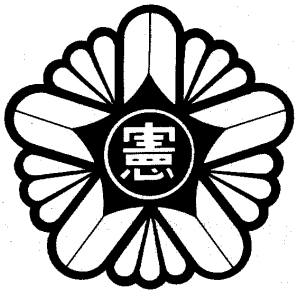
DECISIONS
OF
THE KOREAN CONSTITUTIONAL COURT
(2000)



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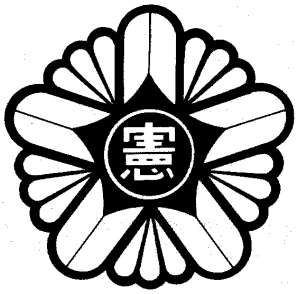

THE CONSTITUTIONAL COURT OF KOREA
2002

PREFACE

The publication of this volume is aimed at introducing to foreign readers those important cases decided from January 1, 2000 until December 31, 2000 by the Korean Constitutional Court.

This volume contains 16 cases, two full opinions and fourteen 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. Assistant Constitution Research Officer Kim Jin-han proofread the manuscript. The Research Officers of the Constitutional Court provided much needed support. I thank them all.

January 31, 2002

Park Yong-sang
Secretary General
The Constitutional Court of the 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
  - Hun-Sa : various motions (such as motion for appointment of state-appointed counsel, motion for preliminary injunction, motion for recusal, etc.)

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

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I. Full Opinions

1. *Extracurricular lesson Ban* case

[12-1 KCCR 427, 98Hun-Ka16, 98Hun-Ma429 (consolidated), April 27, 2000, Full Bench]

Contents of the Decision

Summary of the Decision

1. Children's nurturing and education are first parents' god-given rights and their responsibilities at the same time. 'Parents' right to educate children' is not stated in the Constitution. It, however, arises out of the Article 36(1) guarantee of all people's inviolable human rights concerning marriage and family life, the Article 10 guarantee of the right to pursue happiness, and the Article 37(1) which mandates that 'people's liberties and rights shall not be disrespected for not being enumerated in the Constitution.' Parents have rights to make an overall plan on their children's education and configure the education according to their own view of life, society, and education, and parents' right of education take precedence over other providers of education.

2. Article 31(1) of the Constitution states 'All citizens have rights to receive equal education according to their merits', guaranteeing people's right to education. 'Rights to receive education' means the State's responsibility to prepare facilities and systems necessary for making such equal education possible and to formulate

an affirmative policy of providing substantively equal education to the socially and economically weak. Item 6 of the same Article states that the basic matters about school education, life-time education, and all other educational institutions, the management and finance thereof, and the status of teachers shall be specified by statute, specifying the State's power and responsibility in school education. The above provision delegated to the State the operation of school education, and thereby granted comprehensive regulatory power over schools and the responsibility for children's school education.

3. Parents' right of education in children's nurturing and education are to be respected in all areas of education. Nonetheless, in the area of school education, the State was granted by Article 31 of the Constitution an authority over education independent in principle from parents' right of education. The State shares with parents the responsibility for children's education in that area. Outside that area, parents' right of education take precedence over the State's.

4. Article 3 of the Act restricts the learning children's and juvenile's right to free development of personality, parents' right to educate children, and the occupational freedom and the right to pursue happiness of the person who wishes to provide extracurricular lessons.

5. Article 3 of the Act, in banning extracurricular lessons, raises a constitutional issue of drawing the boundaries between children's right to free development of personality and parents' right of education on one hand, and the State's responsibility for education, i.e., to what extent the State can restrict children's right to free development of personality and parents' right to educate children in the area of private education. As to school education, the State has a broad authority in shaping the educational system. In such areas of private education as extracurricular lessons, the State's regulation should be limited by the respect due children's right to free development of personality and parents' right of education, and should abide by the principle of proportionality, the mandates of the rule of law.

6. A. In private education, our society unfortunately lost self-correcting or self-controlling capacity. The State must intervene. In this exceptional loss of societal self-regulation, the legislative purpose of Article 3, namely preventing high-expenditure extracurricular lessons and thereby lessening parents' burden in private education due to over-heated competition and providing all people with private education as equal as possible, is a legitimate purpose that the legislature may pursue 'provisionally.'

B. From the perspective of appropriateness of means, Article 3

allows extracurricular lessons through private teaching institutes, lesson halls, and college (graduate) students but otherwise adopted a comprehensive ban of all private forms of extracurricular lessons with the possibility of high-expenditure extracurricular lessons. It is unquestionable that such means contributes to the accomplishment of the legislative purpose. Article 3 is appropriate as the means.

7. Article 3 adopts the inversed regulatory approach of 'overall prohibition and exceptional permission' on the conduct that actually should be protected as the rule and prohibited only in exceptions. Also, the prohibition in Article 3 includes for regulatory convenience many types of conduct that do not seem necessary to be included for the accomplishment of the legislative purpose. The regulatory means chosen by the legislature is not the least restrictive and unavoidable means for to accomplish the legislative intent.

8. The regulation of private education in Article 3 goes beyond the private dimension of substantially infringing on the basic rights of parents and children in private education but gentrifying the State culturally. Cultural poverty in this age of unlimited competition among states for survival will ultimately lead to social and economic backwardness. There is a question as the effectiveness of Article 3 in the accomplishment of the legislative purpose, one hand, and Article 3 produces substantial restrictive impact on basic rights and substantial disadvantages in the accomplishment of a cultural state, on the other. Therefore, Article 3 departs widely from a reasonable relationship of proportionality between the public interest obtained through the restriction and the restrictive impact caused by the restriction, and therefore violates the balance of interests.

Justice Han Dae-hyun's dissenting opinion

This statutory provision excessively and unconstitutionally restricts people's basic rights, I agree. However, the reality demands that we should not emancipate extracurricular lessons entirely but maintain partial restriction. Therefore, we should not immediately invalidate this statutory provision but should find it nonconforming to the Constitution, allowing the legislature to formulate a new method to eliminate the evils of extracurricular lessons while restricting people's basic rights as little as possible.

Justice Chung Kyung-sik's dissenting opinion

This statutory provision has a legitimate legislative purpose, and the regulation is admittedly necessary. The unconstitutionality of this statutory provision arises out of its insufficiency in system and

method as a statute restricting basic rights. In the current situation where the evils of extracurricular lessons are still serious and need to be regulated, the invalidation of this statutory provision and the resulting all-out emancipation of extracurricular lessons does not realize a constitutional state of affairs. We should not immediately invalidate this statutory provision through a simple decision of unconstitutionality. Far more desirably, we should allow the legislature to find a reasonable method to regulate extracurricular lessons by forming a comprehensive, nation-wide consensus and in the meantime avoid the entire regulatory vacuum in extracurricular lessons by holding the statutory provision provisionally effective on a decision of nonconformity to the Constitution.

Justice Lee Young-mo's dissenting opinion

Extracurricular lessons constitute supplementary education appended to school education. When it threatens the public value of school education, the State has discretion to regulate it to restore the normalcy in school education. Then, the standard of constitutional review is the reasonableness of legislative formation.

The majority opinion finds that the ban is also applied against relatives' or neighbor housewives' lessons and prominent artists' private lessons and therefore violates the principle of proportionality. However, the permission of such lessons undermines the chances of achieving legislative purpose because the lessons are taken up behind closed doors and may threaten the public value of school education. Given the public interest obtained by the ban on extracurricular lessons, their inability to provide extracurricular lessons and the resulting losses to them do not disturb the balance among competing interests. The ban on extracurricular lessons to elementary school students on the school subjects is justified because the lessons may cause undesirable impact on the students, physically, emotionally, and educationally.

Therefore, this statutory provision is a legislative attempt at a harmony between school education, the common tasks for the State and parents, on one hand, and extracurricular lessons, the sole jurisdiction of the parents, on the other. It is not unreasonable as such.

This statutory provision does adopt the regulatory method of prohibiting as the rule and permitting only in exceptions. However, this statutory provision permits those extracurricular lessons that sufficiently supplement the academically challenged students, and bans only those private extracurricular lessons that are substantially likely to cause social evils and side-effects.

Therefore, this statutory provision has a legitimate legislative purpose and is appropriate as means. It does not infringe on the essential content of basic rights of lesson providers, parents, and lesson receivers. It is constitutional.

Provisions on review

Act on the Establishment and Operation of Private Teaching Institutes (Wholly Amended by Act No. 4964 on August 4, 1995)

Article 3 (Extracurricular Lessons)

No person shall provide extracurricular lessons: *Provided*, That this shall not apply where he falls under each of the following subparagraphs:

1. Where he teaches techniques, arts or subjects as determined by the Presidential Decree at a private teaching institute or teaching school.

2. Where he teaches persons who prepare themselves for an examination for admission into high schools. universities or schools equivalent thereto, or for qualification on certification of academic attainments at a private teaching institute.

3. Where a student (including graduate student) enrolled in a university, college, teachers college, college of education, junior college, air and correspondence college, open college or university established by a separate Act and school equivalent thereto, teaches.

Article 22 (Penal Provisions)

(1) A person who falls under any of the following subparagraphs shall be punished by imprisonment for not more than 1 year or a fine not exceeding 3 million won:

1. A person who teaches in violation of Article 3;

2. - 3. [omitted]

Related Provisions

The Constitution

Article 10, 15, 31, 34(1), 37(1), (2), 107(1), 111(1)[1]

Act on the Establishment and Operation of Private Teaching Institutes

Article 2 (Definitions)

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

1. - 2. [omitted]

3. The term "extracurricular lessons" menas activity which teaches students of elementary schools, middle schools, high schools or schools equivalent thereto or persons preparing themselves for an examination for school admission or qualification on certification of academic attainments; *Provided*, That activities which fall under any of the following items shall be excluded;

(a) Teaching activity carried out in accordance with the purpose of establishment in the facilities referred to in each item of subparagraph 1 above;

(b) Teaching activity carried out by any relative of the same family register; and

(c) Teaching activity which belongs to a voluntary service as determined by the Presidential Decree.

