 20-3); f) designation of the greater planning zone for the purpose of facilitating balanced growth of several cities and preservation of the environment (Article 20-4 and 5); g) designation of the prospective urban development zone for the purpose of diluting and distributing population and industrial concentration and facilitating balanced urban growth (Article 22).

All lands that received the area, district, or zone designations inside the urban planning zone under a) to g) are subject to restrictions on new building, additions, and renovations, and also on the building-area-to-land ratio and the building-volume-to-area ratio, depending on the designating purpose and the land conditions. Any change in form and quality of the land requires approval. Land use there is restricted equally as in development-restricted zones and differs from the latter only in the method, and yet is not compensated and rightly considered as a social limit inherent in the right to property. Only the restrictions that amount to a public taking or use and therefore infringe on the core value of private property, namely that of the right of use and disposal, are exceptions that are compensated (Land Expropriation Act, Article 3).

(4) The instant provisions are aimed at preventing disorderly urban growth, preserving and controlling the natural environment and the living space, and protect national security. Urban environmental preservation means maintaining and creating an enjoyable surrounding. Prevention and elimination of waste, noise, vibration, offensive order, and provision of clean air and water are the important conditions of an enjoyable living environment. In order to accomplish this legislative purpose, we need the means, namely, restriction of the landownership.

The owners of bare building lots in development-restricted zones cannot engage in urban-type construction activities involving residential, commercial, or industrial buildings. However, they may build other buildings or structures pursuant to the above 'A. (1)' and change the form and quality of the land in event of a change in the circumstances. They are not prohibited from selling the land, either. If illegal buildings and structures are allowed on bare building lots, population will concentrate in the development-restricted zones and will lead to construction of roads, water supplies, and sewerage, and ultimately insensible urban expansion. Insensible expansion and growth will be accompanied by environmental pollution, infringing on the city residents' right to live in a healthy and enjoyable surroundings.

B. The instant provisions directly concern Articles 23 (guarantee of the right of property and its restriction), 35 (the right of environment), and 122 (use, development, and preservation of national land) of the Constitution. We shall examine that and address the issue of

the standard of constitutional review.

(1) Our Constitution provides for many basic rights that guarantee people's rights and liberties. These basic rights have distinct essences and functions, and their values are not uniform. All people have the environmental right (Article 35), the right to live in a healthy and enjoyable environment, and this right forms the basis for realizing human dignity and worth and the right to pursue happiness. It takes precedence over economic freedom in exercising one's private property right.

First of all, the Environmental Policy Basic Law, which concretized the right of environment, specifies that it is not only people's rights and duties but also the state's duty to protect people from environmental pollution, and maintain and preserve the natural surroundings and the living space. Qualitative improvement of the environment, creation of an enjoyable environment through environmental preservation, and maintenance of a balance between mankind and the environment is an indispensable element of public health, enjoyment of cultural life, land preservation, and perpetual national progress. According to the Law, the state, local self-governing entities, business entities, and people must endeavor to maintain and create a better environment and give priority to environmental preservation, thereby not only distribute the benefits widely among the present generation but pass it down to the future generation (Articles 1, 2, and 6) {The Twenty Seven Principles in the Rio Declaration on Environment and Development on June 8, 1992, also show that environment is an international issue surpassing national dimensions.}

Next, aside the provision on the environmental right, the Constitution explicitly authorizes the state to impose on people that restrictions and obligations necessary for national land use, development, and preservation (Article 122). The National Land Use Management Act authorized thereunder specifies that national land is a limited resource and yet a common basis for promotion of public welfare, and therefore that it must be used after giving the first consideration to public welfare in favor of preserving natural environment, and giving full consideration to all regional features (Article 1-2 of the Act). In other words, we have a small land compared to the population. Planned and reasonable use, development and preservation is a very keen task in that situation. The Constitution and the Act establishes clearly that the first consideration in land use must be given to public welfare, and environmental preservation must also be considered.

The Constitution explicitly provides for the social accountability of the right of property (Article 23) and yet separately provides for the right of environment (Article 23) and the state's authority to

impose duties and obligations for the purpose of national land use, management, and preservation (Article 122). It means that the right of landownership can be guaranteed only to the extent that it does not undermine the harmony and balance with the communal life (5-2 KCCR 36, 45, 92Hun-Ba20, July 29, 1993).

The above constitutional provisions, by emphasizing the social duty to exercise one's property right in accordance to public welfare and environmental preservation, provide the basis for a broader formative power of the legislature in setting the content and limit of the right of landownership.

(2) The right of landownership is a compound product of both rights and duties. In setting its content and limit, the social necessity and the prevailing thought that gave rise to the related constitutional provisions become an important guidance for legislation. Aside the fact that the right of property has an inherent limit in it, the legislature may also engage in regulatory restrictions for the socio-economic purpose of facilitating cities' healthy growth and increasing national security, public order, and public welfare. These regulatory legislations restrict on the landowners' economic freedom. The extent of the restriction is determined not only by the regulatory purpose but also by the location, contour, and use of the regulated land, the interests of the related parties, the state's and the people's efforts to conserve nature and provide the enjoyable living space by housing development policies (Article 35 of the Constitution), the state's imposition of restrictions and obligations on national land use, development, and preservation (Article 122 of the Constitution). They therefore constitute a policy legislation that the legislature has broad discretion in (2 KCCR 245, 262, 89Hun-Ka95, September 3, 1990). The Constitutional Court does not have more prudence and sensibility than the legislature in policy issues. In social and economic regulatory legislations, the legislature must be respected unless it causes a significant departure from the scope of its discretion.

Therefore, a constitutional review on land use regulation must consider the above rationales in order to interpret the concept of guaranteeing landownership correctly.

(3) To state the conclusion first, the instant provisions are constitutionally proper as a regulatory legislation necessary for the prevention of environmental pollution that is harmful to national security, cities' natural surroundings, and living space. Even if the regulation restricts use of bare building lots and interferes with the continued use by bringing about changes in the circumstances, it allows some uses that do not violate the legislative intent of the instant provisions do not restrict the landowners' right of disposal. Therefore such regulation is part of the social limit inherent in the right

of property. In balancing the interests, the benefit in national security and public welfare is greater than the harm to the landowners. The instant provisions are also reasonable and necessary. Hence no violation of the Article 37 (2) requirement for basic rights restrictions. Also, since there is no restriction that arises to the level of deprivation, no issue of equality arises out of comparing owners of bare building lots or those lots of which the circumstances have changed to other landowners inside the development-restricted zone.

C. (1) Today is the day that the Constitutional Court's decision extinguished our constitutional provision on the environment (Article 35), the basis for realization of human dignity and worth and pursuit of happiness. The phrase carefully calligraphed on the rice paper, "all people have right to live in a healthy and enjoyable environment, and the state and people must work toward environmental preservation . . ." was pushed out by the guarantee of private property into the role of an antiquarian decoration. The majority turn a blind eye to the above constitutional provisions (Articles 35, 122) without any clear explanation and are silent about the rules and regulations that specified the venues for using bare building lots and changed-circumstance properties, in surrendering to a decision of unconstitutionality.

I have a few words for the majority. Justice Holmes said, "the true meaning of a judgment is consideration of policies and social interests. It is not profitable to imagine that a controversy is resolved by mere logic or uncontested general statements of law." He always emphasized jurisprudence that recognizes the social role of law and trial based on 'the felt necessities of the time' that depends on social and economic changes.

(2) I would like to state additional reasons for upholding the provisions. Reduction, release, or compensation of the development-restricted zoning was a platform that the candidates raced to adopt in every election. However, the instant provisions since adoption in 1971 and revision in 1972 were passed down to today without any change. The most important reason for that is the majority's consensus on their positive effects, prevention of disorderly urban growth and environmental pollution. Zoning was done without thorough advance survey and restrictions were initially too harsh. But, it should not be denied that the inconvenience to the zone residents and interference with their making of living, and other negative effects arising out deficient and irrational provisions were addressed to by constant revision of the rules and regulations.

The issue of whether the provisions in existence for twenty-seven years need be revised according to the changing time or to what extent they will be revised can be best resolved not by the

Constitutional Court but by the legislature, the function of which is free discussion and gathering of public opinions. Invalidation of such policy-related provisions as the above interferes with the policy-making and policy-execution and is not desirable. Unless the provisions do not support any interpretation that is constitutional, the Court needs be reserved in invalidating them (9-2 KCCR 454, 469, 476, 96Hun-Ba14, October 30, 1997, Justice Lee Young-mo's dissent).

Furthermore, today's nonconformity decision must be acceptable to the present and also the future generation's standard of universality and objectivity. The instant provisions are fated to be revised by the decision. The legislature must revise them by taking into account the holding and reasoning of this decision. Thus revised, the statute will directly affect preservation of urban environment and development and use of national land. If it results in urban expansion and the consequent environmental pollution, it may interfere with the future generation's right to use the land and live in an enjoyable environment. Such result can be attributed to this decision. That is one of the reasons why an issue such as this should be dealt with by the legislature, a representative body, not by the Constitutional Court.

Another concern is that the majority mentions the duty to compensate. Rapid industrialization and urbanization of population are necessarily accompanied by environmental pollution. The regulatory legislation such as the instant provisions are an unavoidable minimum option in order to prevent pollution, preserve natural and living environment, and guarantee the city residents a healthy and enjoyable living space. As I said before, the issue of compensation may arise out of the infringement on such core content of the landownership system as the right to use and dispose because it amounts to deprivation of the right of property. But, such issue should not arise but for such exceptional situation. If land use regulations or ordinances aiming for environmental preservation require compensation, the state and local governments will be hesitant to enact such regulatory legislation.

D. I do not advocate that conservation always takes precedence over growth under the Constitution. Our Constitution is silent on the priority between conservation and growth. Harmonizing the two contradicting policies is in the domain of legislative formation, not that of the Constitution.

Pollution and conservation have long become the most important social problem of our time. Today's environmental debate, countervailing against economic growth, is one of the most difficult problems that cannot be entrusted to anyone but ourselves.

However, it should not be forgotten that optimism about pollution and an irrational growth-first policy lead to destruction of the Nature, disruption of the ecological balance, and ultimately the unstoppable disaster. I can only hope that the legislature, in reducing or releasing development-restricted zones, keep in mind the future of clear air, clean water, and green forests, and implement pro-environmental development.

Whether siding with growth-first arguments or following conservationism, we should engrave on our mind the words of Chieftain Sealth, "we do not own the land, the land owns us for a while." The one and only earth, though angry with pollution, is the home that we and our future generation will live forever. We all should treat it accordingly.

Justices Kim Yong-joon (Presiding Justice), Kim Moon-hee (Assigned Justice), Lee Jae-hwa, Cho Seung-hyung, Chung Kyung-sik, Koh Joong-suk, Shin Chang-on, Lee Young-mo, Han Dae-hyun.

2. Constitutional Complaint against Article 8 (1) of the Support for Discharged Soldiers Act

(11-2 KCCR 770, 98Hun-Ma363, December 23, 1999, Full Bench)

Contents of the decision

1. Whether the practice of giving veterans extra points of 3 or 5% in each subject test of civil service examinations ("veterans' extra points system", hereinafter) is constitutionally based;
2. The group discriminated by the veteran's extra point system;
3. The standard of review in equality review of the veterans' extra point system;
4. Whether the veterans' extra point system violates women and handicapped's rights to equality;
5. Whether the veterans' extra point system violates women and the handicapped's rights to hold public offices.

Summary of the decision

1. Article 39 (1) of the Constitution imposes a duty of national defense on people. Serving in the military pursuant to the Military Service Act is mere discharge of one's sacred duty. Each instance of performance of that duty cannot be compensated as if it is a special sacrifice. Therefore, Article 39 (2) does not impose on the state a duty to grant compensation or a privilege for discharging one's duty of military service. It literally bans any disadvantageous treatment on ground of having served in the military. The veterans' extra point system administered pursuant to Article 8 (1) and (3) of the Support for Discharged Soldiers Act the Veterans' Assistance Act and Article 9 of its Enforcement Decree constitute an affirmative compensatory scheme above and beyond the scope of Article 39 (2). It cannot be said to be founded on Article 39 (2) of the Constitution. Veterans are not "surviving families of national merit achievers, or soldiers and police officers injured or killed in war" under Article 32 (6) of the Constitution, which therefore cannot be the constitutional basis for the veterans' extra point system like any other provision of the Constitution.

2. An extremely small minority of women can become veterans. Almost all men are veterans. The veterans' extra point system is effectively discrimination based on gender. Whether one can be successfully inducted into the full-duty military service does not depend on his will but on the results of the induction examination, his educational backgrounds, and the demand for and supply of military personnel. Therefore, the veterans' extra point system distinguishes healthy males who can serve in the full-duty positions or full-time national reserve positions against other men, i.e., those who are exempted or serve in back-up positions.

3. In equality review, whether a strict or relaxed standard shall be used depends on the scope of the legislative-formative power given to the legislature. However, in those cases where the Constitution specially demands equality or differential treatment may cause a great burden on the related basic rights, the legislative-formative power shall be curtailed and scrutinized under a strict standard. The veterans' extra point system is differential treatment in the area of 'labor' or 'employment', where the Constitution specially demands equality in its Article 32 (4), and causes a great burden on the Article 25 right to hold public offices, and is therefore reviewed under a strict standard of review.

4. A. Veterans may need be supported through various social policies, but not by depriving other groups in the community of equal opportunity. The veterans' extra point system is an unfinanced at-

tempt to support veterans that ends up shifting burdens to the social weak such as women and the handicapped. Our Constitution abides by various international treaties, and stands for substantive equality and a social state, the ideals further manifested in our legal system. The veterans' extra point system violates the basic order firmly established in our legal system, namely, 'anti-discrimination and protection of women and the handicapped', and therefore loses the requisite appropriateness and reasonableness as the means of policy implementation.

B. The veterans' extra point system poses an obstacle in many women's hope for civil service positions, and gives 5% or 3% in each subject tested in a hotly contested civil service examination where the passage or failure is decided by decimal points and the cut-off is usually above 80%, thereby exerting a decisive influence on the results of the exam. This is tantamount to excluding the non-beneficiaries of the veterans' extra point system from civil service hiring below Grade 6. Veterans can receive the benefits an unlimited number of times. For each veteran, several non-veterans sacrifice their opportunities. In comparison to the weight of the public interest aimed at, the inequality due to the differential treatment is serious. The veterans' extra point system is not proportional.

C. The veterans' extra point system, therefore, discriminates against women and non-veteran males, in comparison to veterans, through unjust methods and overly unequally, violating Article 11 of the Constitution and the petitioners' right of equality.

5. The Article 25 right to hold public offices guarantees all an equal opportunity to hold public offices according to one's ability and interest. A standard of selection not based on merit and unrelated to one's ability to perform the duties demanded of the positions violates that right. Veterans' assistance, as a legislative purpose, cannot justify curtailing of merit-based selection. However, the veterans' extra point system uses an unreasonable standard such as gender or 'whether one is healthy enough to serve full-duty positions', thereby excessively restricting the petitioners' right to hold public offices in contravention of Article 25 of the Constitution.

Provisions reviewed

Support for Discharged Soldiers Act (enacted by Act No. 5482, 1997.12.31)

Article 8 (extra points in hiring examination)

① When job protection agencies[1] under Article 7 (2) conduct hiring examinations, veterans receive up to 5% of the full score as

extra in each subject tested in the written examination as determined by presidential decrees. If the agencies do not conduct written examinations, the points are added in skills tests, document evaluations, or interviews conducted in lieu of them.

② [omitted]

③ The grade levels in which the points are added in hiring examinations conducted by job protection agencies are determined by presidential decrees.

Support for Discharged Soldiers Act Enforcement Decree (1998.8.21. Presidential Decree No. 15870)

Article 9 (the number of extra points in hiring examination)

① Pursuant to Article 8 (1) of the Act, veterans sitting for hiring examinations receive extra points as follows:

1. Veterans who were discharged after serving two or more years: 5%
2. Veterans who were discharged after serving less than two years: 3%

② Pursuant to Article 8 (3) of the Act, the following grade levels are subject to the extra point system:

1. Grade 6 or lower level positions, including technical officials, specified by Article 2 of the State Public Officials Act and Article 2 of the Local Public Officials Act.
2. All positions for which new hiring is conducted by job protection agencies specified by Article 30 (2) of the Act on the Honorable Treatment and Support of pensions, etc. of Distinguished Services to the State.