4. [omitted]

Related Precedents

1. 7-1 KCCR 274, 91Hun-Ma204, February 23. 1995.
   4 KCCR 756, 89Hun-Ma88, November 12, 1992.
2. 3 KCCR 18-19, 90Hun-Ka27, February 11, 1991.
   4 KCCR 750-752, 89Hun-Ma88, November 12, 1992.
   6-1 KCCR 173, 93Hun-Ma192, February 24, 1994.

Parties

Requesting Court

Seoul District Court (98Hun-Ga16)

Original Case

Seoul District Court 98Go-Dan7799, a violation of the Act on the Establishment and Operation of Private Teaching Institutes

Petitioner (98Hun-Ma429)

Kim Yong-jin and four others
Counsel: Chung Ki-seung, and one other

Holding

Article 3 and 22(1)[1] of the Act on the Establishment and Operation of Private Teaching Institutes (Wholly Amended by Act No. 4964 on August 4, 1995) is unconstitutional.

Reasoning

1. Introduction of the cases and the subject matters for review

A. Introduction of the Cases

(1) 98Hun-Ga16

Yi Eung-sun, was indicted at the Seoul District Court for a violation of the Act on the Establishment and Operation of Private Teaching Institutes (98Go-Dan7799). The main content of the indictment is that 'Defendant, the representative of 'Hanoori Education' set up a communication service community, called 'Hanoori Bang' in Chollian and Miraetel, the communication services providers, received the enrollment of 2,415 members in that website, provided extracurricular lessons by giving several thousands of tests followed by questions and answers, and received about 374 million wons between early December 1995 and October 16, 1997. Also, between early July 1997 and October of the same year, Defendant had the instructors Park Choong-man and others visit those fee-paying members for extracurricular lessons. Defendant thereby violated Articles 22(1)[1] and 3 of the statute.'

On November 10, 1998, the above court made a finding of suspicion that the statutory provisions to be applied against Yi Eung-sun and others, namely Articles 22(1)[1] and 3, may be unconstitutional, and requested constitutional review *sua sponte*.

(2) 98Hun-Ma429

Complainants are professional musicians. Complainant Kim Yong-jin majoring in composition is a professor *emeritus* at the Music School of Seoul National University and the chairman of the

board of Korean Music Society, Inc. (a corporation). Complainant Shin Soo-jung majoring in piano, is the Dean of the Faculty of Music at Kyungwon University. Complainant Park Soo-gil, majoring in vocal, is a professor of the Faculty of Music at Hanyang University and the president of the National Opera Company of Korea. Complainant Yi Jong-yong, majoring in cello, is a professor of the Faculty of Music at Kyunghee University and the representative director of the Beehouse Cello Ensemble. Complainant Kim Min, majoring in violin, is a professor of the Faculty of Music at Seoul National University and the representative director of the Baroque Chamber Orchestra.

Complainants filed this constitutional complaint against Article 3 of the Act on the Establishment and Operation of Private Teaching Institutes that banned them from giving lessons to musically talented children and Article 22(1)[1] that punished such conduct, alleging that the statutory provisions infringe on their basic rights.

B. Subject matter for review

Therefore, the subject matter for review in this case is whether Articles 3 and 22(1)[1] of the Act on the Establishment and Operation of Private Teaching Institutes (those provisions after overall revision by Act No. 4964 on 1995. 8. 4; 'Statute' hereinafter, and 'Statutory Provisions' hereinafter) violate the Constitution, and the statutory provisions and related provisions are as follows:

Article 3 (Extracurricular Lessons)

No person shall provide extracurricular lessons: *Provided,* That this shall not apply where he falls under each of the following subparagraphs:

1. Where he teaches techniques, arts or subjects as determined by the Presidential Decree at a private teaching institute or teaching school;

2. Where he teaches persons who prepare themselves for an examination for admission into high schools, universities or schools equivalent thereto, or for qualification on certification of academic attainments at a private teaching institute.

3. Where a student (including graduate student) enrolled in a university, college, teachers college, college of education, junior college, air and correspondence college, open college or university established by a separate Act and school equivalent thereto, teaches.

※ "Technical college" was inserted into Number 3 by Act

No. 5272 on 1997. 1. 13 and "provided that lessons given to students enrolled in middle and high schools or the equivalents thereof shall be limited to the period set by the Minister of Education" was deleted from the latter half of Number 2 of Act No. 5634 on 1999. 1. 18.

Each of the above revisions does not cause substantial changes. The subject matter for review includes all versions after 1999. 1. 18 including the current one. Therefore, the subject matter for review is the statute after the overall revision by Act No. 4964 on 1995. 8. 4.

Article 22 (Penal Provisions)

(1) A person who falls under any of the following subparagraphs shall be punished by imprisonment for not more than 1 year or a fine not exceeding 3 million won:

1. A person who teaches in violation of Article 3;

2. - 3. [omitted]

(2) [omitted]

Article 2 (Definitions)

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

1. The term "private teaching institute" means facilities in which a private person teaches learners, greater in number than those as determined by the Presidential Decree, knowledge, techniques (including skills; hereinafter the same shall apply) and arts with a teaching curricula of not less than 30 days (including where the number of teaching days is not less than 30 days by repeating the curricula; hereinafter the same shall apply) or which are provided as learning places for not less than 30 days, and which do not fall under each of the following items:

(a) Schools referred to in the Education Act or other Acts and subordinate statutes;

(b) Libraries and museums;

(c) Facilities such as working places, which are used for training employees attached to them;

(d) Social educational facilities established pursuant to Article 21 of the Social Education Act;

(e) Facilities attached to a school pursuant to Article 26 of the Social Education Act; and

(f) Vocational training facilities referred to in the Framework Act on Vocational Training or facilities established by other Acts on social education.

2. The term "teaching school" means a facility which carries out extracurricular teaching referred to in subparagraph 1 of Article 3, and which is not a private teaching institute.

3. The term "extracurricular lessons" means activity which teaches students of elementary schools, middle schools, high schools or schools equivalent thereto or persons preparing themselves for an examination for school admission or qualification on certification of academic attainments; *Provided,* That activities which fall under any of the following items shall be excluded;

(a) Teaching activity carried out in accordance with the purpose of establishment in the facilities referred to in each item of subparagraph 1 above;

(b) Teaching activity carried out by any relative of the same family register; and

(c) Teaching activity which belongs to a voluntary service as determined by the Presidential Decree.

4. The term "learner" means a person who takes lessons at a private teaching institute or teaching school or uses a facility which is provided as a learning place for not less than 30 days.

Act on the Establishment and Operation of Private Teaching Institutes Enforcement Decree

Article 2 (Definitions)

(1) [omitted]

(2) "Greater than the number determined by Presidential Decree" in Article 2[1] of the Act means when the number of students who can receive instruction or use the space for instruction simultaneously is greater than ten (two for practical training of the private teaching institutes for automobile driving).

Article 3 (teaching activities not falling under extracurricular lessons)

(1) [omitted]

(2) "Subjects determined by Presidential Decree" in Article 3[1] of the Act means those subjects not included in elementary, middle, and high school curricular.

2. Reasons for requesting constitutional review, Complainants' arguments, and the opinions of the related agencies

A. Reasons for requesting constitutional review

This statutory provision restricts the freedom of arts and science (the Constitution, Article 22(1)), the right to receive education (Article 31(1)), occupational freedom (Article 15), and the right to pursue happiness (Article 10). In doing so, this statutory provision does not limit the restriction on basic rights to those exceptionally pathological situations as extracurricular lessons given by incumbent teachers. To the contrary, it bans and criminally punishes all extracurricular lessons as the rule and allows as lawful only those extracurricular lessons that fall under exceptions. As a result, even desirable extracurricular lessons above criticisms were treated as crimes unless they fell under the defined exceptions. It violates the rule against excessive restriction in Article 37(2) of the Constitution and the essential content of basic rights.

The State must encourage and protect teaching and learning as much in private domain as in public domain. This statutory provision bans private teaching and learning as a matter of principle, and the State by this statutory provision, plays the role of an oppressor, not a defender of private education. Forfeiting private education for the purpose of remedying such social diseases as arising out extracurricular lessons becomes a significant obstacle to people's development of faculties in the age of unlimited competition. It is contrary to the ideology of a cultural state, and is based on a philosophy unacceptable to a free democratic state. It is also contrary to the spirit of the preamble of the Constitution: To afford equal opportunities to every person and provide for the fullest development of individual capabilities in all fields, including political, social and cultural life by further strengthening the basic free and democratic order conducive to private initiative and public harmony.

B. Arguments of Complainants

(1) Legal prerequisites

Complainants, who were about to give lessons to students upon their request in October 1998, realized that this statutory provision does not allow them to do so without a violation of law, and filed this constitutional complaint. The legal prerequisites are in place, and the filing time limit was not passed.

(2) Review on merits

(A) This statutory provision violates the complainants' right to pursue happiness (the Constitution, Article 10) and freedom of arts and sciences (Article 22(1)) in violation of Article 37(2) of the Constitution, and is also contrary to the constitutional provision concerning the right to receive education (Article 31(1)) and the public-interest-oriented nature of the exercise of a property right under Article 23.

(B) It is not just to condemn as illegal an decision to expend one's own time, money, and effort to obtain knowledge and ideas. A ban on the pursuit for excellence through private education outside school education violates the Article 10 right to pursue happiness in the Constitution. An overall ban of private education outside formal education in this statutory provision will pull backward our country in today's global competition for knowledge and culture. There is no reasonable cause to limit the place of learning to private teaching institutes, lesson halls, and other places defined by statutes. It is against constitutional ideology for the State to regulate the place and qualifications for learning and thereby manipulate people's development of knowledge and arts.

(C) As long as this statutory provision is in place, apprenticeship is impossible in this country. We cannot produce a good player of instrument. Koreans who would like to become a professional musician will have to go overseas.

(D) It has not been proven that more investment in a child leads to greater capacities of that child. Although an inequality results therefrom, it is not just to eliminate the inequality by banning all forms of learning outside schools, private teaching institutes, and lesson halls. The isolated incidents of high-expenditure extracurricular lessons cannot be generalized that they cause the bankruptcy of family economy or obstruct children's normal growth. No argument can justify that the State, as a method of price control, bans lessons and standardize schools, private teaching institutes and lesson halls.

(E) Admission fraud, professors' disloyalty to their main profession, unjust enrichment exploiting others' helplessness, and tax evasion should be remedied by the improvement on admission processes and the establishment of the rule of law through strict punishment and regulation. It is putting a cart before the horse to sacrifice the pursuit for excellence and the freedom of teaching and learning for the purpose of preventing these evils.

(F) Parents' right to education their children and teachers' right to teach them is the most peaceful of all liberties because it does

not conflict with any other person's freedom. This statutory provision constitutes a case of abusive equality that attacks freedom to teach and learn and freedom to nurture arts to an extent unheard of, and is unconstitutional.

C. Opinion of the Minister of Education

(1) Legal Prerequisites

(A) Filing time limit

This statutory provision is the result of overall revision of the Act on Private Institutes on August 4, 1995 by Act No. 4964. This constitutional complaint was filed after the filing time limit accrued from the effective date of this provision expired.

(B) Directness and self-relatedness

Complainants are not directly, presently, and themselves infringed their basic rights.

Complainants are referring to the possibility of restricting basic rights of gifted children. Such injury does not satisfy the requirement that the restriction on basic rights be related to the complainants themselves.

Complainants are incumbent college professors or professors *emeritus*. Their rights to open and maintain private teaching institutes and lesson halls or pursue other profit-oriented activities are regulated by Article 64 of the State Public Officials Act concerning prohibition profit-making activities and the concurrent holding of offices and Article 55 of the Private Schools Act which applies the above to professors and teachers of private schools. They should have first gone through requests for constitutional review or constitutional complaints against the above provisions. This constitutional complaint against this statutory provision prior to the above said procedures is not legally sufficient.

(2) Review on merits

(A) The Constitution does not recognize a right to choose between school education and home schooling and therefore does not recognize a right to receive one form of home schooling, extracurricular lessons. If extracurricular lessons are included in the right to receive education and permitted as such, discrimination in educational opportunity will result from parents' different economic resources. Then, the Article 31(1) right to receive equal education according to merits cannot be guaranteed.

(B) Extracurricular lessons are ineffective yet cause many evils. They weaken students' independent studying habits and increase

their dependence. An excessive amount of extracurricular lessons interferes with sound physical and mental growth. They heighten competitive tendencies, interfering with the nurturing of cooperative and community-oriented tendencies. Extracurricular lessons make teachers and students inattentive to school education, impoverishing it. Extracurricular lessons injure low income family's budgets and give rise to a sense of alienation among different social participants. In area of music, extracurricular lessons have been related to admission frauds. This statutory provision was aimed at the elimination of these evils, the sound nurturing of school education, and the establishment of the rule of law. It is therefore a restriction on freedom necessary for national security and public order and welfare under Article 37(2) of the Constitution.

(C) Extracurricular lessons banned by the statute are limited to those lessons by ordinary people (incumbent teachers and private teaching institutes instructors) that are likely to be expensive or to cause social problems. Supplemental lessons at school, extracurricular lessons given by relatives, the same given by college students or graduate students, private teaching institutes lectures, lesson halls lessons in arts, are all permitted. The statutory provision does not restrict basic rights excessively. Extracurricular lessons by housewives, if allowed, will unavoidably lead to illegal extracurricular lessons by private teaching institutes instructors due to the secret nature of the lessons and the selfishness of parents. In consideration of the public interest achieved by the ban, any infringement on those housewives' interests who cannot give lessons does not destroy the balance among the competing interests. The statutory ban on extracurricular lessons is reasonable as a regulation and does not violate the rule against excessive restriction.

(D) High-expenditure extracurricular lessons are harmful to the maintenance of societal order and public interest, and violative of the principle of equal opportunity in the right to receive education. The ban is in consistent with the preamble of the Constitution that calls for 'elimination of all bad social customs and injustices.'

(E) Extracurricular lessons, done in the force-feeding manner, obstructs students' development of problem-solving abilities, thinking abilities, and creativity. Therefore, the ban on extracurricular lessons does not constitute oppression on private education, obstructs people's development of faculties in this international age, or contradicts the ideology of a cultural state.

D. Opinion of the Minister of Justice

Generally similar to that of the Minister of Education

3. Review

A. Review on Legal Prerequisites (98Hun-Ma429)

A constitutional complaint against laws and regulations must be filed within 180 days of the effective date of the law and regulations and within 60 days from the day of becoming aware of the law and regulations being put into effect (the Constitutional Court Act, Article 69(1), Article 68(1)). Those whose basic rights are infringed only *after* the laws and regulations are becoming effective when some conditions governed by the laws and regulations arise, also must file within 180 days of those relevant conditions coming into being and within 60 days of being aware of the relevant conditions coming into being.

This statutory provision is the result of overall revision of an old law which took place on August 4, 1995 by Act No. 4964 and became effective on January 1, 1996. Since the complainants were professional musicians when the laws became effective. An issue is when the governed conditions under the laws and regulations arose.

In determining the starting date of the filing time limit of a challenge against prohibitive and punitive provisions applicable to all people, we do not find that the relevant conditions arise immediately upon the effective date of the laws for ordinary people. We find that the relevant conditions arise only when there is concrete and present injury upon the complainants. Only when an injury is certain to take place, we allow the complainant to file a constitutional complaint *before* there is a concrete injury on basic rights to increase the efficacy of the protection of basic rights, or equivalently recognize the presentness (8-1 KCCR 241, 250, 93Hun-Ma198, March 28, 1996)

This statutory provision is applied to ordinary people. It is practically difficult to set the scope of applicable professional groups. Many professional musicians like the complainants used to give extracurricular lessons but it cannot be generalized to follow from the nature of the profession. As long as there is no evidence that the complainants gave extracurricular lessons around or after the effective date of this statutory provision, the relevant conditions under the statutory provision did not come into being concretely or presently, and therefore the filing time limit did not expire. (4 KCCR 739, 750, 89Hun-Ma88, November 12, 1992; 6-1 KCCR 672, 676, 91Hun-Ma162, June 30, 1994)

In order for the constitutional complaint to be legally sufficient, the injury to basic rights complained of must satisfy the relatedness-

to-oneself, presentness and directness.

Complainants wish to teach children and students who wish to receive extracurricular lessons in arts. They are also equipped with objective conditions to do so. Their freedom to give extracurricular lessons is restricted by this statutory provision. On the other hand, this statutory provision imposes a criminal penalty for any act condemned under it, and therefore *presently* imposes a duty not to engage in the condemned conduct even before the complainants are subject to any enforcement action. Some complainants are professors who cannot give extracurricular lessons due to Article 64 of the State Public Officials Act concerning prohibition of profit-making activities and the concurrent holding of offices and Article 55 of the Private Schools Act which applies the above to teachers and professors of private schools. But, they are concurrently restricted by this statutory provision. The above provisions do not affect the legal relationship between the complainants and this statutory provision.

Then, the relatedness-to-oneself, the presentness, and the directness of the injury to basic rights is satisfied, and this constitutional complaint is legally sufficient.

B. Review on merits

(1) The educational ideology in the Constitution

(A) Parents' right to educate children

Article 36(1) of the Constitution states "Marriage and Family life shall be entered into and sustained on the basis of individual dignity and equality of the sexes, and the State shall do everything in its power to achieve that goal", specifying the State's special protection for marriage and family life built thereon, which is the community of living for parents and children. This constitutional provision passively constitutes a right to defend one from unjust intrusion by State power, and affirmatively imposes on the State a task of not only protecting marriage and home from third parties but also realizing marriage and family formed and maintained on the foundation of personal dignity and sexual equality.

Protection of family and marriage is a necessary precondition for free democratic cultural state that the Constitution aims at. It is because culture is expressed through individuality, uniqueness, and diversity, and is founded upon a domain of the society's autonomy, and the domain of social autonomy starts from home. The Constitution extends special protection to family and thereby builds a precondition of protecting freedom of conscience, religion, press, arts, and sciences, and other basic rights necessary for the formation of

a cultural state. It specifies a necessary condition of the realization of a cultural state, the essence of which is diversity in opinions and thoughts. Therefore, Article 36(1) of the Constitution protects marriage and family, and thereby protects the autonomous domain of family life from the State's intervention in order to prevent the institution from being standardized, equalized and indoctrinated.

The core content of family life is the rearing and education of children. It is primarily a god-given right of parents as well as their responsibility. Only when parents can make decisions about their children's education freely and independently, they can discharge their duty to rear and educate their children in the free democratic cultural state, and can ensure the diversity in education that a cultural state demands.

'Parents' right to educate children' is not stated in the Constitution. It, however, arises out of the Article 36(1) guarantee of all people's inviolable human rights concerning marriage and family life, the Article 10 guarantee of the right to pursue happiness, and Article 37(1) provides that 'people's liberties and rights shall not be disrespected for not being enumerated in the Constitution.' The Constitutional Court has already ruled, concerning a restriction on parents' right to choose their children's middle school, that 'parents have rights to educate their children in elementary, middle, and high schools who have yet to achieve maturity and work on their personalities, and the right includes one to choose the schools for their children.' (7-1 KCCR 274, 91Hun-Ma204, February 23, 1995) The Constitutional Court, on a case concerning state-certified textbooks, stated that a teacher's right to teach in school education 'holds it in trust for parents' rights to teach their children, and procedurally was delegated by the State which holds the ultimate responsibility for public education.' (7-1 KCCR 274, 89Hun-Ma88, November 12, 1992) The Constitutional Court recognized parents' right to educate children through the above cases.

Parents' right to educate children are different from other basic rights in that the agent of basic rights, parents, do not enjoy it as one of the rights of self-determination. It is a right granted for the purpose of protection and development of personality of children. In other words, parents' right to educate children is protected for children's happiness. Children's happiness becomes the criterion for setting the direction of parental education.

Parents have rights to make an overall plan on their children's education and configure the education according to their own view of life, society, and education, and parents' right of education take precedence over other providers of education in principle. On the other hand, parents' right to educate children and the duty thereof

are inseparable from each other. The duty forms the characteristic component of parents' right to educate children. Parents' right to educate children can be described as 'parents' duty to educate children.' Parents' right to educate children means the right to decide freely how they will discharge their duty to educate children. Therefore, it includes the right to decide on the objectives and methods of the education. In other words, parents have the right to set the objectives as to how their children's personalities should be developed, and choose the appropriate means to achieve the objectives in light of the child's individual favor, merits, and mental and physical level of growth. Parents have the primary right to decide on these matters because they, better than any other, can protect children's interests.