Related provisions

The Constitution

Articles 11, 25, 32 (4) and (6), 34 (3) and (5) and 39 (1) and (2)

Support for Discharged Soldiers Act

Article 2 (definitions)

① 'Veterans' means those who were (includes retirement, exemption from further service, and release from full-time reserve service) after completing his or her military service pursuant to the Military Service Act.

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1). Those agencies imposed by the Veterans' Assistance Act a duty to protect employment opportunities of the veterans.

② 'Long-term service veterans' means those who were appointed as officers, warrant officers, or non-commissioned officers, and resigned after completing the full-duty service of longer than ten years.

Article 7 (job protection)

① [omitted]

② Articles 30 to 33 of the Act on the Honorable Treatment and Support of pensions, etc. of Distinguished Services to the State shall be incorporated here and applied to the scope of job protection agencies, its hiring duties, and hiring orders.

③ ~ ④ [omitted]

Article 8 (extra points in hiring examination)

① [omitted]

② Those full-duty soldiers who are expected to be discharged less than six months are considered veterans for the purpose of the extra point system.

③ ~ ④ [omitted]

Act on the Honorable Treatment and Support of pensions, etc. of Distinguished Services to the State

Article 30 (job protection agencies)

The following agencies must conduct job protection:

1. State agencies, local government agencies, and schools specified by Article 2 of the Elementary and Secondary Education Act and Article 2 of the Higher Education Act, except the agencies with less than five technical officials and the private schools with less than five staff people excluding the faculty.
2. Public or private businesses and organizations that hire twenty or more employees on a daily basis, except manufacturing businesses identified by presidential decree that hire less then two hundred employees.

State Public Officials Act

Article 26 (principle of appointment)

Civil servants are appointed according to the test results, the performance, and other proofs of merit.

Article 35 (principle of equality)

A hiring examination subject to open competition shall be open to all people with the same qualifications, and its timing and location must be determined in consideration of the examinees' convenience.

Related precedents

8-1 KCCR 550~557, 96Hun-Ma200, June 26, 1996

Parties

Complainants

Cho Kyung-ok and five others
Counsel: Lee Suk-yeon and one other

Holding

Article 8 (1) and (3) of the Support for Discharged Soldiers Act (revised by Act No. 5482, 1997. 12. 31) and its Enforcement Decree Article 9 (1998. 8. 21, Presidential Decree No. 15870) are unconstitutional.

Reasoning

1. Overview of the case and the subject matter of review

A. Overview of the case

Complainant Lee Yoo-jin graduated from Ehwa Women's University in February 1998, and complainants Cho Kyung-ok, Park Eun-joo, Kim Jung-won, and Kim Eun-jung, are seniors in the same school. They are preparing for the open-competition hiring examination for Grade 7 or 9 national public employees. Complainant Kim Hyung-soo is a senior at Yonsei University and a handicapped male, who is also preparing for the Grade 7 National Public Employee Hiring Examination.

Complainants argue that Article 8 (1) and (3) of the Support for Discharged Soldiers Act and Article 9 of its Enforcement Decree, by granting veterans 5% or 3% of the full points as extra in each subject tested in all hiring examinations for civil service positions of Grade 6 or lower and for public and private business entities, violated their right to equality, right to hold public offices, and freedom to choose their occupations, and filed this constitutional complaint on October 19, 1998.

2. Subject matter of review

The subject matter of this review is whether the Support for Discharged Soldiers Act (revised by Act No. 5482, 1997.12.31, "the Act", hereafter) Article 8 (1) and (3) and its Enforcement Decree (1998.8.21, Presidential Decree No. 15870, "the Decree", hereinafter) Article 9 violate the basic rights of the complainants. The provisions are as follows:

The Act, Article 8 (extra points in hiring examination)

① When job protection agencies[2] under Article 7 (2) conduct hiring examinations, veterans receive up to 5% of the full score as extra points in each subject tested in the written examination as determined by presidential decrees. If the agencies do not conduct written examinations, the points are added in skills tests, document evaluations, or interviews conducted in lieu of them.

③ The grade levels in which the points are added in hiring examinations conducted by job protection agencies are determined by presidential decrees.

The Enforcement Decree, Article 9 (the number of extra points in hiring examination)

① Pursuant to Article 8 (1) of the Act, veterans sitting for hiring examinations receive extra points as follows:

1. Veterans who discharged after serving two or more years: 5%
2. Veterans who discharged after serving less than two years: 3%

② Pursuant to Article 8 (3) of the Act, the following grade levels are subject to the extra point system:

1. Grade 6 or lower level positions, including technical officials, specified by Article 2 of the State Public Officials Act and Article 2 of the Local Public Officials Act;
2. All levels in which new hiring is conducted by job protection agencies specified by Article 30 (2) of the Act on the Honorable Treatment and Support of pensions, etc. of Distinguished Services to the State.

The Act, Article 7 (job protection)

② Articles 30 to 33 of the Act on the Honorable Treatment and Support of pensions, etc. of Distinguished Services to the State shall

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2). Those agencies imposed by the Veterans' Assistance Act a duty to protect employment opportunities of the veterans.

be incorporated here and applied to the scope of job protection agencies, its hiring duties, and hiring orders.

The Act on the Honorable Treatment and Support of pensions, etc. of Distinguished Services to the State, Article 30 (job protection agencies)

The following agencies must conduct job protection:

1. State agencies, local government agencies, and schools specified by Article 2 of Elementary and Secondary Education Act and Article 2 of the Higher Education Act, except the agencies with less than five technical officials and the private schools with less than five staff people excluding the faculty.

2. Public or private businesses and organizations that hire twenty or more employees on a daily basis, except manufacturing businesses identified by presidential decree that hire less then two hundred employees.

2. Complainants' arguments and the related agencies' opinions

A. Complainants' arguments

(1) The legislative intent behind the veterans' extra point system is said to be to create a climate encouraging voluntary completion of military duties and to assist veterans in readjusting to the society and thereby redress the drawback they suffered by completing the service. However, the climate favorable for voluntary completion of military duties must be achieved by strict enforcement of the Military Service Act and by forming healthy awareness about military duties. The veterans' extra point system that grants them 5% or 3% of the full points as extra in each subject tested in the hiring examinations for civil services and public or private businesses is not an appropriate means. Redress for veterans must be made financially or by other reasonable means and cannot be done by creating a new social status and granting a privilege, thereby infringing on other subjects[3] of basic rights.

(2) In Grade 7 or 9 Civil Service Hiring Examination, the cutoff averages far above 80 points and the pass or failure is decided upon decimal points. Extra points of 3% or 5% given to veterans exert a decisive influence on the results and may even cause a contradictory result where non-beneficiaries fail even after receiving the

3). 'Subject' as an agent who exercises the right.

maximum score. The consequent, cruel burden tantamount to effective deprivation of the right to sit for the examination violates the principle of minimum restriction.

(3) Women and the handicapped, due to tangible or intangible forms of gender discrimination or social prejudice and hostilities, are extremely difficult to find jobs appropriate for their abilities. The veterans' extra point system pushes the social weak - women and the handicapped - out of a job market for not having completed the military duties that they cannot perform, and threaten their rights to livelihood.

(4) Article 25 of the Constitution guarantees the right to hold public offices. Its intent is to establish a merit-based standard of selection upon which all people are given equal opportunities to hold public offices according to their abilities and interests. The veterans' extra point system uses the fact of having performed military duties, not the ability to perform job duties, as the standard of selection, and therefore infringes on people's right to hold public offices.

(5) Article 15 of the Constitution guarantees freedom of occupation. The permitted scope of restriction is relatively narrower for freedom to choose occupations than for freedom to conduct occupations. The veterans' extra point system effectively blocks women and the handicapped from being hired by public and private businesses, infringing their freedom to choose occupations.

(6) Therefore, the veterans' extra point system violates the rule against excessive restriction in infringing the petitioners' right to equality, right to hold public offices, and freedom to choose occupations.

B. Ministry of Patriot's and Veteran's Affairs opinion

(1) Women are protected by the women hiring goal-program and thereby can be hired even if they fall below the cut-off. Since they receive these benefits, they cannot be considered the victims of the veterans' extra point system and therefore do not have a standing to bring this constitutional complaint.

(2) The Act was enacted on December 31, 1997 and brought into effect on July 1, 1998. The time limit for filing a constitutional complaint begins to accrue from the time of the enactment. This complaint was filed on October 19, 1998, well past the time limit for filing.

(3) The veterans' extra point system restores the rights and interests that they were deprived of in being forced into the military duties and keeps the full-duty soldiers' morale up, thereby maintaining a stable national defense capability. Soldiers must forego educa-

tion, career, job opportunities, and even an opportunity to prepare themselves for jobs during their service. Restoring their personal loss and assisting them in prompt readjustment into the general society is consistent with fairness in relation to those who did not perform military duties.

(4) Mechanical equal treatment of those who served in the military and those who did not and subjecting them to competition constitutes a fundamental restriction on the first group's right to hold public offices and choose their occupations, and violates the principle of substantive equality.

3. Review

A. Legal Prerequisites

(1) The Minister of Patriot's and Veteran's Affairs argues that women benefit from the women hiring goals program and therefore cannot claim to be the victims of the veterans' extra point system and do not have a standing in this constitutional complaint. However, the women hiring goal-program has a different purpose and intent. As long as their status vis-à-vis basic rights are affected by the veterans' extra point system, their self-relatedness cannot be denied.

The Minister of Patriot's and Veteran's Affairs also argues that the complainant Lee Yoo-jin failed in the 1997 Grade 7 National Civil Service Hiring Examination with a score regardlessly low of the veterans' extra point system, and therefore does not have a standing. However, unless it cannot be shown that the complainant is not preparing for the same examination, her standing cannot be denied.

(2) At the time of the filing, the complainants were preparing for national civil service hiring examinations, and therefore their basic rights were not presently being infringed by the instant provisions. However, it is clearly predictable that the veterans' extra point system will be applied to their future exams. Therefore, their present injuries are recognized (4 KCCR 659, 669, 92Hun-Ma68 etc., Oct. 1, 1992). When the present injury requirement is satisfied by ascertainable future injuries, the filing time limit could not have expired. The filing time limit begins to accrue and later becomes an issue only after the infringement has taken place. In this case, there has been no infringement, yet we recognize its presentness in advance. Therefore, the Minister's argument concerning the filing time limit is without basis.

(3) Since there is no defect in relation to the legal prerequisites, we move on the review on merits.

B. Review on merits

(1) Veterans' extra point system

The veterans' extra point system is the practice of granting veterans extra 5% or 3% of the full score in each subject tested (or in skills tests, document evaluations, or interviews conducted in lieu of written exams) in hiring examinations conducted by certain job protection agencies.

(A) Veterans

Veterans are those who completed their military duties and were discharged (retired, exempted from further service, or released from full-time reserve service) pursuant to the Military Service Act or the Military Personnel Management Act. (Article 2 of the Act)

All male citizens of the Republic of Korea have a duty of national defense (Article 39 (1) of the Constitution, Article 3 (1) of the Military Service Act) and accordingly must complete military duties pursuant to the Military Service Act or the Military Personnel Management Act (Articles 3 (1) and 4 of the said Act). Military duties are classified into full-duty, reserve, backup, first-class national, and second-class national (Article 5 (1) of the said Act). The word 'discharge' applies only to those who completed full-duty service (including those converted into combat police personnel or correction facility security guards) or full-time reserve services. Therefore, those who completed backup services or second national services are not veterans.

Women can volunteer for full-duty services (Article 3 (1) (ii) of the Act) and therefore can be veterans.

Also, those full-duty servicemen expected to be discharged within six months are also considered veterans (Article 8 (2) of the Act).

(B) Job protection agencies

Job protection agencies are state agencies, local government agencies, and schools specified by Article 2 of Elementary and Secondary Education Act and Article 2 of the Higher Education Act (except the agencies with less than five technical officials and the private schools with less than five staff people excluding the faculty) and public or private businesses and organizations that hire twenty or more employees on a daily basis (except manufacturing businesses identified by presidential decree that hire less than two hundred employees) (Article 7 of the Act, Article 30 of the Act on the Honorable Treatment and Support of pensions, etc. of Distinguished Services to the State).

(C) Extra points

Veterans who were discharged after serving two or more years receive 5% and those who were discharged after serving less than two years receive 3% (Article 9 (1) of the Enforcement Decree of the said Act).

(D) Positions and levels subject to extra points system

All Grade 6 or lower level positions, including technical officials, specified by Article 2 of the State Public Officials Act and Article 2 of the Local Public Officials Act, and all positions for which new hiring is conducted by job protection agencies specified by Article 30 (2) of the Act on the Honorable Treatment and Support of pensions, etc. of Distinguished Services to the State are subject to extra points system.

(2) Constitutionality of the veterans' extra point system

(A) Basis of the veterans' extra point system

1) We shall review whether the veterans' extra point system is constitutionally based or merely based on a legislative policy is an important element in evaluating its constitutionality.

2) Article 39 (2) of the Constitution states "no one shall receive adverse treatment for the reason of having discharged his military duty", and we shall review whether this provision can become the constitutional basis for the extra point system. Article 39 (1) of the Constitution imposes the duty of national defense on people in order to protect national independence and land from direct or indirect aggression from external hostile forces. Serving in the military pursuant to the Military Service Act is merely discharge of a sacred duty, and cannot be considered a special sacrifice that the state imposes on individuals for public interest. People's discharge of their constitutionally imposed duties is indispensable to national integrity and livelihood. Each instance of such discharge cannot be considered a special sacrifice that requires compensation.

Therefore, Article 39 (2) of the Constitution does not impose on the state a duty to grant compensation or a privilege for discharging one's duty of military service. It literally bans any disadvantageous treatment for reason of having served in the military. 'Disadvantageous treatment' in the provision does not cover all factual or economic drawbacks but only means legal disadvantages. Otherwise, the provision would mean that the state must protect from all disadvantages that are causally related to the performance of military duties - the scope of which is broad beyond counting or prediction, and would contradict with Article 39 (1) that imposes on people the duty of national defense.

Therefore, the veterans' extra point system constitutes an affirmative compensatory scheme above and beyond the scope of Article 39 (2) and cannot be said to be founded on Article 39 (2).

3) Article 32 (6) of the Constitution provides that "surviving families of national merit achievers, or soldiers and police officers injured or killed in war are granted priorities in job opportunities pursuant to statute." However, veterans are not "surviving families of national merit achievers, or soldiers and police officers injured or killed in war." They are not national merit achievers even under the Act on the Honorable Treatment and Support of pensions, etc. of Distinguished Services to the State (Article 4). The state merely incorporated the extra points system for national merit achievers and extended them to veterans (Article 70) for legislative convenience. The groups are treated under separate schemes since passage of the Act. Therefore, Article 32 (6) of the Constitution cannot be the constitutional basis for the veterans' extra point system.

4) The veterans' extra point system is therefore not constitutionally based but merely based on a legislative policy of assisting veterans in readjusting to the society.

(B) Violation of the right to equality

1) Discriminated groups

The veterans' extra point system has the form of distinguishing veterans and non-veterans. However, the substance of the veterans' extra point system cannot be clearly grasped with the formal concepts such as veterans and non-veterans. We must examine concretely what groups of people fall under veterans or non-veterans under the current legal system. Veterans include ① males discharged (or retired or exempted from further service) after completion of full-duty service ② males discharged from full-time reserve service ③ females who volunteered for and completed full-duty service. Non-veterans are ① the super majority of women who did not volunteer for military service ② males classified at induction examinations as unable to perform military duties due to illness or handicap (Articles 12 (1) (iii), 14 (1) (iii) of the Military Service Act) ③ males who completed military service in backup or second-class national positions.

Most of all, the veterans' extra point system factually discriminates women in comparison to men. Among veterans, women that fall under ③ are an extremely small minority of women. Most women are not veterans. Most men fall under ① or ② and are therefore veterans. According to the records attached to this case [Military Service Classification Notice], for five years between 1994 and 1998, full-duty classifications range between 81.6% and 87%, meaning that

more than 80% of men can become veterans (backups, 4.6% to 11.6%; second-class nationals, 6.4% to 9.85; exemptions, 0.4 to 0.6%). Since the veterans' extra point system distinguishes most men from most women, the current status of law must be considered as discrimination based on gender.