(B) State's responsibility for education

Parents are not granted an exclusive right to educate their children by Article 36(1) of the Constitution. Article 31(1) of the Constitution states 'All people have rights to receive equal education according to their merits', guaranteeing people's right to education. Rights to education are a necessary precondition to attain human dignity and worth, pursue happiness (Constitution, Article 10), and enjoy humane life (Article 34(1)), and a foundation for the meaningful exercises of other rights. Also, in a democratic state, the betterment of people' faculties and aptitude is a foundation for the country's enrichment and progress. For this reason, the Constitution imposes education as one of the State's important duties.

Article 31(1) of the Constitution guarantees 'the right to receive education' and thereby guarantees people as a basic right the right to demand from the State necessary facilities and to learn at and enter educational facilities according to their merits. On the other hand, it imposes on the State a duty and task of endeavoring to procure for all equal education according to their merits. (3 KCCR 18-19, 90Hun-Ka27, February 11, 1991; 4 KCCR 750-752, 89Hun-Ma88, November 12, 1992) 'Rights to receive education' means the State's responsibility to prepare facilities and systems necessary for making such equal education possible and to formulate an affirmative policy of providing substantively equal education to the socially and economically weak.

Therefore, the State must provide everyone, as compulsory education, with the minimum course of instructions for becoming a democratic citizen to the extent permitted by other important responsibilities of the State and its finances. Article 31(2) and (3) of the Constitution specifies not only parents' duty to make their children receive the primary education provided by the State but also the gratuitous nature of the compulsory education. 6 of the same

Article states the basic matters about school education, life-time education, and all other educational institutions, the management and finance thereof, and the status of teachers shall be specified by statute, specifying the State's power and responsibility in school education. The above provision delegated to the State the operation of school education, and thereby granted comprehensive regulatory power over schools and the responsibility for children's school education. Therefore, the State is granted by Article 31(6) of the Constitution a comprehensive authority over the organization, planning, operation, and supervision of school systems, or equivalently, the overall formative and regulatory power over school systems.

From the area of school education, parents' rights are not excluded by the State's authority over education. The constitutional limit of the State's power to educate through schools is drawn by parents' right of education and students' right to free development of personality and self-determination. Nonetheless, in the area of school education, the State was granted by Article 31 of the Constitution an authority over education independent in principle from parents' right of education and holds a comprehensive formative power over school education. It is constitutionally valid for the State to decide on whether to receive compulsory education or on at what age children should begin their education. (6-1 KCCR 173, 93Hun-Ma192, February 24, 1994) Any conflict between the State's regulatory power and parents' right of education, if at all, must be resolved by balancing competing interests for each concrete case. Parents may be deprived of the right to decide whether their children should receive compulsory education or decide what age the children should enter the school system, but such deprivation does not constitute an excessive restriction parents' right of education. Likewise, the State has a comprehensive authority to set the contents and methods of school education through setting educational objectives, study plans, pedagogic methods, and school organization.

(C) Relationship between parents' right of education and the State's responsibility for education

As shown above, children's education is a common task both for the State and the parents, and therefore calls for a mutually cooperative relationship. The primary holders of rights and responsibilities for children's education are parents but the Constitution also grants the State a responsibility for children's education. The State's power or duty of education is exercised mostly through a systematic form, i.e., school education. Ultimately, parents are responsible for the consequences for children's education. Therefore, the State is the secondary agent in education and an institution that forms the basic conditions for education and provides educational facilities. The State

should not attempt to regulate the entire course of children's growth. It should establish a school system within which the diverse interests and faculties of the students can be freely developed to the extent that finance permits.

Parents' right to educate and rear children should be respected in all respects of education. Nonetheless, in the area of school education, the State was granted by Article 31 of the Constitution an authority over education independent in principle from parents' right of education. The State shares with parents the responsibility for children's education in that area. Outside that area, parents' right of education take precedence over the State's.

(D) Relationship between Article 31 of the Constitution and private education

The Constitution guarantees *liberty-rights* and thereby accepts inequality among individuals within the society, which is the inevitable result of each person's exercises of his or her freedom. On the other hand, the Constitution guarantees social basic rights and thereby imposes on the State a duty to shape substantive conditions for everyone to exercise his or her basic rights with his or her own means. Especially, Article 31 of the Constitution guarantees 'the right to receive education' and thereby imposes on the State a duty to establish equal opportunity in the area of education. Therefore, the Article 31 right to 'receive equal education according to one's merits' means the State's duty to not only repair and improve the educational system but also adopt and expand compulsory education, provide social benefits in the area of education such as educational subsidies and loans, and thereby dilute the inequality among individuals' starting points through the State's affirmative measures. However, this statutory provision does not authorize the State to impose equality in all aspects of education, especially in that of private education outside schools, by prohibiting individuals from obtaining or providing additional education. To the contrary, the State, in light of the ideology of a cultural state aimed at by the Constitution, has a duty to support and promote private education outside the formal education system such as school education. A difference in economic resources may lead to inequalities among individuals in educational opportunity. The State can lessen the inequalities by means of such affirmative subsidies as the expansion of compulsory education, but cannot obtain education equality by banning or restricting extracurricular lessons, thereby suppressing one's basic rights in private education.

(2) Subject matter for review

(A) Article 3 of the statute bans all extracurricular lessons as a

matter of principle except for a few exceptions. Article 22(1)[1] criminally punishes those who gave extracurricular lessons in violation of Article 3.

'Extracurricular lessons' prohibited by Article 3 is defined as the act of teaching knowledge, skills, and arts to elementary, middle, and high school students and to those students preparing for admissions or tests for Scholastic Certification. (Article 2(3))

Extracurricular lessons given to elementary, middle, and high school students are not deemed 'extracurricular lessons' (the third proviso of Article 2) if done at schools, libraries, museums, companies' employee training facilities, social education facilities, ancillary facilities to schools, and other social education facilities in accordance with respective founding purposes; given by relatives in the same family register or given as volunteer services set forth in Presidential Decrees. Also, because 'extracurricular lessons' are defined in terms of those given to elementary, middle, and high school students, lessons in national language, English, and arts to preschool children are not considered 'extracurricular lessons.' But, the subject matters taught are not limited to school curriculum or specified subjects, but defined as the teaching of 'knowledge, skills, and arts.'

(B) Article 3, as a matter of principle, bans all acts of teaching or learning outside schools if the students are elementary, middle, and high school students, and defines a few exceptions.

Firstly, it is permitted to teach skills, arts and those subjects selected by Presidential Decrees to elementary, middle, and high school students at private teaching institutes and lesson halls (Article 3(1)). Here, 'those subjects selected by Presidential Decrees' are those subjects not included in any part of elementary, middle, and high school curriculums. As a result, barring extracurricular lessons given by college (graduate) students permitted by Article 3(3), all private teachings of skills, arts, and non-school subjects are banned so that ordinary people cannot even for free teach knowledge, skills, and arts to elementary, middle, and high school students without establishing and operating private teaching institutes or lesson halls.

Secondly, the teaching of school subjects to middle and high school students is permitted at private teaching institutes (Article 3(2)). Therefore, besides the Article 3(3) exception for college (graduate) students' private lessons, all private lessons to middle and high school students on school subjects are banned outside private teaching institutes. As to elementary school students, all lessons on school subjects are banned within or without private teaching institutes. For instance, teaching English, a school subject for the third graders all above of elementary school, to those elementary school

students, is banned unless done by college (graduate) students. What is also banned is teaching to elementary school students National Language and mathematics at supplementary studying private teaching institutes, manual calculation private teaching institutes, oratory private teaching institutes. Even the distribution of study papers or study tapes followed by visits, and the lessons through telephone, facsimile, and computer communications are all banned.

Thirdly, college students and graduate students currently enrolled in colleges can give extracurricular lessons (Article 3(3)). In this case, there is no limit on the subjects that can be taught. College students and graduate students can teach to elementary, middle, and high school students school subjects, non-school subjects, skills, and arts without any limitation.

As a result, the core regulatory content of Article 3 is that those other than college (graduate) students can give extracurricular lessons only by establishing private teaching institutes or lesson halls, and that students can receive extracurricular lessons only from college (graduate) students or through private teaching institutes or lesson halls.

(3) Constitutionality of the instant statutory provision

(A) Basic rights restricted by Article 3

1) When the Constitutional Court reviews the constitutionality of a statute upon request under Articles 107(1) and 111(1)[1] of the Constitution, it reviews the reviewed norm not just from the legal perspectives proposed by the requesting court or the requesting Complainant but from all constitutional perspectives inclusive of all legal effects of the reviewed norm. Only the scope of the subject matter is defined by the request, not the standard of constitutional review. (8-2 KCCR 690, 96Hun-Ka18, December 26, 1996) Equally, for a constitutional complaint to satisfy the legal prerequisites, the likelihood of infringement on complainants' basic rights must exist. Once a constitutional complaint is lawfully filed, the Constitutional Court use all standards of constitutional review for the review on merits, and is not limited by the arguments of the injuries on basic rights proposed by complainants. (9-2 KCCR 862, 96Hun-Ma172, December 24, 1997)

2) Article 3 of the Act restricts all ordinary people other than college (graduate) students in their choosing of extracurricular lessons as their occupation by requiring them to establish private teaching institutes or lesson halls. Therefore, Article 3 restricts the freedom to choose one's occupation (the Constitution, Article 15), one's basic right to choose his or her occupation freely of any State's intervention.

On the other hand, Article 3 bans all forms of instructions at a place other than private teaching institutes or lesson halls regardless of whether or how much a fee is involved. The area of conduct protected by the Constitution is 'occupation', the concept of which requires an element of 'continuous income-generating activity.' Gratuitous or one-time or temporary forms of instructions do not fall under the area of conduct protected by the occupational freedom in Article 15 of the Constitution. The acts of teaching of the above nature and form falls under freedom of general action and are protected by the Article 10 right to pursue happiness of the Constitution.

3) Article 3 directly bans only the giving of extracurricular lessons by those wishing to give them. However, it practically restricts elementary, middle, and high school students' acts of learning outside schools freely, limiting their rights to pursue happiness. The right to pursue happiness includes the general freedom of action and the right to free development of personality. The ban on extracurricular lessons restricts the student's right to free development of personality. Children and adolescents as the learners have the right to develop their personalities, especially their attributes and merits, without the State's intervention.

Children and adolescents are immature persons who require the decisions of others such as teachers and parents for the development of their personalities. They are, however, not mere objects of the education given by parents and the State. They are independent persons whose rights to personalities are protected as adults by Article 10 of the Constitution, which protects the human dignity and the right to pursue happiness. Therefore, the Constitution grants children the right to make decisions about their own education or equivalently to receive education freely within the boundaries of the State's power of education and the parents' right of education. Children therefore have the right to decide freely of the State's intervention whether to receive separate extracurricular lessons outside school education and from whom and in what format they will receive extracurricular lessons.

4) The basic right limited by Article 3 is parents' right to educate children. We already established above that parents should be given an autonomous area within which they can decide what in terms of education is important and needed for their children's development of personality. Parents' right to educate children as such is a god-given right derived from Articles 36(1), 10, and 37(1) of the Constitution. Therefore, the Article 3 ban on extracurricular lessons restricts parents' right to make decisions on their children's education.

5) Therefore, the basic rights restricted by Article 3 is the right

to free development of personality of the children and adolescents wishing to learn, parents' right to educate children, and the freedom to choose occupation and pursue happiness of those wishing to give extracurricular lessons.

(B) Unconstitutionality of Article 3

1) Legislative background and purpose of Article 3

A) In our country, academic background played a decisive role in determining one's social and economic status. People's passionate interests in their children's education gave rise to a prevailing trend that parents devote all their efforts and resources to their children's education. On the other hand, due to the transient educational policies of and the insufficient investment in education by the State, the quality and facilities for school education did not meet people's expectations, and turned away people's attention to private education. As the income level arose, the competition for the limited opportunity for higher education became ever more intense, and the competition to obtain extracurricular lessons in preparation for college admissions became over-heated when the ban on extracurricular lessons was first legislated in 1981.

Against this background, the Act on Private Institutes (revised by Act No. 3433 on April 13, 1981) was revised and enacted on April 13, 1981, banning extracurricular lessons almost entirely. From this point on, extracurricular lessons disappeared from the surface but continued illegally. When the Act on the Establishment and Operation of Private Teaching Institutes (revised by Act No. 4133 on June 16, 1989, the name of the Act changed from that time on) allowed elementary, middle, and high school students to receive extracurricular lessons at private teaching institutes and college (graduate) students to give extracurricular lessons, extracurricular lessons increased again and brought back the conditions of 1981 by the time Article 3 of the Act came into being as part of a major revision of the Act on the Establishment and Operation of Private Teaching Institutes.

Due to the social structure built on *academic-background-firstism*, the limited opportunities of higher education, and the lack of high quality education through schools, a difference in private education has lead to a difference in competitiveness in admissions race. Those falling behind in private education were disadvantaged in obtaining higher education and could be given relatively weaker social and economic status.

Over-heated competition for extracurricular lessons caused several undesirable side-effects other than economic burdens on parents. They are the deficiency in students' creativity and self-initiated

studying abilities, the impoverishment of school education due to the overheated race outside schools, the disadvantages and the feeling of relative deprivation suffered by those parents and children who cannot obtain extracurricular lessons for economic reasons, and the undesirable impact on the national economy due to wasteful investment in terms of human and physical resources.

B) The most fundamental and desirable cure for the overheated race in extracurricular lessons is to revise the social structure so that the abilities, not academic backgrounds, are respected, improve the environment for and therefore the quality of school education through financial investment, pursue a balanced growth of various institutions of higher education, expand life-time education, and especially improve on college admissions system to decrease the demand for extracurricular lessons. However, these problems are closely related to all other social phenomena, and therefore cannot be cured in short time. It has been long since the overheated competition in private education related to college admissions surfaced as a social disease. Parents, well aware of these pathological phenomena, did not try to overcome them but rode on them for the sake of their children's interests, both contributing to the aggravation of the socio-pathological phenomena and being victimized by them at the same time.

Against this social background, the overall ban on extracurricular lessons in Article 3 was an unavoidable means to reduce the overheated competition in private education and thereby restore normalcy to school education, and lessen the economic burdens on the majority of people when the adverse effects at that time were too great to be left alone.

When viewed in light of the legislative background and the regulatory content surveyed above, the legislative purpose of Article 3 is to shut down high-expenditure extracurricular lessons thereby cooling down the race in extracurricular lessons and restoring normalcy to school education, minimize the inequality in opportunity for private education arising out of the abnormal race in extracurricular lessons, and therefore reduce nationally the waste of human and physical resources because of the abnormal educational investment.

2) The principle of proportionality as the limit on the restrictions on basic rights

The unconstitutionality of Article 3 depends on whether the restriction on parents' right to educate children and children's right to development of personality can be justified by its legislative purpose. In other words, the constitutional issue raised by Article 3 is that of drawing the boundaries between children's right to free development

of personality and parents' right of education on one hand, and the State's responsibility for education, i.e., to what extent the State can restrict children's right to free development of personality and parents' right to educate children in the area of private education. In this angle, the restriction on the freedom to choose extracurricular lessons as an occupation is secondary.

As to school education, the State has a broad authority in shaping the educational system. In such areas of off-school private education as extracurricular lessons, the State's regulation has a limit. The State must guarantee people's basic rights and therefore must respect children's right to free development of personality and parents' right of education in restricting such private form of education as extracurricular lessons. In other words, the opportunity should be open for the parents to realize their particular wishes for their children's education when formal education does not satisfy them. The opportunity should be also open for children to develop their diverse merits and attributes freely of the State's intervention. However, parents' right of education, children's right to personality development, and the occupational freedom of those wishing to give extracurricular lessons are not absolute basic rights and therefore can be restricted like other basic rights pursuant to Article 37(2) of the Constitution. Such restriction on basic rights must abide by the principle of proportionality, the mandate of government by the rule of law.

3) Legitimacy of legislative purpose and appropriateness of means

A) The restriction on basic rights by Article 3 is permitted only when the legislature pursues through it a constitutionally permitted purpose. The legislative purpose of Article 3, as well as the public interest that justifies the restriction on people's basic rights, is, as said before, to shut down high-expenditure extracurricular lessons to cool down the race in extracurricular lessons, thereby restoring normalcy to school education; lessen the economic burdens on parents arising out of the abnormal race in extracurricular lessons, and therefore reduce nationally the waste of human and physical resources because of the unreasonable educational investment.

The Constitution accepts it as evident that, when its guarantee of rights to property, occupational freedom, and other basic rights allows individuals to enjoy their economic freedom, they will have to live economically unequal lives to a certain extent. The Constitution also guarantees parents' right to educate children and their rights to use and dispose of their properties freely, thereby protecting their rights to bear different economic burdens for their children's education depending on their views of life and education and their economic resources. Therefore, it is highly questionable whether Article 3's

legislative purpose to lessen parents' economic burden in private education and to equalize the extent of private education received by all people is legitimate public interest permitted by the Constitution.

B) People will have different conceptions of 'high-expenditure' depending on their economic resources. To the resourceful, the so-called 'high-expenditure extracurricular lessons' may not be 'high-expenditure.' To the low-income, even extracurricular lessons at private teaching institutes which is allowed by Article 3 may be 'high-expenditure.' The Constitution posits as its ideal human image that of a mature democratic citizen who decides on and shapes each one's life under his or her responsibility within the social community on the basis of his or her views of life and society. Therefore, it is consistent with the ideology of the Constitution that parents decide themselves how much a burden they will carry for their children's private education, in consideration of their views of life and education and their economic resources, and they bear the responsibility and the risk thereof. Furthermore, forcing all students to receive private education in all areas encompassing school subjects, non-school subjects, arts, and skills only from private teaching institutes and lesson halls will make them receive the almost equal level and content of private education. Such result contradicts the constitutional principle of a cultural state, which is directed at creativity, individuality, and maximization of one's potential as the goal of education and at the individuality and diversity of each person generally.

In private education, our society unfortunately lost a self-correcting or self-controlling capacity. The State must intervene. In this exceptional loss of societal self-regulation, the legislative purpose of Article 3, namely preventing high-expenditure extracurricular lessons and thereby lessening parents' burden in private education due to over-heated competition and procuring equal education to all people to an extent, is a legitimate purpose that the legislature may pursue 'provisionally.'

C) From the perspective of appropriateness of means, Article 3 allows extracurricular lessons through private teaching institutes, lesson halls, and college (graduate) students but otherwise adopted a comprehensive ban of all private forms of extracurricular lessons with the possibility of high-expenditure extracurricular lessons. It is unquestionable that such means contributes to the accomplishment of the legislative purpose. The Article 3 is appropriate as the means.

4) The least restrictive means and the balancing of interests

A) The progress of human history and culture can take roots only when one generation's product of mental activities is inherited

by its successor generation. The act of teaching and learning is a precondition of historical development and cultural progress.

All individuals, through learning, develop their inborn potential, mature their personalities, and nurture the abilities to live independently within the social community. One's liberty and right to learn is the stepping stone for the national community to progress economically and culturally. It is one of the most important basic rights upon which one can maintain human dignity and worth and pursue a happy and humane life. The freedom to learn includes a right to decide on the instructor, the content and place of instructions, and the expenses for instructions.

Especially, as established earlier, private education is an area for the society's autonomy. Children's right to personality development and parents' right to educate children in principle take precedence over the State's regulatory power. The private act of teaching and learning does not interfere with another's legal interest or public interest, and is therefore not socially harmful. On the contrary, it is an act guaranteed as a basic right, and an act to be promoted by a cultural state. Only in exceptional situations where the exercise of the basic right causes a social risk, the State must intervene and regulate.