Next, the veterans' extra point system discriminates males unable to perform military duties due to illness or handicap in comparison to healthy males able to perform as full-duty or full-time reserve servicemen. Whether one can serve full-duty depends not on the will of the service-men but on the results of the induction examination (Articles 11, 12, and 14 of the Military Service Act). Ill or handicapped males, even if they want to serve full-duty, cannot do so and therefore cannot become veterans and benefit from the veterans' extra point system.

Finally, the veterans' extra point system discriminates those who served as backups. Backup classification is done according to educational backgrounds and physical fitness levels and in consideration of the supply and demand of military personnel (Articles 5 (1) (iii) and 14 of the Military Service Act). It is done regardless of the will of those classified. Backups, even if they complete certain duties in lieu of military duties (in public interest service, public interest legal service, public health, specialized research, and industrial technical service), they cannot benefit from the veterans' extra point system merely because the form of service is not a full-duty service.

2) Standard of review

A) In equality review, whether a strict or relaxed standard shall be used depends on the scope of the legislative-formative power given to the legislature. However, those cases where the Constitution specially demands equality shall be scrutinized under a strict standard. If the Constitution itself designates certain standards not to be used as reason for discrimination or certain domains in which discrimination shall not take place, it is justified to strictly scrutinize the discrimination based on that standard or in that domain. Also, if differential treatment causes a great burden on the related basic rights, the legislative-formative power shall be curtailed and strictly scrutinized.

B) The veterans' extra point system requires a strict standard of review for both of the two reasons. Article 32 (4) of the Constitution states, "women's labor is specially protected, and they are not unjustly discriminated in hiring, wages, and conditions of employment," specially requiring gender equality in the domain of 'labor' or 'employment'. The veterans' extra point system differentiates men and women in that domain. Also, it causes a great burden on the

Article 25 of the Constitution the right to hold public offices (and on the Article 15 of the Constitution freedom to choose one's occupation in case of the veterans' extra point system conducted by private businesses).

The veterans' extra point system therefore is reviewed under strict scrutiny, which goes above the rule against arbitrariness, i.e., testing whether there is rational basis, and means a test under the principle of proportionality, i.e., whether there is a strict proportionality between the means and the end of the differential treatment.

3) Violation of equality by the veterans' extra point system

A) Legislative purpose of the veterans' extra point system

The veterans' extra point system is mainly aimed at redressing the opportunity for jobs or job preparation that veterans lose while serving in the military and thereby helping them promptly readjust back to the society. They devoted their golden times in their early or mid 20s to performing military service in an isolated and controlled environment with no opportunity for self-development, and thereby made a contribution to the country and the society. They are at a disadvantage in preparing for civil service hiring examinations, relative to non-veterans. It is a necessary and permissible purpose to assist veterans' readjustment.

B) Appropriateness of discrimination

a) Assistance for veterans' readjustment must be done through an reasonable and proper means

Firstly, veterans can be redressed for any legal disadvantage they suffer in comparison to non-veterans.

It is permissible to take into account the service periods in calculating salaries or retirement benefits, as the current legal system already does. Article 8 and its Table 15 of the Civil Service Compensation Rules takes all mandatory military service periods as a period of employment and even adds one year. Article 23 (3) of the Public Officials Pension Act also accepts the period of all full-duty services or non-commissioned officer's involuntary services as a period of civil service employment. the State Public Officials Act also considers the duration of military service under a leave of absence during which the status as a civil servant is protected (Articles 71 to 73).

Next, it is permissible to formulate a social or financial assistance program such as job referral, occupational training, reeducation, educational loan or loan forgiveness, or medical benefits. Articles 4, 10, 11, 12, and 13 of the Act does provide such program for long-

term duty veterans. It will be truly reasonable to extend the benefits to veterans as much as possible.

b) However, the veterans' extra point system is not a reasonable means of supporting veterans. The veterans' extra point system grants veterans a special privilege by adding 5% or 3% in each subject tested in civil service hiring examinations by eroding or depriving non-veterans of their job opportunities. Non-veterans are none other than the super majority of women and a substantial number of men (handicapped or ill males who cannot perform military duties, males who served as backups) who could not be veterans. Women and the handicapped are the weak of our society. The Constitution professes in several instances the state's duty to affirmatively protect them in accordance to the principle of substantive equality and social state, e.g., Article 11 that bans gender discrimination, Article 34 (1) that guarantees humane livelihood, the aforementioned Article 32 (4), Article 34 (3) that provides, "the state must endeavor to promote women's welfare and rights", Article 34 (5) that provides, "the handicapped and others who cannot make living due to illness and age are entitled to the state's protection pursuant to statute", and Article 36 (2) that provides, "the state must endeavor to protect maternity". Despite this, women and the handicapped suffer various institutional, or tangible or intangible factual forms of discrimination, and hardship due to social and cultural prejudice in all areas of living. It is especially difficult for them to obtain jobs appropriate for their abilities. In order to negate this reality and realize the constitutional ideals of equality and welfare, a comprehensive legal system is established in the area of women and the handicapped. The Framework Act on Women's Development, the Act on Prohibition and Remedy for Sexual Discrimination, and the Sexual Equality Employment Act emphasize expansion of women's social participation and specially institute discrimination bans and affirmative actions for women in public offices and employment. Also, the Welfare of Disabled Persons Act and the Promotion, etc. of Employment of Disabled Persons Act specify various discrimination bans and protective measures for the handicapped. If a means to achieve a certain legislative purpose contradicts an entire legal system that institutes a certain constitutional ideal, it cannot be considered an appropriate policy means. The Convention on the Elimination of All Forms of Discrimination against Women and other international treaties, the above constitutional provisions, and the legal system establish the ban on discrimination against and the protection for women and the handicapped as a basic order. However, the veterans' extra point system, in attempting to support veterans with no financial backup, causes sacrifice on the social weak, conflicting with the basic order of our legal system and causing a systemic disharmony.

In sum, veterans may need be supported through various social polices but not by depriving other groups in the community of equal opportunity. The veterans' extra point system deprives women and the handicapped of an opportunity to participate in the society, using gender and other criteria that do not have any rational relationship to the ability to perform official duties. It has lost appropriateness and reasonableness as a means.

C) Proportionality of discrimination

The veterans' extra point system also has lost proportionality because the discriminatory effect is serious in comparison to the weight of the public interest aimed at.

a) The veterans' extra point system restricts quantitatively a very large number of women's right to hold public offices. According to the attached records, [Grade 7 and 9 Hiring Examination Women Applicants and Their Passing Rate], about ten thousand women annually sat for the Grade 7 exam and about forty to fifty thousand women for the Grade 9 exam for three years between 1996 and 1998. The veterans' extra point system is an obstacle to so many women desiring to participate in public offices.

b) The effect of the veterans' extra point system on the hiring result is too great. 5% or 3% of the full score in each subject tested is a decisive factor in determining whether one passes or not. In Grade 7 or 9 exams, the competition is intense, the cut-off ranges far above the average of 80 points, and a few tenths of a point decides passage or failure. (According to the attached record, [Men and Women Applicants and Passers, and their Average Scores, Ages, and Passing Scores], the lowest passing score for men were 86.42, for women 85.28 in Grade 7 General Administrative Exam, and 95.50 generally in Grade 9 General Administrative Exam in 1998.) There is even a possibility that one who does not benefit from the veterans' extra point system and yet achieves the perfect score may fail the exam.

The effect of the veterans' extra point system is apparent statistically. The attached record, [Subject Grades of Passers], upon analysis, shows that, in Grade 7 General Administrative Exam, 72 out of 99 hires, 72.7%, are veterans who received the extra points. Those who did not receive the extra points are only six, 6.4%, three of who were below the cut-off of 86.42 but benefited from the women's hiring goals program. In other words, 3 hires or 3.3% of the hires were all that overcame the wall of the veterans' extra point system. In 1998 Grade 7 Prosecutors' Office Clerical Exam, only one out of fifteen hires did not receive the extra points.

These facts show that the veterans' extra point system brings

about the result equivalent to excluding women and other non-beneficiaries of the system from the Grade 6 or lower level civil service hiring.

c) Furthermore, the veterans' extra point system grants the benefits to veterans in an unlimited number of times. Regardless of the number of trials or whether a veteran has already obtained a job by benefiting from the extra points, he or she can receive them repeatedly. For one veteran, many non-veterans' opportunities are being sacrificed.

d) The veterans' extra point system does not merely discriminate *at* a public workplace but interferes with entry into it and therefore deprives a public employment opportunity from its entry stage, imposing a great burden on the right to hold public offices.

e) What is more serious, a civil service hiring examination is nearly the only market in which women and the handicapped can fairly compete. Social and cultural prejudice makes it very difficult for women and the handicapped to find a job appropriate for their abilities in the private sector. Contrarily, civil service hiring is supposed to be conducted openly on the basis of merit and in observance of the principle of equality (Article 26 of the State Public Officials Act requires that hiring be based on proofs of merit, and its Article 35 opens up hiring equally to all people with the same qualifications). Discriminating them even in civil service hiring imparts a serious blow to them. Blocking women's entry into public offices will also cause a very disharmonious result from the perspective of utilizing the nation's manpower.[4] When one half of the country cannot display their abilities, the potential of the whole country or society cannot be fully tapped. According to the records of the National Statistical Office, only 265,162 or 28.7% of all public employees were women in Dec. 1997. Even 53.8% of them are educational employees, and 18.6% technical employees. According to the records of the Korean Women's Development Institute, women are 0.3% in Grade 1 to 3, 1.6% in Grade 4, 3.2% in Grade 5, and 22.2% in Grade 6 or lower. Our civil service community is dominated by men. This is not desirable. Especially, in face of the information era, women's abilities are being considered a valuable resource and the necessity to develop them is growing. The veterans' extra point system is blocking us from future progress.

f) As shown above, the public interest accomplished by the veterans' extra point system is merely a policy objective of the legislature. However, what is infringed by it are constitutional values such as gender employment equality and the discrimination ban on the

4). Used as a gender-neutral term.

handicapped, which the Constitution specially protects. Therefore, in comparing the legal interests generally or abstractly, or appreciating the seriousness of the harm, the veterans' extra point system is seriously lacking a balance between the legal interests.

D) Relationship to women's hiring goal-program in civil service recruitment

Women's hiring goal-program has been administered pursuant to Article 11-3 of the Civil Service Hiring Examination Decree and Article 51-2 of the Local Civil Service Hiring Decree since 1996. Administrative and Diplomacy High-level Examination and Grade 7 and 9 National Civil Service Examination have annual hiring goals for women and, when the goals are not met, hire additional women within three points below the cut-off in Grade 5 hiring and five points below in Grade 7 or 9 hiring (In Grade 7, the goals are 10% in 1996, 13% in 1997, 15% in 1998, 20% in 1999, 20% in 2000, 23% in 2001, and 25% in 2002. In Grade 9, 20% in 1999, 20% in 2000, 25% in 2001, and 30% in 2002).

Hiring goals are part of the so-called temporary affirmative action. Temporary affirmative action is a measure of providing direct or indirect benefits in hiring or school admission to the members of a group that has been discriminated by the society, and thereby redressing the injuries they suffered. Naturally, under temporary affirmative action, one receives benefit not on the basis of a qualification or an achievement but on the basis of belonging to a group. It pursues equal result, not just equal opportunity. It is not a permanent measure but a temporary one that expires when its purpose is achieved.

We examine whether the hiring goal-system removes the unconstitutional element of the veterans' extra point system.

a) The hiring goal-system is a system different from the veterans' extra point system both in its intent and functions.

The hiring goal-system is aimed at raising the status of women to that of men who are otherwise in an advantageous position. Unlike this, the veterans' extra point system operates regardless of the male to female ratio and may end up solidifying directly and indirectly men's vested interest in their advanced position.

b) The effect of the hiring goals system is limited.

Firstly, the equality-oriented goal itself is limited. Until 2002, the year that the system expires, the goals to be achieved are 20% in Administrative and Diplomacy High-Level Examination, 25% in Grade 7, and 30% in Grade 9. (Positions related to correction, juvenile protection, protective supervision are excluded.) Secondly, the hiring

goal-system is a temporary measure. In 2002 and when the goals are accomplished, it expires. Thirdly, according to the attached record, [Women Applicants' Passing Rate According to Women Hiring Goal-System], only two to five were hired through that system in Administrative Exam for three years between 1996 and 1998, and nine to sixteen annually in Grade 7 National Civil Service Examination. The veterans' extra point system substantially disadvantages annually forty to fifty thousand women Grade 9 applicants and ten thousand women Grade 7 applicants. The hiring goal-system cannot remedy the situation.

Considering these facts, the hiring goal-system does not eliminate or reduce unconstitutionality of the veterans' extra point system.

E) Sub-conclusion

In conclusion, the veterans' extra point system discriminates women and non-veteran males in comparison to males in contravention of the principle of proportionality, violating Article 11 of the Constitution and the complainants' right to equality.

(C) Violation of the right to hold public offices

We examine whether the veterans' extra point system violates the complainants' right to hold public offices.

1) Right to hold public offices and merit-based selection

Article 25 of the Constitution provides, "all people have the right to hold public offices pursuant to statute." The right to hold public offices includes a right to be a candidate and ultimately be elected in various elections and the right to be appointed for public offices (8-1 KCCR 550, 557, 96Hun-Ma200, June 26, 1996). That right can be restricted to the extent necessary for national security, public order, and public welfare, but cannot be unequally or excessively restricted, or restricted on its essential content.

Unlike elected positions, professional civil servants are demanded political neutrality and the ability to perform work duties efficiently. Regulation of the right to be professional civil servants can only be based on merits or achievements and according to the applicants' ability, professionalism, interests, and personality. The Constitution does not explicitly say so but, in light of its Article 7 professional civil servant system that includes the element of meritism, its Article 25 can be said to guarantee all people equal opportunity to hold public offices according to their abilities and interests. Article 26 of the State Public Officials Act provides, "hiring must be done on the basis of test results, work performance, and other demonstrations of abilities." Article 35 of the same Act provides, "a hiring examination subject to open competition must be equally open to all people with

the same qualifications." These statutory provisions show that the jurisprudence behind Article 25 of the Constitution centers on meritism and equal opportunity. Therefore, a standard of selection based, not on merits but, on gender, religion, social status, regional origins, and other factors unrelated to the abilities demanded of the positions violates people's right to hold public offices.

The basic principle of the Constitution and its specific provision may allow exceptions to the meritism. The social state principle, Articles 32 (4) to (6) concerning protection of women and minors and priority hiring of the survivors of national merit achievers and police officers and soldiers killed in war, and Article 34 (2) to (5) specifying the society's duty to protect women, the elderly, and the handicapped. When there is such a constitutional mandate, meritism can be compromised to a reasonable extent.

2) Violation of the right to hold public offices by the veterans' extra point system

A) As shown above, the legislative purpose of assisting veterans is not a just basis for compromising merit-based selection. Therefore, the extra point system infringes upon one's right to hold public offices by unreasonable standard with no relation to meritism.

a) The veterans' extra point system discriminates the supermajority of women for the sake of the majority of men. We already established that its distinction is formally on veteran status but is substantively on gender. However, women and men do not have physiological differences in relation to the abilities to perform public services. Therefore, the practice of depriving people of public service opportunities, not on the basis of interests, professionalism, and personality, but on gender is clearly unreasonable and is not appropriate.

b) The veterans' extra point system discriminates between veterans on one hand and those who are exempt from military services or have served in backup positions on the other. The substantive distinction is made between whether one is healthy enough to sustain the full-duty service, a standard unrelated to his ability to perform public services. Public service does require health. However, the level of fitness required there is different from that required for full-duty military service.

B) The veterans' extra point system is unjust as shown in our equality review and excessive, violating the principle of proportionality.

C) In conclusion, the veterans' extra point system excessively restricts women and the handicapped's right to hold public offices by a standard unrelated to merit, violating Article 25 of the Constitution and the complainants' right to hold public offices.