Therefore, if the legislature wants to regulate extracurricular lessons even to protect the society from important risks, it must choose, among many appropriate means to accomplish the legislative purpose, the means as less restrictive on and as respectful of basic rights as possible. Therefore, the format of regulation should not be a 'ban as a principle' but a ban only 'in exceptional situations accompanied by anti-societal elements.'

B) The main legislative purpose of Article 3 is to suppress high-expenditure extracurricular lessons that have encouraged and over-heated the abnormal race in extracurricular lessons and otherwise were the main culprit for the attendant social evils. In order to suppress high-expenditure extracurricular lessons, the State had to engage in price control. Article 3 therefore allowed extracurricular lessons only through private teaching institutes and lesson halls, and controlled the prices by setting up a registration system for private teaching institutes and lesson halls. In other words, the legislature found it easy to control lesson fees when extracurricular lessons take place publicly and lawfully through the registered private teaching institutes and lesson halls, and therefore permitted such extracurricular lessons. Also, the legislature found the risk of high-expenditure extracurricular lessons given by college (graduate) students relatively low, and therefore allowed such extracurricular lessons. On the other hand, the legislature must have banned private lessons almost entirely

because it considered that they were hard to monitor and the price control on lesson fees would be difficult to maintain.

In other words, the legislature, in preventing high-expenditure extracurricular lessons, took the method of 'overall prohibition and exceptional permission' against all extracurricular lessons, entirely banning private lessons. As a result, many forms of teaching without any relationship to the legislative purpose of eradicating the risk of high-expenditure extracurricular lessons, were inclusively banned.

For a concrete example, firstly, high-expenditure extracurricular lessons are the products of the overheated frenzy in private education, and the overheated race is caused by the intense admissions race. Some private lessons are unrelated to the admission race and done in the area of private education, in other words, knowledge, skills, and arts in non-school subjects. They are done for the purpose of self-development, hobbies, and pastime. Banning such private lessons exceeds the extent of restriction on basic rights necessary for the accomplishment of the legislative purpose.

Secondly, the ban on elementary school students' receiving of extracurricular lessons on school subjects at private teaching institutes also exceeds the means necessary for the accomplishment of the legislative purpose. As long as extracurricular lessons given at private teaching institutes are under the control of lesson fees by statute, there is no risk of high-expenditure extracurricular lessons there.

Thirdly, private lessons on school subjects given to elementary, middle, and high school students are directly or indirectly related to the admission race. They are likely to be turned into high-expenditure extracurricular lessons. Although there is thus the need for regulation, ordinary people's extracurricular lessons on school subjects may include relatives' or neighbor housewives' lessons for low fees, prominent artists' private lessons in music and fine arts for appropriate fees, private lessons through computer communications, the sale of study papers followed by visits, and many other private lessons that will not cause any social evil.

C) Since extracurricular lessons are not by nature anti-social and are acts protected as basic rights, Article 3 should have taken the approach of overall permission and 'exceptional ban in anti-social cases.' Article 3 takes the inverse approach of 'overall prohibition and exceptional permission.' The roles of the rule and the exception are reversed. Furthermore, the prohibition in Article 3 includes for regulatory convenience many types of conduct that do not seem necessary to be included for the accomplishment of the legislative purpose. The regulatory means chosen by the legislature is not the least restrictive and unavoidable means for to accomplish

the legislative purpose.

The legislature used 'convenience of control' as the standard of choosing the means, and thereby banned private lessons outside private teaching institutes and lesson halls entirely. As the scope of the banned conduct thus grew, the State also had to broaden the scope of illegal extracurricular lessons that the State had to monitor and discover in order to maintain the effectiveness of the statute. Of course, one may argue that, unless all private lessons by ordinary people are banned, the monitoring for high-expenditure extracurricular lessons will be ineffective given the extreme shortage in labor and budget required. However, the shortage in labor and budge cannot justify indiscriminate restriction on important basic rights. Furthermore, detection of illegal extracurricular lessons is difficult and requires ever more administrative resources of the State. The legislative means to accomplish the legislative purpose chosen by Article 3 is the only effective means.

The restriction exceeding the extent necessary for the accomplishment of the legislative purpose obstructed humanity's most natural acts and the acts to be respected most by the State, namely, freely and individually learning from prominent artists and artisans or housewives in the neighborhood. Such result has reduced the efficacy of Article 3 and made it disrespected by people. Ubiquity of illegal acts at the places of learning is itself harmful educationally. That a law is not abided by people and cannot enforced by the State is the representative manifestation of the fact that it is regulating an area of life not practically possible to be regulated.

D) From the perspective of the balancing of interests, the legislature's aim through Article 3, namely 'prohibition of high-expenditure extracurricular lessons', may not be a constitutionally permitted legislative purpose. Given that question, such public interest cannot be said to be great. The concrete effects produced by the restriction on basic rights, namely, the prohibitory effect on high-expenditure extracurricular lessons, are not clearly shown, either. On the other hand, the restrictive effects on basic rights and the threat to the constitutional aim of a cultural state are severe. Article 3 places a severe limitation on parents' right to educate children freely and children's right to learn freely. Outside the formal education system, there was no choice other than private teaching institutes education regulated by the State. As a result, 'diversity in private education', needed to supplement the uniformity of the formal education, and 'individuality in private education', needed to accommodate each child's individuality and merits, were lost amidst private teaching institutes education, which is itself conducted as collectively and uniformly as school education. A case of banning all students all

forms of private education outside private teaching institutes just so as to prevent high-expenditure extracurricular lessons is unheard of. It also contradicts the Constitution's image of humanity built on the basic principles of self-determination and individual responsibility, and also violates the principle of a cultural state aimed at individuality, creativity, and diversity.

Such regulation of private education as Article 3 has more than the private dimension of infringing on basic rights of parents and children. It culturally impoverishes the State, and the cultural poverty will lead to social and economic backwardness in this age of unlimited global competition which is difficult for the states to survive. The regulation of private education in Article 3 goes beyond the private dimension of substantially infringing on the basic rights of parents and children in private education but gentrifying the State culturally. Cultural poverty in this age of unlimited global competition difficult for states to survive will ultimately lead to social and economic backwardness. There is a question as the effectiveness of Article 3 in the accomplishment of the legislative intent, one hand, and Article 3 produces substantial restrictive impact on basic rights and substantial disadvantages in the realization of a cultural state, on the other. Therefore, Article 3 departs widely from a reasonable relationship of proportionality between the public interest obtained through the restriction and the restrictive impact caused by the restriction, and therefore violates the balance of interests.

5) Sub-conclusion

Then, Article 3 violates the principle of proportionality because it is not the least restrictive means and does not balance the interests, thereby excessively and unconstitutionally restricts people's rights to educate children, to develop personality freely, and to choose occupations.

The reason for invalidating Article 3 is not that the prohibition of high-expenditure extracurricular lessons is itself unconstitutional. It is that the chosen means of suppressing high-expenditure extracurricular lessons is unconstitutional because it all-inclusively bans those extracurricular lessons with no risk of being high-expenditure and thereby excessively restricts people's basic rights. Therefore, even though Article 3 is struck down, the legislature can take legislative action, the effects of which are limited, for instance, to extracurricular lessons given for exorbitant fees, extracurricular lessons given by college professors and others related to college admissions to those students preparing for exams, extracurricular lessons to the students given by school teachers who can influence students' evaluations and grades, and other cases of threatening the fairness of admissions or causing grievous social harms.

(C) Unconstitutionality of Article 22(1)[1]

Article 22(1)[1] is a punitive provision that punishes the violation of Article 3. Therefore, Article 22(1)[1] is unavoidably unconstitutional and is struck down.

4. Conclusion

The instant statutory provisions are unconstitutional. Justices Chung Kyung-sik, Lee Young-mo, and Han Dae-hyun each wrote a dissenting opinion. Justices Kim Yong-joon, Kim Moon-hee, Koh Joong-suk, Shin Chang-on, and Ha Kyung-chull wrote a opinion in reply to Lee Young mo's dissent.

5. Justice Han Dae-hyun's dissenting opinion

This statutory provision excessively and unconstitutionally restricts people's basic rights, I agree. I, however, think that immediate invalidation is not appropriate in light of today's reality.

As the majority opinion appropriately state, the most fundamental and desirable cure for the overheated race in extracurricular lessons and the attendant evils is to revise the social structure so that the abilities, not academic backgrounds, are respected, improve the environment for and therefore the quality of school education through financial investment, pursue a balanced growth of various institutions of higher education, expand life-time education, and especially improve on college admissions system to decrease the demand for extracurricular lessons. Banning extracurricular lessons is not a fundamental cure.

However, today's reality has not been improved much from 1981, the year that a ban on extracurricular lessons was first legislated, or 1995, the year that this statutory provision was legislated. Academic backgrounds are still all-important in the decisions affecting employment and social status. College admission race is still intense around a few schools in the capital area. Various forms of extracurricular lessons are appearing in preparation for the College Scholastic Ability Test (Pre-University exam), school grades, and logical composition tests. The frenzy to strengthen small children's scholastic abilities is still high. The quality and environment for school education is still insufficient.

Then, we had better to maintain the regulation to a certain extent than to allow extracurricular lessons entirely. The concrete choice for the regulatory method is the legislature's task. The legislature should examine closely adverse consequences and the severity

thereof arising out of each type of extracurricular lessons varying in terms of instructors, students, the contents and places of instructions, and the fees for instructions. It should also project the changes thus far to the future. It should ultimately craft a precise legislative method that effectively restricts only those types of extracurricular lessons causing adverse consequences, and therefore the least restrictive means on basic rights that eliminates the evils of extracurricular lessons.

Therefore, I think that we should not immediately invalidate the instant statutory provision and instead should find it nonconforming to the Constitution so that it remains effective in form, and thereby allow the legislature to prepare a constitutional way to regulate extracurricular lessons.

6. Justice Chung Kyung-sik's dissenting opinion

I find it legitimate to regulate extracurricular lessons. The unconstitutionality of this statutory provision arises out of its insufficiency as a basic-rights-restrictive-statute in its system and method. We should not immediately invalidate this statutory provision through a simple decision of unconstitutionality. We should hold the statutory provision provisionally effective on a decision of nonconforming to the Constitution.

A. Legitimacy of regulating extracurricular lessons

Extracurricular lessons are causing serious evil consequences in today's society. It is necessary and legitimate to regulate them.