4. Conclusion

Articles 8 (1) and (3) of the Veterans' Assistance Act and Article 9 of its Enforcement Decree violate the complainants' rights to equality and to hold public offices, and therefore unconstitutional. So held by an unanimous decision of all Justices.

Justices Kim Yong-joon (Presiding Justice), Kim Moon-hee, Lee Jae-hwa, Chung Kyung-sik (Assigned Justice), Koh Joong-suk, Shin Chang-on, Lee Young-mo, Han Dae-hyun, Ha Kyung-chull

3. Detainees' Mandatory Wearing of Uniforms

[11-1 KCCR 653, 97Hun-Ma137, 98Hun-Ma5 (consolidated), May 27, 1999, Full Bench]

Contents of the decision

1. Whether there is a justiciable interest when the infringing act complained of has ended;
2. Whether the act of forcing the detainees on trial or appeal to wear uniforms constitutes an exception to the requirement of exhaustion of prior remedies;
3. Whether the act of forcing the detainees on trial or appeal to wear uniforms inside jails and other detention facilities infringes basic rights;
4. Whether the act of forcing the detainees on trial or appeal to wear jail uniforms during investigation or trial infringes basic rights.

Summary of the decision

1. The subjective justiciable interest in a complaint against the act of forcing detainees on trial or appeal evaporated when the complainants were released. However, the infringing act is likely to repeat, and resolution of the issue has keen importance for the defense and maintenance of the constitutional order. The justiciable interest is recognized.

2. The petitioning system under Article 6 of the Criminal Administration Act is insufficient and indirect as a remedial procedure and

therefore cannot be a prior remedial procedure one must go through before filing a constitutional complaint. The act of forcing detainees on trial or appeal to wear jail uniforms is a completed, *de facto* excercise of power that can not be easily reviewed under administrative or judicial review and is likely to be denied justiciable interest in those procedures. In this case, constitutional complaint is the only effective remedy. This case constitutes an exception to the requirement of exhaustion of prior remedies.

3. In jails and other detention facilities, wearing jail uniforms is not seen by the public and does not interfere with the detainee's exercise of the right to explain or defend at investigation or trial. If detainees are allowed to wear regular clothes, the clothes need be repaired, washed, and seasonally changed. En route, the detainees may destroy evidence or plan escape or import contrabands such as weapons, tobacco, or drugs. Forcing the detainees on trial or appeal to wear jail uniforms is a minimum restriction necessary for accomplishing the purpose of detention and maintaining the institutional order and safety. It is a just and reasonable measure within the scope of discretion.

4. Forcing the detainees, who are not yet convicted, to wear jail uniforms during investigation or trial makes them feel insulted and ashamed and psychologically threaten them, interfering their right of defense. Ultimately, it will interfere with the truth-seeking process. Such restriction cannot be justified even by the possibility of escape. It violates the principle of proportionality in by Article 37 (2) of the Constitution, the presumption of innocence, the right to personality arising out of human dignity and worth, the right of pursuit of happiness, and the right to fair trial.

Related Provisions

Criminal Procedure Act

Article 70 (reason for detention)

① The court may order detention of the defendant if there is a reasonable basis for suspicion that he or she committed the crime and

1. the defendant does not have a regular residence;

2. the court is concerned that the defendant may destroy evidence;

3. the defendant may escape or the court is concerned that he may escape.

② The defendant cannot be detained in a case for a fine of five hundred thousand wons or less, short term of incarceration or minor

fine unless the condition of Section 1 and Item 1 obtains.

Article 201 (arrest)

① When there is a reasonable basis for suspicion that the suspect committed a crime and the condition under one Item of Article 70 (1) obtains, the prosecutor may apply to a judge in the district court for an arrest warrant and arrest the suspect. A police officer may request a prosecutor for an arrest warrant, obtain it from a judge in the district court upon the prosecutor's application, and arrest the suspect. However, in a case for a fine of five hundred thousand wons or less, short term of incarceration, or minor fine, the above applies only when the suspect does not have a stable residence.

② A warrant application must be accompanied by materials that establish the necessity for the arrest.

③ A judge who received the application in Section 1 must decide expeditiously whether to issue the warrant.

④ A judge who received the application in Section 1 shall issue an arrest warrant upon a finding of reasonableness. If the judge does not issue the warrant, he must state the reason for such in a signed writing and deliver to the applicant prosecutor.

⑤When the prosecutor applies for a warrant under Section 1 against the same person for the same crime after having applied for or obtained a warrant, he must state the reason for applying the warrant for the second time.

Criminal Administration Act

Article 1 (purpose)

The Act aims to specify the matters about isolating and correcting those who were sentenced to imprisonment, detention, labor camp, or short term of incarceration (hereafter, 'prisoners'), nurturing healthy national awareness among them, providing them with technical education, and thereby ultimately helping them return to the society, and also detaining the suspects or the defendants on whom the arrest warrant was executed (hereafter, 'detainees on trial or appeal').

Article 2 (segregation)

① Prisons hold prisoners who are twenty years or more of age.

② Juvenile prisons hold prisoners who are less than twenty years of age.

③ Jails hold detainees on trial or appeal.

④ The name, location, organization, and capacity of prisons, juvenile prisons, and jails are determined by presidential decree.

Article 3 (exceptions to segregation)

① Prisons or juvenile prisons may create a detainee section to hold detainees on trial or appeal.

② Jails may hold prisoners needed for cooking and other activities.

③ The directors of prisons, juvenile prisons, and jails may decide to hold prisoners that need be transferred to other prisons or juvenile prisons pursuant to Article 2 for a period not exceeding six months under special circumstances.

④ In the case of Section 3, prisoners, detainees on trial or appeal, adults, and minors are held separately.

Article 6 (petition)

① Prisoners, upon objecting to their treatment, may petition the Minister of Justice or the visiting inspector.

② Prisoners, in petitioning the Minister of Justice, must state their objections in writing and submit the petition to the director. Correction officers must not open the petition.

③ A petition to the visiting inspector may be made in writing or orally. The inspector must not allow correction officers to attend the hearing of the oral petition.

④ The decision on the petition shall be made in writing and shall be promptly delivered by the director to the petitioner.

Article 20 (provisions)

① Prisoners shall be provided clothing and bedding.

② The matters about provision of clothing and bedding shall be determined by presidential decree.

Article 22 (self-payment)

① Prisoners may be allowed to pay for their own clothing, bedding, and food.

② The matters about self-payment for clothing, bedding, and food shall be determined by presidential decree.

Criminal Administration Act Enforcement Decree

Article 73 (clothing)

① Clothing and bedding provided under Article 20 must be suitable for maintenance of the prisoners' health.

② The types, colors, sizes, and other necessary matters about the clothing and bedding shall be determined by ministerial decrees of the Ministry of Justice.

Article 85 (approval for self-payment)

① The director may allow the prisoners to use the clothing (except the outer clothing), bedding, and other living items that they paid for themselves.

②The types and quantities of the self-paid living items in Section 1 are determined by the director.

Article 86 (types of self-paid clothing)

The self-paid clothing and bedding shall be suitable for season and sanitation, and do not interfere with the order of the prison.

Related precedents

1. 4 KCCR 51, 91Hun-Ma111, January 28, 1992
2. 7-2 KCCR 94, 92Hun-Ma144, July 21, 1995
   10-2 KCCR 637, 98Hun-Ma4, October 29, 1998
3. 7-2 KCCR 94, 92Hun-Ma144, July 21, 1995
   10-2 KCCR 637, 98Hun-Ma4, October 29, 1998
4. 4 KCCR 51, 91Hun-Ma111, January 28, 1992
   9-2 KCCR 806, 95Hun-Ma247, December 24, 1997

Parties

Complainants

1. Kang Gi-hyun (97Hun-Ma137)
2. Suh Joon-sik (98Hun-Ma5)

   Counsel: Legal Corporation Duksoo
   Attorney in charge: Kim Chang-kook and 5 others

Respondents

1. Director of the Sungdong Jail (97Hun-Ma137)
2. Director of the Youngdungpo Jail (98Hun-Ma5)

Holding

1. Respondent Director of the Sungdong Jail forced Complainant Kang Gi-hyun between 1997. 3. 28 and 5. 8 of the same year, and Respondent Director of the Youngdungpo Jail forced Complainant Suh Joon-sik, respectively, to wear jail uniforms during investigation and trial. Their conduct violates the principle of presumption of innocence,

the complainants' right to personality, their right to pursue happiness, and their right to fair trial.

2. Other claims of the complainants are rejected.

Reasoning

1. Overview of the case and the subject matter of review

A. Overview of the case

(1) Complainant Kang Gi-hyun was confined at the Sungdong Jail on March 28, 1997 for damage to public use buildings and violence, and indicted on April 4 at the Eastern Branch of the Seoul District Court (97Ko-Dan778).

Respondent Director of the Sungdong Jail required the complainant to wear an inmate's uniform both in confinement and during investigation or trial (The uniforms include government-provided uniforms and self-paid clothes permitted by the Minister of Justice). The complainant filed a constitutional complaint on May 8 of the same year, arguing that the respondent's act of prohibiting the petitioner from wearing his plain clothes and forcing him to wear an inmate uniform violated the Article 10 human dignity and worth and the right to pursuit of happiness and the Article 27 (4) presumption of innocence. The complainant was released on May 8 of the same year after being sentenced to one year of imprisonment with suspension of the sentence for three years.

(2) Complainant Suh Joon-sik was confined at the Youngdungpo Jail on November 12, 1997 for a National Security Act violation, and was indicted on the 28th of the month at the Western Branch of the Seoul District Court (97Ko-Hap269).

Respondent Director of the Youngdungpo Jail required the complainant to wear an inmate' uniform both in confinement and during investigation or trial. The complainant filed a constitutional complaint on January 3, 1998, arguing that the respondent's act of prohibiting the petitioner from wearing his plain clothes and forcing him to wear an inmate uniform violated the Article 10 human dignity and worth and the right to pursuit of happiness and the Article 27 (4) presumption of innocence. The complainant was released on bail on February 5 of the same year.

B. Subject matter of review

Whether the act of prohibiting Complainant Kang Gi-hyun held at the Sungdong Jail between March 28 and May 8, 1997 (97Hun-Ma137) and Complainant Suh Joon Sik held at the Youngdungpo Jail between November 11, 1997 and Febrary 5, 1998 (98Hun-Ma5), from wearing their plain clothes and forcing them to wear inmate's uniforms during confinement, investigation, and trial (the "instant act", hereafter) violated their basic rights.

2. Complainants' arguments and the opinions of interested parties

A. Complainants' arguments in summary

Jail directors' act of forcing detainees on trial or appeal to wear inmate uniforms during the investigation or the trial makes the detainees suffer from a feeling of insult and shame and thereby interferes with exercise of their right of self-defense. The instant act violates the complainants' rights to human dignity and worth, pursuit of happiness, and presumption of innocence.

B. Respondents' and Justice Minister's opinions

(1) Complainant Kang was released on suspended sentence on May 8, 1997 (97Hun-Ma137) and Complainant Suh was released on bail on February 5, 1998 (98Hun-Ma5). Therefore, there is no interest in deciding whether their rights were violated. The instant act can also be remedied through the petition under Article 6 of the Criminal Administration Act, administrative review, or judicial review of administrative action at ordinary courts. The constitutional complaint, not preceded by these procedures, violates the requirement of prior exhaustion.

(2) Detainees on trial or appeal may escape or destroy evidence. Once they are detained, they must live in a group setting. Any conduct threatening the purpose of confinement or the collective living must be restricted to an extent.

The Criminal Administration Act or its Enforcement Decree allow the detainees on trial or appeal to wear government-provided clothes or self-paid clothes. Self-paid clothes must be appropriate for season and sanitation, and must not disrupt the order of the prison. Their clothes are colored mud yellow which is the symbolic color of korean natural country-side, differently from those of prisoners. Self-paid

clothes are also diverse in types and come in better forms and colors.

In shortage of detention facilities and personnel, allowing the detainees to wear plain clothes is problematic. If the detainees appear at trial in their plain clothes, they will feel a stronger urge to escape. If self-paid clothes are not limited, the difference in the inmates' wealth will cause a feeling of alienation among them and may lead to stealing of expensive clothes. Clothes may secretly carry a message used in destruction of evidence, drug, and weapons, defeating the detaining purpose of preventing destruction of evidence and threatening the safety and order of the correctional facility.

3. Review

A. Legal prerequisites

(1) When the petitioners were released on suspended sentence or bail, their subjective, justiciable interest in seeking review of the instant act evaporated.

However, constitutional complaint has not only a subjective function of providing relief but also an objective function of defending and maintaining the constitutional order. Even if the subjective justiciable interest evaporated during the review, when the infringement on the basic rights is likely to repeat and its resolution has an important meaning for the defense and maintenance of the constitutional order, our Court has by precedent recognized the justiciable interest. The instant act falls under the precedents and can be reviewed (4 KCCR 51, 56, 91Hun-Ma111, January 28, 1992)

(2) Article 6 of the Constitution provides, "prisoners or detainees on trial or appeal ("inmates", hereafter) may object to their treatment and petition the Justice Minister or the visiting inspector." However, the petition process under the Criminal Administration Act is insufficient and indirect in light of the administering body, process, and binding force, and cannot be considered one of the prior remedies that must be exhausted before the filing of a constitutional complaint (10-2 KCCR 637, 644, 98Hun-Ma4, October 29, 1998). The instant act is a *de facto* exercise of power, which is difficult to challenge in administrative review or ordinary courts' judicial review, and is likely to be denied as having any justiciable interest in those procedures. Since there is no other effective venue for relief than constitutional complaint, an exception to the requirement of prior exhaustion is recognized (7-2 KCCR 94, 102, 92Hun-Ma144, July 21, 1995)

B. Review on merits

(1) A judge shall issue an arrest warrant when there is a concern that a suspect or a defendant either does not have a stable residence or may escape or destroy evidence (Article 70, 201 of the Criminal Procedure Act). When the warrant is executed, the custody is turned over to prisons, juvenile prisons, or jails as that of a detainee on trial or appeal (Articles 1, 2, and 3 of the Criminal Administration Act). As the detainees are forced into collective living in an isolated facility, it is unavoidable to restrict freedom of action for the purpose of detention. However, basic rights may be restricted only to the extent necessary for national security, public order, or public welfare under Article 37 (2) of the Constitution, and may not be restricted on their essential contents.

Therefore, the restriction on the detainees on trial or appeal who are presumed innocent must not depart from the minimum, reasonable extent necessary for the purpose of the detention, namely, preventing escape and destruction of evidence and maintaining institutional order and safety. The limit of such restriction is set by weighing the contents and features of the concrete right or liberty, and the form and extent of the restriction under Article 37 (2) of the Constitution.

Concerning the rights of detainees on trial or appeal, the Constitutional Court has invalidated correction officers' attendance in attorney visits (4 KCCR 51, 91Hun-Ma111, January 28, 1992) and transportation of the detainees to prisons after receiving a judgment of not guilty (9-2 KCCR 806, 95Hun-Ma247, December 24, 1997) and has upheld censorship of letters (7-2 KCCR 94, 92Hun-Ma144, July 21, 1995) and partial deletion of newspaper articles (10-2 KCCR 637, 98Hun-Ma4, October 29, 1998) as the minimum restriction necessary for accomplishing the purpose of detention.

This case is concerned with whether the act of forcing the detainees on trial of appeal to wear prisoner's uniform is unconstitutional.

(2) All detainees on trial or appeal must wear government-provided uniforms but, upon the director's approval, may choose from self-paid clothes. Self-paid clothes must be appropriate for season and sanitation and must not threaten the order of the facility (Articles 20, 22 of the Criminal Procedure Act; Articles 72, 85 of its Enforcement Decree).

According to the Detainees' Clothes Improvement Plan (Ministry of Justice Rules, Work No. 61440-73, 95.5.27), self-paid clothes are more diverse in color than government provisions but they are standardized as the latter except addition of jackets. The colors distin-

guish prisoners and detainees, and men and women. The detainees on trial or appeal may choose from self-paid clothes permitted under the Rules of the Ministry of Justice but may not wear any plain clothe.

(A) The complainant detainees wore inmate's uniforms both inside the jail and during investigation or trial.

However, there is a difference between when they are inside the jail and when they are appearing in court or being investigated.