From an educational viewpoint, extracurricular lessons consist usually of commission to memory of isolated pieces of knowledge and of sharpening the abilities to answer the questions in admissions tests for higher-level schools. Students are forced into mechanistic acquisition of knowledge and do not accomplish intellectual maturity of a creative person. They do not nurture the abilities to study and solve problems independently. An excessive amount of extracurricular lessons burdens students too much mentally and physically in their growing years, and deprives them of an opportunity to develop their specialties and interests. It disrupts their emotional state and sound physical growth. At they relate to school education, extracurricular lessons cause students to ignore school education and put emphasis on extracurricular lessons, forcing the schools to distort their curriculums to meet the exam-preparation needs so that they can compete with extracurricular lessons. As a result, many teachers find their roles as teachers full of contradictions and some of them

end up becoming high-income extracurricular lesson instructors.

From an economic perspective, the frenzy over extracurricular lessons makes the lesson fees oppressive upon family finances. Rich families invest in exorbitant lesson fees to receive ever better extracurricular lessons. Ordinary people also receive extracurricular lessons to get out of anxiety traps. It is well known that high-expenditure extracurricular lessons cost a few hundreds of thousand wons per month to a few million wons per subject. As the time for college admission tests nears, so-called 'pinpointing extracurricular lessons' and 'wrap-up extracurricular lessons' mushroom at the rate of a few tens of million wons per month. In this state, parents cannot but help investing in exorbitant fees despite their family finances even by taking up extra jobs, and feel tempted to earn money through illegal means for their children extracurricular lessons.

From the social perspective, the frenzy over extracurricular lessons is a serious problem. Children of low-income families fall behind in the race in extracurricular lessons. Already handicapped by the impoverished school education, effectively, they are not given an equal opportunity for admissions to higher-level schools. This state of affairs leads the formation of social status through private investment in education and the hereditary pass-on of wealth. Those who did not obtain for their children or receive themselves extracurricular lessons form a belief that education is decided by economic resources and the competitive structure of the society is not fair. The frenzy over extracurricular lessons deepens the sense of alienation between various classes of people and interferes with the stabilization and integration of the society.

A fundamental cure for the evil consequences of extracurricular lessons must involve the enrichment of school education, the expansion of opportunities for higher education, the improvement on student selection processes, the reform of consciousness, and the establishment of merit-based society. However, such fundamental cure will be a new, long-term solution that must wait for an all-inclusive national consensus. Therefore, today's reality demands a direct ban on extracurricular lessons as the urgent symptomatic treatment for the evil consequences of extracurricular lessons. Therefore, the legitimacy of legislative intent is sufficiently recognized.

B. Unconstitutionality of the regulatory method of this statutory provision

This statutory provision adopted the overall ban on extracurricular lessons accompanied by the selective permission in exceptional

cases. Such regulatory method does not satisfy the requirements for legislative restriction on basic rights.

(1) All acts protected by basic rights are by themselves not harmful socially. They need to be restricted only because they conflict with others' interests or public interest when they are exercised. Restriction on them, even if done by statute, should not eliminate the right to exercise the freedom guaranteed by basic rights, and should be limited to the necessary extent. (10-1 KCCR 552, 96Hun-Ka5, May 28, 1998)

The acts of learning and teaching are mankind's original behavior. They are the basic elements necessary for the maintenance of a society. They are protected by the general freedom of action derived from the Article 10 right to pursue happiness in the Constitution. Lessons are not in themselves harmful. On the contrary, they are in essence educational, and should be protected as basic rights. Only when they cause educational, social, and economic harms, they need be appropriately regulated.

Of course, the types of lessons vary from the socially harmful ones such as given by incumbent school teachers and college professors for high fees to the socially innocuous ones given by relatives in a natural mode. The legislature should decide which type will be regulated, and it should take into account the reality of school education, the extent and practice of extracurricular lessons, the intellectual level and cultural background of the society, the income distribution, and other social and economic circumstances. Subject to that limitation, the legislature has a broad legislative-formative discretion.

Nonetheless, the statute regulation extracurricular lessons should be limited to the extent necessary for remedying their evil consequences. An overall ban, which destroys the freedom to teach and learn guaranteed as basic rights, is not within the scope of that legislative-formative discretion.

(2) This statutory provision adopts the regulatory format where the ban is the rule and the permission is an exception. Such format must be based on a judgment that extracurricular lessons are inherently or socially undesirable or harmful. When the act of learning and teaching is a basic right to be guaranteed, such legislative format is not consistent with the requisite system and method of legislatively restricting basic rights, demanded by the Constitution. Basic rights may be restricted for the sake of public welfare and social order, but only by a legislative method that restricts as little as possible. Therefore, any regulation on extracurricular lessons must involve the selection of those particular and concrete types that cause social harms and therefore need to be regulated, and the restrictions

or bans of only those types. Through those types not regulated, people should be freely allowed to teach and learn. This statutory provision takes the inverse method of banning all forms of extracurricular lessons and permitting a few defined exceptions. The inverse regulatory method will necessarily result in a ban on those extracurricular lessons that do not need to be regulated, and therefore violates the rule against excessive restriction, the requirement for any legislation that restricts basic rights. One example of such unnecessary restrictions is that close relatives, not in the same family register, cannot give extracurricular lessons even for free.

(3) This statutory provision bans all forms of extracurricular lessons and permits a few exceptions. Such legislative format is not consistent with the system and method of restricting basic rights. It can restrict extracurricular lessons that do not need be regulated. Therefore, it infringes upon the instructor's freedom to choose occupation and the student's freedom to learn excessively of the extent necessary for the accomplishment of the legislative purpose.

Therefore, this statutory provision violates the rule against excessive restriction of Article 37(2) of the Constitution.

C. Proposal to cure the unconstitutionality of this statutory provision and the decision of nonconformity to the Constitution

I find this statutory provision unconstitutional because regulation on extracurricular lessons is admittedly legitimate but the chosen legislative method is not consistent with the constitutional rule against excessive restriction. I do not mean that extracurricular lessons cannot be regulated, but that the legislature can properly regulate extracurricular lessons through a constitutional method.

In the current situation where the evils of extracurricular lessons are still serious and need to be regulated, the invalidation of this statutory provision and the resulting all-out emancipation of extracurricular lessons does not accomplish a constitutional state of affairs.

The elimination of the unconstitutionality in this statutory provision depends on the legislature's efforts to improve upon it legislatively. The legislature first must base its efforts on the belief that the acts of learning and teaching are not by themselves harmful but are protected as basic rights. Upon that basis, the legislature must change the current method of prohibiting all extracurricular lessons and permitting exceptions to a method of permitting all forms of learning and teaching and selectively regulating only those types that

cause social harms and need be regulated. Only then, the legislature can accomplish a constitutional state of affairs.

Therefore, we should not immediately invalidate this statutory provision through a simple decision of unconstitutionality. Far more desirably, we should allow the legislature to find a reasonable method to regulate extracurricular lessons by forming a comprehensive, nation-wide consensus and in the meantime avoid the entire regulatory vacuum in extracurricular lessons by holding the statutory provision provisionally effective on a decision of nonconformity to the Constitution.

7. Justice Lee Young-mo's dissenting opinion

I find this statutory provision constitutional and state the reasons below.

A. National Educational Policy and the Standard for Constitutional Review

(1) Education originates from the custody holders' rights and duties to protect and educate their children. It is a natural right that began with human history. Accumulation of knowledge and skills through education is necessary for each individual's formation of personality and participation in social life. A citizen of a democratic state needs education to understand national governance and participate in politics. A modern constitution states the right to receive education as a basic right.

(A) The Constitution states in Article 31, all people have rights to receive equal education according to their merits (Item 1). All people have duties to provide elementary education and the education specified by law to the children they protect(Item 2). The right to receive education is a basic right that forms the basis of all liberties and rights. It is the essential element necessary for the establishment of a democratic, cultural, and social welfare state, the ideology of the Constitution. Article 31(1)'s mandate 'equal. . . according to their merits' reflects the importance of this right. It bans discrimination on the basis of mental and physical merits, gender, religion, belief, social status, economic status, or any other criterion (the Framework Act on Education, Article 4), and mandates the establishment and administration of a scholarship or educational subsidy for those with economic hardship (the same Act, Article 28(1)). It is geared toward the realization of substantive equality.

Therefore, whether the State's educational policy is consistent

with the principle of equality is not an issue of policy judgment. Instead, in light of the bases for discrimination listed in Article 11(1) of the Constitution (gender, religion, social status) should be subject to strict scrutiny. (9-1 KCCR 683, 96Hun-Ma89, June 26, 1997, Justice Lee, Young-mo's concurring opinion)

(B) The legislature enacted the Framework Act on Education by Act No. 5437 on December 13, 1997 for the purpose of specifying people's rights and responsibilities and the responsibilities of the State and local governments about education, and the educational system and the basic matters about its operation.

According to Article 31(1) and (2) of the Constitution and Article 1 of the Framework Act on Education, education is not only all people's rights but also the common responsibility of the State and people. Both the providers and the recipients of education are the agents of that right. People's right to learn and teacher's freedom to teach are both protected but the first takes precedence over the second. (4 KCCR 756, 89Hun-Ma88, November 12, 1992) Parents and other custodians ('parents', hereinafter) have the duty to have their children or the children under their custody ('children', hereinafter) receive the basic education, elementary education (6 years), and the State and the local governments have the duty to bear the expenditure, establish and administer schools and social education facilities, and instruct and supervise the same (the Constitution, Article 31(1)-(3); the Framework Act on Education, Articles 8, 11, and 17). The learner's basic human right must be respected and protected. Therefore, the contents, methods, materials, and facilities of the education must accommodate the learner's personality and individuality so that his or her merits are developed to the fullest extent. Students must abide by the rules of the school, and refrain from interfering with teachers' education or research or from disrupting the orders of the school (the Framework Act on Education, Article 12).