1) Firstly, we examine whether the ban on plain clothing does not depart from the limit of the restriction necessary for the detaining purpose or maintenance of the order and safety.

The detainees, prevented from wearing plain clothes and forced to wear inmate uniforms, will feel insulted and ashamed. Their free manifestation of individual personality is suppressed, and their human dignity and worth infringed.

However, inside the jails, the uniforms are not seen by the public and do not interfere with the detainees' right to explain or defend themselves. The detainees wearing plain clothing will be indistinguishable from visitors. Repair, washing, or seasonal change of the clothing may be a route for conspiring destruction of evidence or escape or a conduit for weapons, tobacco, drugs, and other contrabands. The detainees' social status and wealth may be shown through plain clothing, leading to a feeling of alienation and possibly a fight among them.

Therefore, requiring the detainees to wear inmate uniforms inside the facility is the restriction minimum necessary for accomplishing the detaining purpose and maintaining the institutional order and safety and is a just and reasonable measure within the scope of discretion.

2) Next, we examine whether banning plain clothing outside the jail and during investigation or trial departs from the limit of the restriction aimed at accomplishing the detaining purpose and maintaining the institutional order and safety.

When the detainees investigated or tried for serious crimes step out of the jail in plain clothes, they may have an urge to escape, and when they do, it is difficult to stop or catch them because they are hard to distinguish from others. It is a necessary and useful measure of accident prevention that inmate uniforms are worn during trial or investigation.

However, when the detainees wearing inmate uniforms are exposed to the public, they feel ashamed and insulted. The detainees need be guaranteed their right to be notified, explain or defend during trial or investigation. The detainees whose guilt is not established

may be psychologically hampered by the uniform. Hence the discovery of substantive truth is undermined.

Even if we are relatively short on human and physical resources for correction, prevention of escape should be achieved by use of instruments or additional guards. Prohibiting them to wear plain clothes during a trial or an investigation, where the need for protection of basic rights is compelling, violates the principle of proportionality in Article 37 (2) of the Constitution.

Therefore, forcing the detainees to wear inmate uniforms violates the presumption of innocence, the rights to personality and pursuit of happiness derived from human dignity and worth, and the right to fair trial (The 1955 UN Crime Prevention and Criminals' Treatment Conference adopted 'the Standard Minimum Rules for the Treatment of Prisoners, which states in its Article 84 (2) that 'detainees who have not been found guilty are presumed innocent and treated accordingly.' Its Article 17 (3) states, even detainees not allowed to wear plain clothes inside the facility shall be 'allowed to wear their own clothes or other indistinguishing clothes when they leave the facility for a legitimate purpose.')

(B) After this case was docketed in the Constitutional Court, the Ministry of Justice drafted a new guideline on March 4, 1999 whereby detainees on investigation or trial can appear in plain clothes. Between April and June 1999, the new guideline was used in five demonstration sites in Seoul, Ulsan, Kunsan, Hongsung, and Kangrung, and was being planned to be extended nationally in July of the same year.

4. Conclusion

The portion of the instant act, which required the detainees on trial or appeal to wear inmate uniforms during the trial or investigation, violates the presumption of innocence and the complainants' right to personality, pursuit of happiness, and fair trial, and therefore should be withdrawn. The claim about the other portion of that act, which required wearing of inmate uniforms inside the facility, is without basis and denied. Since the act has been already completed, we find the act unconstitutional and declare so by a unanimous decision of all Justices.

Justices Kim Yong-joon (Presiding Justice), Kim Moon-hee, Lee Jae-hwa, Cho Seung-hyung, Chung Kyung-sik, Koh Joong-suk, Shin Chang-on, Lee Young-mo (Assigned Justice), Han Dae-hyun

Ⅱ. Summaries of Opinions

1. *Family Ritual Standards Act* case
(10-2 KCCR 586, 98Hun-Ma168, October 15, 1998)

A. Background of the case

In this case, the Constitutional Court invalidated the limitation on service of meals under the Family Ritual Standards Act on the ground that it violated the requirement of clarity[1] under the principle of *nulla poena sine lege*, infringing on people's general freedom of action.

The Family Ritual standards Act[2] was passed by an emergency cabinet when the legislature was disbanded. The Act had suppressed excessive wastes and vanities in family rituals, but had also been criticized for subjecting to criminal punishment an area otherwise reserved for ethics and custom and also for being ineffective.

Article 4 of the Act, titled 'prohibition of wasteful etiquette and vain rituals', bans in Item 1 various family ritual activities except those specified by presidential decrees. Then, Sub-item 7 of Item 1 bans serving of alcoholic beverage and meals during festivities and funerals. The regulation of the Act permitted only 'modest servings of alcoholic beverage and meals at home or ordinary restaurants (hotels excluded).'

The complainant was a groom about to wed on October 17, 1998, and filed a constitutional complaint on May 29, 1998, on the ground that the ban on serving of meals to the guests at wedding ceremonies under the above provision violated the right to pursuit of happiness.

B. Summary of the decision

The Court narrowed the scope of adjudication as applied only to festivities but also broadened it to include Article 15 (1) (i).

The Court unanimously ruled that the provision restricted the complainant's general freedom of action and violated the requirement of clarity under the principle of *nulla poena sine lege* as follows:

The practice of serving alcoholic beverage and meals to one's

1). The American counterpart to this requirement is the rule of 'void-for-vagueness.' This requirement applies especially stringently to criminal laws.

2). Promulgated on March 13, 1973; formerly, the Family Ritual Guidelines Act promulgated on January 16, 1969.

guests at his or her wedding ceremony has long been common part of the social life of the mankind and belongs to the domain of an individual's general freedom of action and it should be protected by the Article 10 right to pursuit of happiness.

The provision, while generally banning serving of alcoholic beverage and meals, enables presidential decrees to provide for exceptions. Then, the statute must be sufficiently clear so that ordinary people can easily predict what the enjoined conduct is.

The elements of crime under this statute are determined inversely by the presidential decrees that specify the permitted conduct, the scope of which must be 'reasonable in light of the true meaning of family etiquette and rituals' according to the statute. Therefore, the rule of clarity is satisfied by whether the statutory phrase allows sufficient inference on the overall extent of the presidential decree. The concept of 'the true meaning of family etiquette and rituals' does not allow people to predict how one can treat the guests at the wedding ceremonies and the sixtieth birthday parties[3] in accordance to that 'true meaning.' In our tradition, a wedding is a very generous festivity. It is such an important event for one that he or she is expected to make it extravagant even if it requires exceeding his or her budget. The records show diverse understandings which people have of the provision. 'The true meaning of family etiquette and rituals' is not easily discernible to people.

Also, the overall meaning of 'reasonable scope', when applied to family etiquette and rituals, is not easy to predict. The subject matter also belongs to the realm of custom and localities and can not be easily reconcilable with the Western concept of 'reasonableness.' Alcoholic beverage and food items vary widely in quantity, quality, and price and are therefore not conducive to setting of any scope. The regulatory history around past presidential decrees also does not make the prediction any easier.

In the end, the concept of 'reasonable scope in light of the true meaning of family etiquette and rituals' is not sufficiently predictable in overall content to be used as a guide for one's action. It is dangerously conducive to arbitrary action of those administering the law. The provision violates the requirement of clarity under the principle of *nulla poena sine lege*, and violates people's general freedom of action.

C. Aftermath of the case

The major media noted the statute to be unrealistic and therefore

3). In Korea, the sixtieth birthday is a specially celebrated event.

fossilized and found total revision necessary. They interpreted the decision as a resolution that service of meals during festivities should be determined by people on their own, rather than regulated by law. Although the decision, striking down the provision, brought about the effect of meals being served at high class hotels, the side effect also mentioned by the media, they valued the decision as a shift from the 'law-as-panacea' approach whereby even daily lives are regulated by law to people's autonomy.

The decision was aimed at review of one provision under the clarity requirement but resulted in repeal of the entire statute. The succeeding Act on Family Rite Establishment and Related Assistance[4] does not provide for any criminal punishment and instead provides for the establishment of 'Family Etiquette and Rituals Review Committee', the role of which is to promote sound family etiquette and rituals by recommending appropriate guidelines. Accordingly, the Sound Family Etiquette and Rituals Guidelines (Presidential Decree No. 16544) provide for the basic procedures for adulthood ceremonies, weddings, funerals, and commemoratives.

2. *Water Quality Improvement Contribution Fee* case (10-2 KCCR 819, 98Hun-Ka1, December 24, 1998)

A. Background of the case

In this decision, the Court upheld the former Drinking Water Management Act which levied the Water Quality Improvement Contribution Fee in the amount of up to 20% of the sales of drinking water.

The former Drinking Water Management Act[5] authorized, in Article 28 (1), the Minister of Environment to levy upon drinking water producers at a rate set by presidential decree up to 20% of their total revenue in order to protect public underground water resources and promote private contribution to the improvement of drinking water. The regulation of that Act sets the rate at the maximum 20%.

The complainant drinking water producers sought annulment of the assessment of the Water Quality Improvement Contribution Fee in the Seoul High Court, and made a motion for constitutional review of the above Act, which was granted by the presiding court.

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4). 1999. 2. 8, Act No. 5837.

5). Enacted on 1995. 1. 5 by Act No. 4908, prior to the 1997. 8. 28 revision by Act No. 5394.

B. Summary of the decision

The Constitutional Court unanimously upheld Article 28 (1) of the former Drinking Water Management Act.

The Court first spoke on the nature of the Water Quality Improvement Contribution Fee and its constitutional limits as follows:

The Water Quality Improvement Contribution Fee is a non-taxation obligation imposed for a special administrative purpose on those groups specially interested in the accomplishment of that purpose. The fee imposes financial burdens on drinking water producers, thereby indirectly suppressing those entrepreneurial activities that exploit and dissipate underground water resources, and at the same time finances another environmental policy of bettering the quality of tap water. It is substantively a contribution to the environment and functionally a financial inducement geared toward certain policy goals.

The state cannot impose the unlimited obligations of this nature, which will jeopardize people's economic liberties and property rights. Those obligations must abide by the principle of equality or proportionality and other basic limits on restriction of basic rights, and be imposed only on those groups related to the social or economic task at hand so specially and intimately as to justify such extra-taxation measure. The contributions thus collected must be separately managed and spent for the accomplishment of that special task and not be included in the general treasury.

The provision does not violate the principle of equality or proportionality.

Drinking spring water is used for drinking in competition with or in lieu of tap water. Popularization of spring water will undermine the state's policy to improve tap water. Where the majority uses tap water for drinking, forfeiture or failure of that policy will increase people's expenses for drinking water. In light of these and other circumstances, selective imposition of the Water Quality Improvement Contribution Fee on the spring water distillers and not on other beverage manufacturers who also use underground water has a reasonable basis and does not violate the principle of equality.

The Constitution, in Articles 35 (1), 120 (1) and (2), grants the state the powerful regulatory authority for conservation of natural resources and the environment. Here, spring water manufacturers are identified as posing a special danger to pursuit of the policy to conserve underground water and promote use of tap water. Therefore, it is an appropriate means to the legislative end to impose the Water Quality Improvement Contribution Fee on them and use the revenue under a special account for improving the quality of tap water and

other environmental purposes. Underground water is a limited public good and the water resource of the last resort that we must pass down to future generations. It is constitutionally permissible to impose the Fee on the spring water manufacturers profiteering off the underground water even at a substantially high rate. The fact that the state exacts up to 20% of the total sales while permitting the business itself is neither clearly arbitrarily or excessive.

C. Aftermath of the case

The decision was significant in light of the growing number of 'special contribution fees' that, unlike the traditional tax-like impositions, are imposed for pursuit of a certain policy task and only on a special group intimately and specially related to that task. It recognized the necessity of such impositions for the efficient administration of various policies and yet established a constitutional limit on them from the perspectives of people's economic freedom and property.

After the decision, the Court on January 28, 1999 reviewed upon request Article 17 of the Korea Transportation Safety Authority Act[6] that assessed a contribution fee on surface, ocean, and air common carriers. The Court characterized the fee as a special contribution fee, which is aimed at financing traffic safety projects, and invalidated the concerned provision for effecting a blanket delegation to presidential decrees.[7] Later, the Court also reviewed the television broadcast reception fee imposed only on the television owners under Article 35 of the Korean Broadcasting System Act[8] and the tourism promotion and development fund fee imposed only on the casino operators under Article 10-4 (1) of the former Tourism Promotion Act[9], and characterized both as special contribution fees.

3. *Overseas Citizens Voting Rights Ban* case (11-1 KCCR 54, 97Hun-Ma253, January 28, 1999)

A. Background of the case

In this case, the Court upheld Article 37 (1) of the Act on the Election of Public Officials and the Prevention of Election Malprac-

6). Revised 1990. 8. 1 by Act No. 4254.

7). 11 KCCR 1, 97Hun-Ka8, Jan. 28, 1999.

8). 11-1 KCCR 633, 98Hun-Ba70, May 27, 1999.

9). 11-2 KCCR 433, 97Hun-Ba84, Oct. 21, 1999.

tices[10] that specified certain residential requirements for voting and thereby denied Korean citizens living overseas the right to vote. The complainants are Korean citizens above twenty years of age who are living in Japan. When they could not vote in the December 18, 1997 presidential election due to lack of voting provisions for overseas Koreans, they filed a constitutional complaint against the above provision.

B. Summary of the decision

The Court unanimously upheld Article 37 (1) of the Act on the Election of Public Officials and the Prevention of Election Malpractices as follows:

It is needed to impose residential requirements on voting rights in order to protect the essential content of the voting right, the fairness in voting, and other public interests. Such requirements may effectively deny overseas citizens the right to vote. However, it is unrealistic to recognize the voting rights of North Korean citizens or other Japanese residents participating in the pro-North Chosun Federation (*'jo-chong-ryeon'*) when the nation remains divided. It is difficult to assure the fairness in voting once it is open to overseas citizens. Also, it is practically impossible to deliver the election and candidate information, campaign, and send ballots to all overseas residents, and retrieve them within the statutory election period. Furthermore, the right to vote is correlated to the duty to pay tax and serve in the military, and overseas residents have not performed these duties.

Therefore, the restriction on overseas residents' voting rights is not only aimed at legitimate legislative purposes but also balances well the public interest served and the basic rights infringed by it. It is also an appropriate means to accomplish the end.

It will be ideal to grant all overseas residents voting rights and thereby promote their national pride as Korean citizens, elevate their love of the country, and generate in their daily lives keener interest in the fate of the country. This issue of an ideal is different from the question of whether a restriction on voting rights necessarily violates the Constitution. Even if it is undesirable to deny overseas residents the voting rights, as long as there is a reasonable basis, such denial is not excessive restriction on basic rights. Therefore, the above provision does not depart from the Article 37 (2) limit on restriction on basic rights.

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10). Revised 1994. 12. 22 by Act No. 4796.

C. Aftermath of the case

Some commented that making overseas residents' voting rights contingent on their national values or level of national awareness is like putting a cart before the horse. They reasoned that the fairness in voting can be obtained by the government's efforts and the technical problems can be overcome through the advanced means of communication. To them, it was proper to recognize their voting rights in order to help them attain national identities.

After this decision, the Court also reviewed Article 38 (1) of the same Act that denied the absentee voting of study-abroad students and overseas representatives of Korean companies[11] and upheld it on the ground that overseas absent ballots are costly and difficult to administer fairly. The Court also reasoned that, unlike domestic absentee voters, the above groups are responsible for their absence, and finally that the absentee voting is merely an administrative amenity made available to the voters, and its lack does not deny the voting right itself. Therefore, the issue is subject to legislative discretion.[12]

4. *High Class Entertainment Facility Enhanced Assessment* case
(11-1 KCCR 158, 98Hun-Ka11, March 25, 1999)

A. Background of the case

In this case, the Court invalidated the Local Tax Act provisions that imposed enhanced property taxes on "high class entertainment facilities" and enhanced land taxes on "land used for luxurious purposes" on the ground that they violated the principle of *statutory taxation* and the ban on blanket delegation.

The complainant sought annulment of the enhanced taxes imposed on his properties in a court and requested constitutional review, which the presiding courts granted.

The Constitutional court had already invalidated Article 112 (2) of the former Local Tax Act that imposed acquisition taxes enhanced 75% above the normal rate on "high class dwelling and entertain-

11). They are different from *overseas residents* who established permanent residence overseas. Essentially, study-abroad students and overseas branch representatives, for all purposes, retain their permanent residence in Korea. The question reviewed here is whether they can vote through absent ballots if the election takes place while they are at overseas locations.

12). 11-1 KCCR 218, 97Hun-Ma99, Mar. 25, 1999.

ment facilities designated by presidential decrees" on the ground that the statutory phrase constitutes blanket delegation.[13)]

B. Summary of the decision

The Court invalidated the Local Tax Act provisions in the following majority opinion of seven justices:

Article 188 (1) (ii) (B) of the Local Tax Act heightens the property tax rate to 5% for "high class entertainment facilities" and Article 234-16 (3) (ii) of the same Act heightens the comprehensive land tax rate to 5% for "land used for luxurious purposes."[14)] The quoted statutory phrases are too abstract and vague to predict their subject matters. The legislative history and purposes of the Act do not permit reasonable and objective prediction of the extensions of such concepts as "high class entertainment facilities" or "luxurious properties". There is a danger of arbitrary interpretation and administration of the provisions by the administrative body imposing the taxes. Hence violation of the principle of *statutory taxation* under Articles 38 and 59 of the Constitution.

Also, the enhancement applies to those 'high class entertainment facilities' and 'land used for luxurious purposes' that are 'designated by presidential decrees.' Despite the centrality of the two concepts to the elements of taxation, Articles 188 (3) and 234-15 (2) (v) leave their extensions undefined to 'presidential decrees', thereby leaving the enhanced taxation to administrative whim. The legislative purposes, other Local Tax Act provisions and other related statutes do not facilitate the prediction, either. Hence violation of the ban against blanket delegation of legislation in Article 75 of the Constitution.

Justices Chung Kyung-sik and Lee Young-mo concurred with the majority that the provisions are unconstitutional, but advocated for a decision of nonconformity that would allow the National Assembly with legislative-formative power to revise the luxury taxes comprehensively and systematically in conjunction with other tax or related laws.

C. Aftermath of the case

Before the Court announced the decision, the National Assembly revised "high class entertainment facilities" in Article 188 (1) (ii) (B) to "gambling, drinking, and specialty bath facilities and other facilities

13). 10-2 KCCR 172, 96Hun-Ba52, July 16, 1998.
14). Prior to revision on 1998. 12. 31 by Act No. 5615.

used for similar purposes that are designated by presidential decrees and the auxiliary properties", and also replaced land used for luxurious purposes in Article 234-15 (2) (v) to "high class entertainment facility designated by presidential decrees under Article 112 (2) (iv)" and "auxiliary properties of an area exceeding the standard area established by presidential decrees, which are auxiliary to residential properties, under Article 188 (1) (ii) (A)".[15]

5. *Competence dispute provisional order* case (11-1 KCCR 264, 98Hun-Sa98, March 25, 1999)

A. Background of the case

In this case, the Court granted a plaintiff's motion for an order staying the respondent Kyung-gi Province governor's administrative action, pending the final judgment.

The City of Sung-nam denied a private third party its application to be designated the contractor for the planned construction of a practice golf course inside Seo-hyun Park. The applicant sought administrative review of the denial. At the review, the governor of Kyung-gi Province cancelled the denial and compelled the city to grant and approve the contract.

When the mayor of Sung-nam disobeyed the administrative order, the governor of Kyung-gi Province issued a direct order, pursuant to Article 37 (2) of Administrative Adjudication Act, allowing the third party contractor to proceed with the construction of the practice golf course and the access road both in and outside the park. As a preliminary step to approve construction of the access road *outside* the park, the Kyung-gi governor also set up a new city development plan as to the public property outside the park.

The plaintiff City of Sung-Nam filed a competence dispute (98 Hun-Ra4) against such portion of the Kyung-gi Governor's direct order as applicable to the area designated for the construction of the *outside* access road. At the same time, the plaintiff sought a provisional order staying the Kyung-gi Governor's direct order until the final judgment on the underlying competence dispute, arguing that construction of the access road during the review on the competence dispute will cause irreparable damage to the plaintiff's authority.

15). 1998. 12. 31, Act No. 5615.

B. Summary of the decision

The Constitutional Court granted the provisional order after explaining the requirements for a provisional order as follows:

A provisional restraining order in a competence dispute proceeding is granted when there is a urgent need to prevent irreparable damage due to the respondent entity's pending action or any other compelling reason of public welfare by staying the pending action. Also, unless the underlying competence dispute is legally inadequate or clearly lacks a basis, the Court must weigh the probable harm caused by granting the provisional order and later rejecting the main litigation against the probable harm caused by rejecting the provisional order and later accepting the main litigation. The Court can grant the order only when the second harm is greater than the first one.

In this case, if the Court now grants the City a provisional order staying the governor's direct order and thereby enjoins construction of the practice golf course but ultimately rejects the City's main litigation, the only resulting harm is a delay in the construction which will inconvenience prospective users of the planned golf course. If the Court now rejects the City's motion for provisional order but later ends up accepting its main litigation, the construction will proceed pursuant to the respondent agency's direct order, and cause disruption in traffic and damages to public properties and necessitate restoration costs. In weighing the two harms, there is substantial reason to grant the motion.

C. Aftermath of the case

In this case, the Court for the first time granted a provisional order. The decision concerned a competence dispute but opened a way for using it in other proceedings such as constitutional complaints. It was a step forward in obtaining the binding force of constitutional adjudication and remedying infringement on people's rights.

The Court ruled on the main litigation as follows:

The holding of Kyung-gi governor's administrative order concerned only the practice golf course and did not provide for any access road. Therefore, the City of Sung-nam did not have any duty to approve any contractor for the access road. Accordingly, the Kyung-gi governor's direct order, issued for reason of the City's dereliction of duty pursuant to Article 37 (2) of Administrative Adjudication Act, is void as to the access road. On the other hand, the City's petition as to the making and modification of the devel-

opment plan was dismissed for expiration of the filing period and for not falling under the City's authority, respectively.

6. *Residential Property Ownership Ceiling* case (11-1 KCCR 289, 94Hun-Ba37, April 29, 1999)

A. Background of the case

In this case, the Court invalidated, as a whole, the Ceilings on the Ownership of Housing Sites Act as a whole for limiting individuals' housing sites ownership and prohibiting such ownership entirely for corporations.

Traditionally, the people of our country have lived in a family-centered agrarian society and had strong preference for land ownership. The shortage in usable land, relative to the national population, caused an imbalance in supply and demand. Rapid industrialization and urbanization, and the resulting increase in urban population, caused constant increase in urban land prices. Businesses and individuals developed a tendency to own more land than needed for their production or residence and use the surplus land to increase wealth. Under these circumstances, the constant increase in land prices, the vicious cycle around land speculation, and the resulting distortion in wealth distribution prompted a discussion of a remedy. In 1989, the so-called concept of 'all land as public property' was actively discussed and legislated into the Land Excess-Profits Tax Act and the Restitution of Development Gains Act. Also, on December 30, 1989, the Ceilings on the Ownership of Housing Sites Act was passed, allowing people a landownership only up to the amount needed for their own use. However, due to the recent changes in social and economic circumstances, the Act was repealed in less than ten years on September 19, 1998.

The contents of the statutory provisions reviewed were as follows:

An individual cannot own any residential property above the limit established for each type of household (660 m^2 for Seoul). A corporation cannot own any residential property. Those individuals or corporations acquiring land in excess or violation of these rules, whether before or after the enactment of the Act, must dispose of, use, or develop the excess property within a certain period, or pay a fee. This case is consolidated from sixty seven cases in which the excess residential property owners sought cancellation of the assessment of excess residential property ownership fees and requested constitutional review of the Act. When denied by the presiding court, they

filed a constitutional complaint with the Court.

B. Summary of the decision

The Constitutional Court, in a majority decision of eight justices, struck down Article 7 (1) that set the ownership limit, Supplementary Rule 2 that imposed the same obligations on those who acquired the excess land before the enactment of the Act as on those who acquired after, and Article 24 (1) that set the excess residential property ownership fee, individually. The Court, then recognizing that invalidation of the above provisions would bring about the same result as invalidation of the entire Act, invalidated the entire Act. The summary of the decision follows:

The right to property protects material and economic conditions for one to shape his or her life according to his or her values and capacities. It is a material foundation for realization of freedom. Residential property is a shelter for an individual with human dignity and worth, a place where he realizes his right to pursuit of happiness and right to pleasant housing. Therefore, setting the ceiling on ownership too low is equivalent to excessive limitation on the scope of one's exercise of freedom. The statute does not distinguish ownership by the speculative or residential nature of its purposes and indiscriminately imposes the uniform ceiling of 660 square meter without any exception. It is a limitation excessive of the extent necessary for the legislative purpose of maintaining a sufficient supply of residential property. It is an unconstitutional violation of the constitutional right to property.

Also, extending the same uniform ceiling even to those who acquired the excess land before the enactment of the Act may be an unavoidable measure for the legislative purpose of suppressing land speculation and land prices and channeling land to those with actual demand. However, residential property is the place for one's pursuit of happiness and realization of his or her dignity. It should not be evaluated merely as the object of speculation. It should be protected more robustly by the right to property, which also should operate to protect people's confidence in law. In other words, a residential property varies in its social meaning according to the purpose of or the reasons for the acquisition. The uniform ceiling imposed on all instances of residential property ownership, regardless of the purpose of or the reasons for the acquisition, exceeds the extent necessary for the legislative purpose, violating the principle of equality and the principle of protection of confidence in law.

The statute also imposes the same 'use or sell' period on those who, before its enactment, acquired the excess land in reliance on the

status of the law at the time of the acquisition and those who, after its enactment, acquired the excess in full knowledge of the new statute with intent to use or sell in the requisite period. The length of the period, determined in consideration of those who knowingly acquired it after the enactment of the statute, is too short when applied equally to those who had acquired the excess land before the enactment unknowingly. Such indiscrimination violates the principle of proportionality. The length of the period is also uniformly applied to the property acquired for residential purposes and the property acquired for speculative purposes, in violation of the principle of equality.

The statute also assesses a high rate of fee. It is appropriate and necessary to impose the fee to enforce the ceiling. However, imposed for ten years, the fees can accumulate to 100% of the total value of the levied land. Setting the rate of the fees as high as 4-11% of the land value for unlimited periods is equivalent to allowing confiscation of the land in a short period of time. Such rule violates the inherent limit on social intervention into right to property.

Justice Lee Young-mo dissented, after finding the 660㎡ limit reasonable and necessary, finding no reason to exclude those using the excess property for one's own residential purposes, and also finding the two year grace period and the rate of the fee adequate under the principle of equality and the right to property.

C. Aftermath of the case

The Ceilings on the Ownership of Housing Sites Act was one of the 'all land as public property' statutes enacted in 1989 to suppress the then wayward land speculation, and was subject to a constant debate on its constitutionality until it was finally repealed in 1998. When the Korean economy entered the crisis punctuated by receipt of the relief fund of International Monetary Fund, and the danger of land speculation and that of increase in land prices was substantially reduced, the above Act and the Land Excess-Profits Tax Act were repealed, leaving only the one Restitution of Development Gains Act out of the original three statutes passed under the concept of 'all land as public property.'

The decision stands as a refrain that, although the state can regulate individuals' residential property ownership, the regulation should take into account the varying social meaning of the subject property according to the purpose of and the reasons for its acquisition. Also, the property acquired before the enactment of the statute should be protected more stoutly by the 'protection of confidence in law' component of the right to property.

However, the decision was handed down six years after the complaint was filed and half a year after the statute was repealed. Those who had not objected to the assessment of the fees could not benefit from this decision. Hence a criticism that "earnest taxpayers suffered from the Constitutional Court's overdue decision." Some of them even challenged Article 75(7) of the Constitutional Court Act that banned the retroactive effect of a decision of unconstitutionality.

7. *Television Broadcast Receipt Fee* case (11-1 KCCR 633, 98Hun-Ba70, May 27, 1999)

A. Background of the case

In this case, the Court reviewed Article 36 (1) of the Korean Broadcasting System Act that allowed the board of the Korean Broadcasting System (hereafter, KBS) to set the amount of the broadcast receipt fee without any resolution or intervention of the National Assembly but merely by obtaining the approval of the Minister of Public Information, and found it nonconforming to the constitutional principle of *statutory reservation*.

The complainant sought in a court cancellation of the broadcast receipt fee and requested constitutional review of Article 35 and other provisions of the Korean Broadcasting System Act for reasons of violation of the principle of *statutory taxation*. When denied, he filed a constitutional complaint with the Court.

B. Summary of the decision

The Court first found Article 36 (1) of the Korean Broadcasting System Act unconstitutional but held it nonconforming, citing the problems that may arise from a simple decision of unconstitutionality:

One of the basic principles of the Constitution is the rule of law. The rule of law centers around the principle of *statutory reservation*. Today, it is insufficient to require all administrative actions limiting people's liberties and rights or imposing obligations to be merely based on a statute (statutory reservation)[16]. The principle requires that all essential issues having fundamental significance to people, and especially those concerning the realization of their basic rights, be decided by the legislature itself (parliamentary reservation).[17]

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16). The idea is that those state acts that impose duties or restrict rights must be based on statute.

17). The idea here is that all state acts concerning basic rights need be decided

The television broadcast receipt fee is aimed at creating financial resources for the specific public utility, i.e. publicly managed broadcasting. It is a special contribution fee imposed only on those who own television sets. Its imposition and collection is an administrative act that limits people's right to property. The amount of the fee, together with the scope of the fee-payers, is an essential element, and directly affects the interest of the majority of the people. Also, television broadcasting is an indispensable element in freedom of press and realization of democracy and a deciding factor in formation of public opinions. It profoundly influences the development of political and social democracy. The receipt fee is the principal financial source for the KBS and therefore an essential and important issue to be decided in realizing the freedom of broadcasting.

Therefore, the amount of the fee must be determined by the legislature itself. Article 36 (1) delegates the determination entirely to the KBS and the Government, in violation of the principle of *statutory reservation*. However, a simple decision of unconstitutionality will cut off the revenue of KBS and threaten its existence, causing a social disruption and profoundly undermining people's right to know. Since collection of the fee is not in itself unconstitutional, temporary continuation of the fee collection does not cause major infringement on basic rights.

For this reason, the Court finds the provision nonconforming to the Constitution and requests the National Assembly to cure the defect expeditiously and leaves the provision effective until such revision.

C. Aftermath of the case

In this case, the Court departed from the position that infringing state actions merely require statutory bases and required that the National Assembly itself determine the essential issues in those areas directly related to realization of basic rights.

After this decision, the National Assembly consolidated the Broadcasting Act, the Composite Cable Broadcasting Act, the Management of Cable Broadcasting Act, and the Korean Broadcasting System Act into the new Broadcasting Act[18] and stated in its Article 65 that "the amount of the fee shall be set by the board and approved by the National Assembly."

by the legislature.

18). 2000. 1. 12, Act No. 6139

8. *Ban on Local Government Heads' Mid-term Candidacy* case
(11-1 KCCR 675, 98Hun-Ma214, May 27, 1999)

A. Background of the case

In this case, the Court reviewed the Act on the Election of Public Officials and the Prevention of Election Malpractices provision that banned mid-term candidacy of local government heads in elections for other offices, and invalidated it for violating the heads' rights to hold public offices. The Court in the same case upheld another provision of the same Act that limited publication and distribution of the literature publicizing the activities of local self-governing entities.

Article 53 (3) of the Act on the Election of Public Officials and the Prevention of Election Malpractices bars the heads of local self-governing entities from candidacy to presidential, national assembly, local assembly, and other local government elections during their regular terms even after they resign from their positions. Article 86 (3) of the same Act limits publication of each informative literature on the local self-governing entity's future plan or accomplishments to a single publication for one type of literature in each quarter, and entirely prohibits publication of such literature during 180 days preceding the election day. However, the provision allows unlimited informative publishing activities that are incidental to the regular operation of the local self-governing entity, geared toward obtaining the consensus of the interested local constituents for a public project, or aimed at resolution of grievances.

The complainants are twenty two district heads who were elected in the 1998 Local Self-Government Officials Election and began serving their four-year terms on July 1, 1998. They filed constitutional complaints on June 26, 1998, against Articles 53 (3) and 86 (3) of the Act.

B. Summary of the decision

The Court invalidated Article 53 (3) of the Act in the following majority opinion of seven justices:

The legislative purposes of the concerned provisions are to prevent 'disruption in administration' that will arise out of local government officials' candidacy in elections in the middle of their terms, and thereby promote the efficiency of local administration.

We, however, find the disruption in local administration caused

by the local self-government officials' mid-term candidacy not serious and remediable through alternative means such as pro-tems and vacancy elections.

We now review whether the provisions' limitation on the right to candidacy[19] is justified by the legislative purpose of promoting the fairness of elections. The Act already provides for other sufficient measures aimed at promotion of fairness. Especially, Article 53 (1) requires all prospective candidates to resign from their current positions at least sixty days before the day of the election. The comprehensive ban on candidacy in this case exceeds the extent necessary for accomplishment of the legislative purpose and therefore excessively limits the complainants' right to candidacy.

On the other hand, the harm of the restriction on the right to candidacy is extensive, and especially so on the realization of democracy. In principle, only when all people can register as candidates, and therefore voters are given the opportunity to choose from a multitude of candidates and platforms, the election can properly reflect the political judgment of the people and thereby obtain democratic legitimacy. Also, the limitation on the voters' right to choose candidates can constitute substantial limitation on the right to vote itself, and sometimes eliminate it. We find no reasonable basis for the instant limitation on the right to candidacy and find it unconstitutional for violating the principle of common election in limiting the complainants' right to candidacy.

Justices Kim Yong-joon and Chung Kyung-sik dissented, finding the statute constitutional to the extent of banning mid-term candidacy for congressional or local assembly elections in the same electoral district as the local government head's jurisdiction, and cited the possibility that the local government heads intending to run in the next election can obstruct its fairness with 'pork barrel' politics and administrative bias.

The Court upheld Article 86 (3) of the Act in the following unanimous decision:

State entities and local self-governing entities should not use their public functions to support or oppose a particular party or candidate. They especially should not influence voters' decisions through campaign activities. If they do so, it violates the state's duty of neutrality and the principle of equal opportunity. Biased intervention of a state entity in public officials' elections is not allowed even in form of informative publishing activities.

We first review the limitation on publication of informative liter-

19). One of the American counterparts to this terms is the access to ballot.

ature in the days *remote from* the day of election. Informative literature of a local self-governing entity, even if limited in content to the objective information on the future plan and past accomplishments of that entity needed for the local residents, may cause positive publicity for the head of that entity. The instant provision recognizes in principle that the local self-governing entity has the need to publicize its activities but at the same time that its frequent publicity on the entity's accomplishment will bring about favorable publicity for the head of that entity. Therefore, it limits such publication to once for each type of literature in each quarter.[20] It does not constitute excessive limitation on the local government heads' freedom of expression.

We now review the limitation on publication of informative literature in the days *close to* the day of election. The closer to the election, the greater influence the publicity will have on the outcome of the election. In those periods, local self-governing entities have a more important duty to permit formation of the political opinion of the local residents free of intervention of public authority than to publicize its accomplishments. The instant provision's ban on any 'self-glorifying' publication of informative literature is not an excessive limitation on freedom of expression where it allows informative publishing activities incidental to the regular operation of the local self-governing entity.

C. Aftermath of the case

The decision now allowed local government heads to register as candidates for other offices as long as they resign from their current offices sixty days before the day of election. As a result, the first election after this decision in April 2000 witnessed many mid-term candidacies by local government heads. Before this decision, about one hundred assemblymen in a rare act had submitted to the Court an amicus brief in favor of the provisions, arguing that a decision of unconstitutionality will "be blind to the reality of local self-governance and cause disruption due to the mid-term candidacies of local government heads." However, others in the political circles pointed out that "the provisions were self-interested legislations aimed at blocking the challenges of incumbent local government heads." There was a media report that "the provisions were enacted under the pressures of the party policies despite a strong suspicion of unconstitutionality. The decision should be accepted as a check on the incumbent assemblymen's abuse of the legislative power aimed at protection of their stake in the status quo."

20). Be careful to see that it is one publication of one type of literature in each period instead of one publication of each type of literature in each period.

9. *Letter of Condolence for Kim Il-sung* case
(11-1 KCCR 768, 97Hun-Ma265, June 24, 1999)

A. Background of the case

In this case, the Court for the first time balanced the freedom of press and the right to personality on a newspaper report defaming a public person's public activities, and required the criminal defamation statutes to be more narrowly interpreted when applied to a defamatory expression against a public person's public activities.

The complainant is a member of the Kang-won Province Assembly. He sent a letter addressed to Kim Jung-il requesting cooperation for a proposed South-North exchange program initiated by the Kang-won Province. The letter starts out: "Dear the Commander-in-Chief of People's Army for the Democratic People's Republic of Korea; Have you been well? You must have passed many days in grief since Premier Kim Il-sung passed away. I would like to express sympathy and encouragement for you." The letter then explains that the complainant received a letter from Kim Jung-il once and elaborates his anti-dictatorship struggle against the past military regime. The Board of Reunification and the law enforcement agencies began investigating the contents and the route of delivery of the letter.

Kwang-won Daily News reported on April 9, 1995 the investigation under a title "Three Provincial Assemblymen in Contact with North under Probe" and a sub-title "Police and Prosecutor on a Letter of Condolence for Kim Il-sung to Kim Jung-il." The newspaper continued using the expression "a condolence letter for Kim Il-sung" seventeen more times until September 6 in the title or the text of the reports on the contents of the letter, the complainant's authorship of the letter, the actions of Ministry of Reunification, and the status of police and prosecutors' investigation.

The complainant filed charges against the publisher and the reporters of the newspaper for the crime of defamation by means of publication and accused that the report was false and delivered for a derogatory purpose. When the prosecutors dismissed the charges on a finding of no suspicion, the complainant sought its cancellation in the Court.

B. Summary of the decision

The Court unanimously rejected the complaint. The Court laid out a general standard for balancing the competing interests of pro-

tecting freedom of expression and one's reputation concerning a newspaper report on a public person's public activities as follows:

The standard for constitutional scrutiny of a defamatory newspaper report should vary, depending on the public or private nature of the defamed person and the subject matter reported. Objective facts of sufficient public and social value to people contribute to the opinion-making and public discourses that form the basis of democracy, and should not be suppressed for fear of criminal prosecution. Expeditious reporting is the life of a newspaper. The newspaper should be free from all threat of criminal prosecution for those reports that were delivered under the justified belief of truth but turned out to be false, or that were false on minor points. A newspaper report competes with time. The attendant errors in its reports are unavoidable in guaranteeing unlimited, free publication of thoughts and opinions. These expressions are necessary for free discussion and truth-finding and should be protected alike. Only the falsities published knowingly or unconfirmed despite the lack of any basis for truth are outside the protection.

Therefore, we hold that criminal defamation provisions must be interpreted narrowly when they are applied against defamatory reports on a public person's public activities.

Firstly, even absent a proof of truth of the report, when the charged acted with mistaken but justified belief in its truth, the crime is not established. Secondly, the Article 310 Criminal Act exemption for those reports "solely concerned with the interest of the public" should be broadened in its application. Thirdly, the element of 'derogatory purpose' in Article 309 of Criminal Act should be interpreted narrowly. A judge must find a derogatory purpose only on stringent proof.

In this case, we do not find major falsities in the report. Even where trivial falsities can be found, we also find the charged justified in believing them to be true.

C. Aftermath of the case

The complainant partially prevailed in his civil suit against Kwangwon Ilbo requesting corrective report in the Choon-chun District Court and also received a partially favorable judgment his damages suit against the newspaper and the charged, which was affirmed by the Supreme Court.[21]

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21). 98Da24642, Supreme Court, 1998.10.27.

10. *Group Insurance* case

(11-2 KCCR 228, 98Hun-Ka6, September 16, 1999)

A. Background of the case

In this case, the Court upheld Article 735-3 (1) of the Commercial Act that did not require individual consent in formation of a group insurance plan when the individual consent is generally required for formation of all life insurance policies.

The provision states that, when a group enters into a life insurance contract for all or part of its members pursuant to agreement[22], the Article 731 requirement of individual written consent, normally applied to a life insurance contract for a third person, does not apply. According to the separate Article 739, the provision about life insurance is extended to casualty insurance as well. Therefore, a group casualty insurance also does not require the insured's individual consent.

The defendant is an employer of several employees who are insured by a group plan in which the employer is the beneficiary. The complainant is one of the insured employees. When the employee was injured, the employer applied for benefits and paid only part of the benefits to the employee. The employee filed a civil suit against the employer for the remaining amount. The presiding court requested constitutional review of the provision *sua sponte* on a suspicion that it may violate human dignity and worth and the right to pursuit of happiness in Article 10 of the Constitution.

B. Summary of the decision

The Court upheld Article 735-3 (1) of the Commercial Act in the following majority opinion of six justices:

In not requiring individual consent for formation of a group life insurance contract, the provision replaces it with collective consent on the premise that individual opinions were reflected during the process of framing the agreement among the group members.[23] The moral hazard associated with a group plan, which is essentially a life insurance for a third person, can be prevented by such group-based control. It is through the process of forming the agreement that the

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22). Here, a typical example of an 'agreement' is a collective bargaining agreement among employees.

23). Again, keep in mind that the 'agreement' here does not refer to the insurance contract but an agreement amongst the group members.

group members' interests are reflected. The instant provisions contribute to promotion of group members' welfare. In light of the special nature of a group insurance, it is reasonable to replace the usual consent requirement with collective consent. Hence no violation of human dignity and worth, or of the right of pursuit of happiness. Neither is there a violation of the state's duty to protect basic rights.

Justices Kim Yong-joon, Kim Moon-hee, and Shin Chang-on dissented.

They observed that a group life insurance is not different from an individual policy in that both take one's death as the insured event. Therefore, foregoing the requirement of individual consent advances only economic considerations while ignoring an individual's will and right to decide. The moral hazard vis-à-vis group life insurance will increase, and various industrial workplaces will be more lenient in their disaster prevention measures. The instant provision violates Article 10 of the Constitution.

C. Aftermath of the case

Legislative precedents to this case are hard to find in other countries. There were not many theories and precedents domestically, either. However, as many group polices are sold, there lingers a possibility that the beneficiaries and the insured will fight over the benefits in many instances. This decision will be a standard for interpreting the 'collective consent' requirement in future disputes on insurance proceeds.

11. *Urban Planning Long-term Non-performance* case (11-2 KCCR 383, 97Hun-Ba26, October 21, 1999)

A. Background of the case

In this case, the Court reviewed Article 4 of the Urban Planning Act that limited change in use or construction activities on the designated urban planning sites, and found it nonconforming to the Constitution for excessively limiting the land owners' right to property.

Article 4 of the Urban Planning Act bans all changes in use or constructions except on permits and yet does not provide for any compensation for the limitation on the property rights.

The complainants are land owners in City of Sung-nam. Their properties were designated for school sites in 1982 but were never

developed for such purpose for more than ten years. The complainants filed a suit against the state claiming property loss in the Seoul District Court, and requested constitutional review of the Urban Planning Act. When denied, they filed a constitutional complaint. (Originally, the petitioners requested review of Article 6 of the Act. The Court considered the basis for the complaint and *sua sponte* changed the subject matter to Article 4.)

Since the 1962 enactment of the Urban Planning Act and until the end of 1997, about two hundred thirty thousand urban planning site designations applied to 2.9 billion m^2. However, the sites were not developed on 1.3 billion m^2. About 0.5 billion m^2 were left undeveloped for less than ten years, 0.4 billion m^2 for at least ten and less than twenty years, 0.3 billion m^2 for at least twenty years and less than thirty years, 0.1 billion m^2 for more than thirty years.

B. Summary of the decision

The Court found Article 4 of the Urban Planning Act nonconforming to the Constitution while holding it temporary applicable as follows:

When a private property is designated for development of roads, parks, schools, and other urban planning facilities, it cannot be improved upon or changed in any way that makes the designated development more difficult until it is bought and developed by the state. The no-change duty is imposed on the owner of the property. When private use is excluded or the previously permitted use is banned by the urban planning site designation, causing substantial monetary loss, such designation goes beyond social limit and is tantamount to a taking that needs be compensated.

The compensation for the urban planning site designation must be resolved by balancing the mandatory and important public nature of the state or local governing entities' urban planning tasks and the property right of the monetarily affected landowner. Therefore, the legislature must set up a compensatory provision that compensates the loss from the point where the use restriction becomes a taking. In establishing that point, the legislature must consider the entire field of laws restricting property rights in lands, foreign legislative precedents, and other circumstances. In any way, we find that an uncompensated exclusion of private use for more than ten years is an excessive restriction on the constitutional right to property that cannot be justified by any accomplishment of public interest.

The statute here is unconstitutional because it overly infringes upon the landowners' property right in violation of the principle of

proportionality. The albeit, important public interest aimed at by the statute cannot justify the uncompensated ban on the preexisting use or the complete exclusion of private use. In revising the provision consistently with the principle of proportionality, the legislature must set up a compensatory provision that diffuses the cruel burden on the landowners. In doing so, the legislature can choose from monetary compensation, release from the urban planning designation, and request for a public purchase or public taking.

In revising the provision consistently with the principle of proportionality, the legislature must set up a compensatory provision that diffuses the cruel burden on the landowners. In doing so, the legislature can choose from monetary compensation, release from the urban planning designation, and request for a public purchase or public taking.

In this case, immediate invalidation of the provision will eliminate the statutory authorization for the important national task of urban planning, making its administration impossible. We therefore hold the provision temporarily valid until it is revised by the legislature by December 31, 2000.

Justice Lee Young-mo dissented, arguing that the urban planning site designation merely executes a social limit inherent in one's property right in land, and the harm it causes the owner outweighs contributions to the public interest. Justice Cho Seung-hyung advocated for simple invalidation.

C. Aftermath of the case

The decision made unavoidable a comprehensive revision of the undeveloped urban planning sites across the country. Before the decision, local governing entities, even without any finance in place, could tie down private properties for public use and develop them whenever they obtain the funding. Beginning 2002, they now must compensate for those sites undeveloped more than ten years or release them from urban planning designation. Therefore, the local governing entities are expected to conduct a thorough feasibility study and prepare a compensation scheme before proceeding with an urban development plan. Others raised concerns that the local governing entities will find it difficult to finance the compensation and therefore will prefer releasing the sites from designation, dissipating the sites for public development and thereby undermining urban development plans.

After this decision, the legislature went through total revision of the statute. The new statute grants the right to request compensation to the owners of the designated sites undeveloped for longer than

ten years (Article 40; applicable only to building lot) and automatically nullifies the designation of the sites undeveloped longer than twenty years from the year 2000.

12. Trade *Union's Political Contributions* case (11-2 KCCR 555, 95Hun-Ma154, November 25, 1999)

A. Background of the case

In this case, the Court found the ban on labor unions' political contributions violative of freedom of association, freedom of expression, and the right to equality, and therefore unconstitutional.

The complainant labor union filed constitutional complaints against (1) the ban on all political activities of a labor union in Article 12 of the Trade Union Act; (2) the ban on labor unions' political contributions in Article 12 (5) of the Political Fund Act; and (3) the ban on campaign activities of all organizations including labor unions in Article 87 of the Act on the Election of Public Officials and the Prevention of Election Malpractices. In the meantime, the ban on labor unions' political activities was repealed when the old statute was replaced by the new Trade Union and Labor Relations Adjustment Act (1996. 12. 31), and the ban on all organizations' campaign activities was revised to allow campaign activities only to labor unions (1998. 4. 30).

B. Summary of the decision

The Court invalidated Article 12 (5) of the Political Fund Act in the following unanimous decision while dismissing the complaints against other statutes for the justiciable interests ceased to exist due to the revisions:

Today, individuals can realize their political identities through groups that synthesize, prioritize, and reconcile their various interests and desires. Interest groups and political parties are indispensable elements of democratic opinion-making. Social organizations are second to political parties in acting as bridges between the state and the people. The statute is based on the premise that a labor organization must perform only its regular task of 'improvement of working conditions' through collective bargaining and agreement and cannot engage in any political activity. Such legislative intent make the meaning and substantive availability of political freedom vacuous.

The statute allows political contributions by other social organ-

izations, especially management but bans political contributions by labor unions. It is intended to restrain labor unions' influence on political parties and labor unions' participation in political discourse. Such scheme can undermine the reconciliation of social interests between labor and management, and bias the political discourse against labor.

The legislative purposes of preventing the draining of labor union budgets or excessive financial burdens on union members do not justify the ban, either. Weak finance of a labor union merely means that the 'balance of power' and the 'equality in weapons' are broken against labor union while labor and management, two private organizations, are determining working conditions under the principle of private autonomy. Therefore, the fear of weak finance cannot justify the statute. The statute is further unjust because the state, through the statute, even further worsens the relative position of labor by regulating political contributions adversely to labor.

'Independence' required of labor unions does not mean political neutrality, or neutrality in religion or other values. It only means independence of the organization *in fact* and independence of the decision-making structure *in law*. Therefore, the workers, who are in the same social and economic positions, may find themselves a common political objective and, through union activities, not only improve working conditions but also participate in the formation of the people's political judgment without compromising their independence as long as they are acting out of their free wills and according to the union's organizing principles.

In the end, given the meaning of political freedom guaranteed by the Constitution, 'prevention of politicization of labor union' and 'protecting labor union's finance' are not legitimate legislative purposes. Even if they are partially legitimate, they are not compelling interests that may justify the ban on political contributions. The provision violates the complainant's freedom of expression and association and is unconstitutional.

The provision is also violative of the principle of equality. The role of social organizations in the people's political decision-making is equally applicable to labor unions. The statute, however, allows political contributions to interest groups such as corporations representing the management interest or the association of management entities while banning them only to labor unions. We cannot help but finding that the statute discriminates against labor unions in the area of political activities.

C. Aftermath of the case

The constitutionality of Article 12 (5) of the Political Fund Act, one of the provisions banning labor unions' political activities, had been debated since early on.

It is predicted that the decision will enable the labor unions to strengthen their political influence. Some pointed out that "the Court should have separated a labor unions' account into the general treasury and a segregated account and reviewed the ban on political contributions from each source separately. Therefore, the Court should have found the statute unconstitutional to the limited extent."

After this decision, the Hyundai Motors union, for the first time among labor organizations, decided to provide financial support for four city and district assemblymen, who were formerly Hyundai Motors employees. As other organizations follow suit, it is predicted that the labor will accelerate its rise as a political force. After the decision, the legislature revised the statute on February 16, 2000 to allow a federation of company unions, not company unions themselves, to make political contributions but require the giving union to "open and maintain a separate account for the purpose of political contributions."

13. *Separate Taxation on Financial Income* case (11-2 KCCR 593, 98Hun-Ma55, November 25, 1999)

A. Background of the case

In this case, the Court upheld a provision of the Act on Real Name Financial Transactions and Guarantee of Secrecy that imposed a separate tax on financial income.

Supplementary Provision 2 of the above Act repealed an integrated financial income tax and instead adopted a separate tax on financial income at a rate of 20% increased from the previous 15%.

The complainant owns financial assets in banks and filed a constitutional complaint against the above provision, arguing that it increased the tax burdens on the low to mid-range income people.

'Integrated taxation on financial income' is the practice of adding interest income, stock earnings, and other incomes arising out of financial transactions to other incomes, and applying the progressive rate to the total income. Contrary to that, 'separate taxation on financial income' is the practice of imposing a separate tax on financial income. Financial income is the only type of income taxed sep-

arately from other incomes under the current income tax scheme. It is applied a unitary rate.

The legislature had adopted partial integrated taxation for financial income on January 1, 1996 for fairness purposes. When a married couple's total financial income exceeded forty million *wons*, it was added to other incomes and applied a progressive rate of 10 to 40%. When it was less than forty million *wons*, it was applied a unitary rate of 15%. However, when the Korean economy entered into the IMF relief phase, the legislature decided that the integrated taxation scheme did not help the economy's capacity to overcome the financial crisis, and changed back to a separate taxation scheme on Dec. 31, 1997, two years since the adoption of the integrated taxation. The tax rate was increased from the previous 15% to 20%.

B. Summary of the decision

The Court unanimously upheld Supplementary Provision 2 of the Act that imposed a separate tax on financial income as follows:

We first examine whether separate taxation on financial income violates the principle of *equal taxation*. Although equal taxation requires taxation based on the taxpayer's ability to pay, it requires the same income to be taxed equally (horizontal fiscal justice) on one hand, and demands the tax burden to be fairly shared by people of different incomes (vertical fiscal justice) on the other.

The principle of paying ability requires simply that the greater incomes be taxed in greater amounts, and that minimum living expenses be excluded from taxation. It does not require progressive taxation. A choice between unitary taxation and progressive taxation is left to the legislature's policy decision. Therefore, the instant provision's unitary system does not violate the principle of paying ability.

On the other hand, the separate taxation system exacts more from people in the same income bracket if more of their incomes are financial incomes. However, the legislature made a policy judgment from the perspective of the national economic goal of overcoming the dire financial crisis under the IMF relief. Since the judgment is not found clearly wrong, we may find that the relative disadvantages to the taxpayers with greater financial incomes are probably justified by a reasonable basis. The provision does not violate equal taxation.

We now review whether the separate taxation of financial income violates the constitutional economic order. Article 119 (2) of the Constitution identifies 'appropriate distribution of wealth' as one of the economic goals to be achieved by the state. However, it does not provide for a concrete constitutional duty to impose a progressive tax

based on the integrated system. The provision in this case is aimed not only at achieving 'appropriate distribution of wealth' but also at accommodating the sometimes competing interest of 'balanced growth and stability of national economy.' It arose out of a policy judgment in response to the economic circumstances of the time. Therefore, it is not clearly unreasonable and arbitrary, and does not violate the constitutional economic order.

Finally, we review whether the separate taxation violates the low-income people' right to humane livelihood. In principle, income tax is allowed only on the portion of the income that exceeds a minimum living expense. Such limit is demanded not only by the principle of social state that the state must guarantee its people the minimum conditions for humane living, but also by the principle of paying ability in which the paying ability arises only from the portion of the income above the minimum living expense. Although the statute in this case does not provide for the constitutional exception for a minimum living expense, such deduction will be more costly to administer than benefit to the taxpayers while various tax-free savings accounts are available in its place. The separate taxation system is effective only for a limited period, anyway. The absence of the exception in the statute therefore has a rational basis and does not infringe on the low-income people's right to humane livelihood.

C. Aftermath of the case

The government had stopped integrated taxation on financial incomes in December 1997 after trying it out for two years for a reason that it was not helpful in the time of the financial crisis. Hower, after the IMF relief phase, many became concerned about the worsening of the rich becoming richer and the poor becoming poorer. The prevailing public opinion agrees with the government's view that it is now unavoidable to shift back to the integrated taxation of financial income. As the national economy is coming back on its regular course and the financial market is stabilizing, the government announced an integrated taxation bill due to be effective in 2001.

14. *Organizational Campaign Ban* case (11-2 KCCR 614, 98Hun-Ma141, November 25, 1999)

A. Background of the case

In this case, the Court upheld Article 87 of the Act on the Election of Public Officials and the Prevention of Election Malpractices

that banned campaign activities to all organizations except labor unions.

The Constitutional Court had invalidated Article 36 (1) of the Presidential Election Act that banned campaign activities to all people except 'political parties, candidates, campaign managers, campaign liaison officers, campaign staff, and campaign speakers.'[24] The legislature consolidated various campaign-related statutes into the Act on the Election of Public Officials and the Prevention of Election Malpractices on march 16, 1994, and changed the basis of regulation from a comprehensive ban basis to individual bans. Now, whatever campaign activity not expressly prohibited was allowed. Therefore, Article 58 (2) of the above Act stated "everyone can freely engage in campaign activities." However, Article 87 of the Act still comprehensively banned organizational campaign activities by stating, "all organizations, regardless of the names such as associations and foundations, cannot support or oppose a particular party or candidate or solicit such support or opposition." The Constitutional Court already upheld Article 87 twice.[25] However, the legislature added a proviso on April 30, 1998 that exceptionally allowed campaign activities of labor unions in support of a particular party or candidate.

The complainant, a civic social organization, was founded in 1989 for the purpose of conducting a peaceful citizens' movement for economic justice and thereby building a foundation for a democratic welfare society. The complainant filed a constitutional complaint against the above ban on organizational campaign activities for making an exception for labor unions and thereby violating the principle of equal campaign opportunity, equal election, and equality.

B. Summary of the decision

The Constitutional Court upheld the Article 87 ban on organizational campaign activities in the following majority opinion of seven justices:

The Court adopted the reasoning of its own decision[26] upholding the comprehensive ban on organizational campaign activities as follows:

If an organization that is not a party recommends a candidate and support or oppose a particular party or candidate, the legislative intent of the Political Parties Act is eviscerated as many organizations not meeting the qualifications of a party engage in the same acti-

24). 6-2 KCCR 15, 93Hun-Ka4, July 29, 1994

25). 7-1 KCCR 826, 95Hun-Ma105, May 25, 1995; 9-2 KCCR 523, 534, 96Hun-Ma 94, Oct. 30, 1997

26). 7-1 KCCR 826, 95Hun-Ma105, May 25, 1995

vities as political parties, regressing our political culture. If diverse and numerous organizations in a highly pluralistic and specialized society can support or oppose a particular party or candidate, regardless of their founding missions, organizational sizes and forms, and regular activities, elections will be overheated and polluted with money and mudslinging. Such result is not only a big loss from a socio-economic perspective but also confuses voters' choices. It will widen the inequality between a candidate supported by many organizations and another that is not, causing substantive inequality. It will make it more likely for candidates representing particular groups and special interests to prevail over those representing national or regional interests, contradicting the purpose and ideal of elections. Especially, blood relatives, regional ties, school ties, and other organizations formed on the basis of a personal relationship may intervene and turn a healthy policy debate into a battle decided by personal favors, personal proximity, and provincialism. Many para-government entities and outside opposition entities will crowd the election with press statements issued to show off loyalty or accomplishments or for a strategic purpose and thereby undermine a fair and clean election. Many organizations may be controlled by a few of their officers and state their support or opposition for a particular party or candidate regardless of their membership's will, misleading the public opinion. Therefore, the ban on organizational campaign activities is not in itself unconstitutional.

The Court also reviewed whether the provision violates equality as follows:

Our Constitution guarantees all people freedom of association (Article 21) and extends special protection and restriction to one form of association, namely labor unions (Article 33). Labor unions are formed "by workers for the purpose of maintaining and improving working conditions and enhancing their economic and social status through independent means" and have a structure necessary for such purpose (Article 33 (1) of the Constitution, Articles 1 and 2 of the Trade Union and Labor Relations Adjustment Act). However, other associations covered by Article 21 of the Constitution are different in their founding missions and are not of constitutional origins or required to be formed by the Constitution. Therefore, the different protections and restrictions of 'labor unions' and 'other organizations' in their rights to engage in a campaign activity for or against a particular party or candidate must have a rational basis of a constitutional origin. The ban on the non-union petitioner is not in itself violative of equal campaign opportunity or equality.

Justices Kim Moon-hee and Lee Jae-hwa criticized the majority opinion from the perspectives of the openness and plurality of the po-

litical will-formation process, the variability of the concept of public interest, and freedom of campaign activity. They pointed out that the fairness of election can be equally obtained by a restriction on 'the method of campaign activities' instead of a ban on campaign activities themselves. Therefore, the instant statute violates the principle of proportionality because it is excessively restrictive. Also, there is no essential difference between labor unions and other organizations that may justify discrimination in campaign activities. Therefore, the instant statute discriminates against non-union organizations with no rational basis, violating equality.

C. Aftermath of the case

Civic organizations continued their movement to revise or repeal the Article 87 ban on non-union organizations. The legislature revised it on February 16, 2000 to allow campaigning to some organizations. They are those organizations permitted to invite candidates for interviews and debates under Article 81 (1). The revision did not satisfy the demand of the civic organizations which declared 'a non-legal struggle' and began civil disobedience. For the 16th National Assembly Election held on April 13, 2000, about one hundred organizations formed the '2000 Citizens' Coalition for General Election' which conducted negative campaigns on selected candidates under the coalition's name.

15. *Ban on Gross Negligence Exclusion in Personal Insurance* case
(11-2 KCCR 659, 98Hun-Ka12, December 23, 1999)

A. Background of the case

In this case, the Court upheld a statutory provision that banned an exclusion for gross negligence for personal insurance.

In this case, insurance companies either requested constitutional review or filed constitutional complaints against Article 732-2 of the Commercial Act as applied to the insured who were injured or killed in their own driving under influence of alcohol or unlicensed driving. The major arguments were on violation of freedom of business, freedom of contract, and the right to equality.

B. Summary of the decision

The Court unanimously upheld the provision as follows:

The Commercial Act has a general provision in the insurance section that, when the insured event arises out of the intentional or grossly negligent conduct of the policy holder, the insured, or the beneficiary, the insurer does not have a duty to pay the insurance award. In this case, the instant provision bans an exclusion based on the policyholder's gross negligence in a life insurance. Because Article 739 of the Commercial Act extends the application of the above provision to casualty insurance, all personal insurance policies cannot contain gross negligence exclusions. On the other hand, Article 663 of the Commercial Act prohibits the parties to an insurance contract from modifying it to the disadvantage of the policyholder. Therefore, unlike in case of other forms of insurance, the insurers in personal insurance can be exempt from compensating the policyholder's intentional conduct but not from compensating his or her grossly negligent conduct. Any contractual provision against this rule is void.

In light of the original role of insurance, i.e., preparing for unpredictable accidents that can take place in the complex, modern society, it is matter of a principle that all negligently caused accidents are compensated. The general provision of the Commercial Act distinguishes gross negligence from ordinary negligence and treats it like intentional conduct because it is relatively more deliberative than ordinary negligence and subtracts the coincidental nature of the accident. It is also harmful to the society and the policy considerations demand such differentiation. The differentiation, however, does not arise from the principle of insurance. In reality, the boundary between gross negligence and ordinary negligence is vague, creating questions about the propriety of the distinction. The problem is especially serious in a country like Korea where receipt of the entire insurance award turns on that distinction. Then again, insurance contracts are adhesion contracts in which the insured are in a substantially weaker position than the insurer financially and professionally. The insured needs be protected.

Also, if all accidents arising from anti-social or illegal conduct are excluded, the insurance system will become much less useful for its original purpose of protecting peaceful livelihood from accidents. In light of the legislative purpose of protecting the insured or their families in case of life insurance policies, the instant provision is justified in protecting even the illegal conduct such as violative of traffic laws from the exclusion.

The instant provision's limitation on the insurer's freedom of business and the policyholder's and insurers' freedom of contract is not excessive enough to break the balance with the countervailing interests.

Next, we recognized that such limitation on exclusions makes it impossible for the insurer to charge different premiums to people with different risks, thereby putting an unfairly high premium on those policyholders with a low risk of gross negligence. We review whether the provision therefore violates equality.

Gross negligence cannot be demarcated in its form and scope. The modern society is so complex that the distinction between the policyholders with the high risk of gross negligence and those without does not appear clearly obtainable. Even if such distinction is possible, it is not sufficient to compel different treatment of the policyholders. Furthermore, once the accident due to gross negligence takes place, all policyholders are equally treated and equally entitled to compensation. The instant provision does not violate the policyholders' right to equality.

We, however, would like to note a few problems in the provision. It is not denied that the provision may induce unlicensed driving, drunk driving, and other anti-social and illegal conduct. Also, in an accident caused by a grossly negligent policyholder, the victim of gross negligence cannot recover from that policyholder's liability policy because of exclusion but the policyholder himself can recover from his own casualty policy. This is not fair in light of one of the policy objectives of the modern society, i.e., 'protection of innocent victims.' Finally, the state should gradually reduce its patronizing role in the insurance sector and broaden the scope of private autonomy in policy exclusions.

C. Aftermath of the case

The Court left a room for further discussion by pointing out problems with the provision. Some criticized that the decision may induce moral indulgence by allowing drunk drivers to receive insurance awards and thereby suppress the safety of the society. The decision, however, did strike exclusions for unlicensed driving and drunk driving from automobile personal injury policies.

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