(2) Education must, under the ideology of *broadly benefiting all-mankinds*[1], help all people build their personalities and equip themselves with the abilities to live independently and the qualifications of democratic citizens so that they can live human lives, and thereby contribute to the development of a democratic state and the realization of the ideal of mankind's co-prosperity (the Framework Act on Education, Article 2). School education must aim at the *education for the whole person* education that includes the development of students' creativity and personality as its goal (Article 9(3))

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1). The Phrase means *benefit mankind broadly*. It is an expression of the founding ideology of *Chosun* the first nation-state in the Korean peninsula, founded by *Dan-Gun*, B.C.2333.

('the purpose of school education', hereinafter).

School education is an important venue for children's education. It is a public task (the same Act, Article 9(2)). Therefore, schools take the central role in providing organizational and systematic education (education set forth in Article 2 of the Elementary and Secondary Education Act and Article 2 of the Higher Education Act is 'school education', and everything else 'private education', hereinafter). The issue of determining 'when, where, who, what, how' to teach and learn' about one's children's education is a common task and responsibility for the State and parents and requires harmony and compromise between those in the mutually cooperative relationship. Therefore, 'the purpose of school education' forms the foundation for children's education, which is the common responsibility of the State and the parents. Then, the State must not depart from it in intervening in children's education, and the parents' decision-making must abide by its restrictions.

(A) The Constitutional Court ruled, in relation to school education, that when to make secondary education compulsory (3 KCCR 11, 90Hun-Ka27, February 11, 1991), whether to use state-selected textbooks as opposed to certified or approved ones (4 KCCR 739, 89Hun-Ma88, November 12, 1992), and whether to mandate management committees in private schools as in state or public schools (7-1 KCCR 267, 91Hun-Ma204, February 23, 1995), are the matters up to legislative discretion and policy-making. These decisions cited the mandate in Article 31(6) of the Constitution that the basic matters about school education, life-time education, and all other educational institutions, the management and finance thereof, and the status of teachers shall be specified by statute, and used that clause to reason that the basic policies and guidelines about education are to be determined by the statutes of the National Assembly, and the details by the policy-making of the Administration pursuant to the delegation by the statutes. Upon that reasoning, the Constitutional Court did not found wide departures from the scope of the discretion and therefore issued the above decisions.

(B) If 'the purpose of school education' is interfered with by private education, the State has the duty and responsibility to take appropriate regulatory actions to normalize school education. The public value of school education does not stop at requiring parents to send their children to elementary schools. It goes beyond regulating the passive exercise of parents' right to educate children by imposing the said duty. Even when parents exercise their right affirmatively by sending their children to middle and high schools, it imposes on the parents a duty not to interfere with the public value of school education.

When private education interferes with the public value of school education, the State can take various actions. Those actions, though based on 'the purpose of school education' vary according to the inalienability of private education and school education, the impact of the instructions in school education on school education and the society. Therefore, when the State formulates regulatory actions aimed at the normalization of school education, the State must take into account the reality of school education at the time of the regulation, the level of economic, technological, and cultural development, the need to respond to the quantitatively and qualitatively growing need for education of the society that is becoming ever more complex, and the adverse effects of private education on their children. The State's judgments thereof belong to the policy-making domain related to the administration of school education in Article 31(6) of the Constitution. As long as the State abides by the limit of the discretion, it does not violate the legislative formation and the policy-making privilege.

In controversy in this case is extracurricular lessons, a part of private education. It is not complete in itself but ancillary and supplementary to school education. This statutory provision restricts parents' right to educate children and children's freedom of learning. Constitutional review of this statutory provision must examine the legitimacy of legislative purpose and the appropriateness of means, namely whether the legislative formation and policy-making concerning extracurricular lessons departs from the reasonable limit. On the other hand, instructors' occupational freedom belongs to the domain of economic liberties. Due to the uniqueness of the occupation, such freedom is directly related to educational and social issues, and its unlimited exercise may disrupt social order and public welfare, and therefore can be restricted for the purpose of realizing a social welfare state. Constitutionality of the regulatory legislation of this nature is determined according to the reasonableness of legislative formation. (11-2 KCCR 36, 98Hun-Ka5, July 22, 1999)

(3) The determination of the standard of constitutional review according to educational policies is important to the interpretation of 'national security, public order, and public welfare' of Article 37(2) of the Constitution, which is the limiting provision as well as the norm of review on the restriction on people's liberties and rights, and also to the issue of the burden of proof.

B. Constitutionality of this statutory provision

(1) We had once left extracurricular lessons supplementary to school education, to the self-regulation of parents and instructors.

As extracurricular lessons became expensive and over-heated, we had felt to our bones severe social problems. In order to prevent such side-effects and evils of extracurricular lessons, we banned extracurricular lessons to elementary, middle, and high school students entirely by enacting Article 9-2 during revision of the Act on Private Institutes by Act No. 3433 on April 13, 1981 (except lessons in skills, arts, and sports, lessons given at private institutes to those non-students preparing for examinations, lessons given by relatives in the same family register, instructions that qualify as volunteer services, trainings at schools, libraries, factories, and other workplaces). The law later went through a major revision into the Act on the Establishment and Operation of Private Teaching Institutes by Act No. 4964 on August 4, 1995 ('Law', hereinafter). There were partial revisions on the scope of exceptions but they did not change the principle that 'extracurricular lessons are banned to all students enrolled in schools.'

(A) Article 2(3) of the Law defines extracurricular lessons as 'activity which teaches students of elementary schools, middle schools, high schools or schools equivalent thereto or persons preparing themselves for an examination for school admission or qualification on certification of academic attainments'; Article 3 states 'No person shall provide extracurricular lessons' and thereby bans all extracurricular lessons as a matter of principle. Each item of that Article then defines the exceptions to that principle. Article 22(1)[1] of the Law then states 'A person shall be punished by imprisonment for not more than 1 year or a fine not exceeding 3 million Won'. The scope of permitted extracurricular lessons is quite broad.

(B) According to the Empirical Study on Extracurricular lessons (June 1997) of the Korean Educational Development Institute ('the Study', hereinafter), 53.1% of elementary, middle, and high school students receive extracurricular lessons, and another 45.3% are willing to receive them. 76.6% of the subjects taught in extracurricular lessons are school subjects (National Language, English, Mathematics, Science, Civics, etc.), and another 19.5% are arts and sports. 81.5% of those receiving extracurricular lessons in school subjects received them in order to supplement school education in those subjects that they fall behind. 21.4% of those receiving extracurricular lessons in arts and sports receive them for the purpose of school education or admission into higher-level schools, and another 62.2% for the purpose of developing hobbies. Parents, when asked about the reason for the frenzy over extracurricular lessons, pointed to admissions race in 58.2%, development of potential and talents in 15.3%, 'just because others do it' in 14.6%, and lack of time to instruct children themselves in 6.3%.

Extracurricular lessons change depending on the subjects covered by admissions. If college admissions take into account school grades, there appear extracurricular lessons to address that. If each college conducts its own exam, extracurricular lessons prepare students for the admission test for universities. The College Scholastic Ability Test is responded to by extracurricular lessons as logical composition tests are.

Extracurricular lessons have not been pursued for the pure purpose of helping children identify and develop their potentials or build up their character as a whole person. They have been pursued to supplement school education and prepare for admissions into higher-level schools.

(2) The main thesis of the majority opinion is that Article 3 infringes upon the extracurricular lesson instructors' freedom to choose occupation and right to pursue happiness, the parents' right to make decisions on their children's education, and the children's freedom to learn and right to free development of personality, and is therefore unconstitutional. The majority finds that, because the ban is applied against private lessons in knowledge, skills, and arts non-school subjects, relatives' or neighbor housewives' lessons for low fees, prominent artists' private lessons in music and fine arts for appropriate fees, private lessons through computer communications, the sale of study papers followed by visits, and lessons to elementary school students in school subjects, it is not the least restrictive means and does not satisfy the requirement of the balancing of interests.

(A) I agree only with the majority's finding as to the legislative background and intent of Article 3 contained in 1) Legislative background and intent of Article 3 of (B) Unconstitutionality of Article 3 in (3) of [Reasoning] 3. B. Review on Merits. I disagree with all other parts of the decision. I would like to state my opinion as to the legitimacy of legislative purpose and the appropriateness of means.

(B) 1) In this society, one's academic backgrounds are perceived to exercise far more influence on his or her employment, salaries, and social status than his or her merits. Parents are forced to pay attention to extracurricular lessons which provide the force-feeding of knowledge through rote memory and the training on admission test questions, which are geared toward their children's admissions into higher-level schools. Our high interest in education has risen even higher due to the relative sense of victimization that one's own children will fall behind other children who receive extracurricular lessons, and due to the sense of accomplishment that extracurricular lessons give advantages in intense races and facilitate admissions into better higher-level schools or better departments. As a result,

parents have resorted to high-expenditure extracurricular lessons beyond their budget, leaving family finances damaged.

The frenzy in extracurricular lessons forces students into a life centering around examinations in or outside schools, in which good grades are all-important. They do not have a chance to develop their individual specialties and interests. Their intellectual maturity is inhibited, and their growth into a creative person is undermined. The pressure about school grades has forced them into unstable emotional states and then to juvenile delinquency. The accumulated mental and physical fatigue damages children's health, and children and parents equally ignore school education which is then conducted in a distorted manner. The destruction of school education is contradictory to 'the purpose of school education,' and leads to the lack of a cooperative and community-oriented mind among students who finish their middle and high schools without obtaining the wisdom of accommodating and living together with others.

The side-effects of the frenzy in extracurricular lessons do not stop there. Extracurricular lessons by incumbent middle or high school teachers and college professors are difficult to detect, and are expected to cause frequent irregularities in admissions and school grades. Parents' economic resources become an important determinant of their children's chance for admission into higher-level schools. The sense of alienation among people of different levels of income deepens.

2) In order to minimize the above educational and social side-effects and ills and to restore normalcy to school education, we required ordinary people (individuals) to establish and operate private teaching institutes or lesson halls or to work there as instructors if they wanted to provide extracurricular lessons as part of a continuous or repetitive income-generating activity (the Framework Act on Education, Articles 2(1) and (2) and 15). The exception for college (graduate) students was allowed as part of an educational subsidy (the same Act, Article 28(1)).

Founders and Managers of Private Teaching Institutes shall make efforts to provide learners with convenience, lighten their burden and provide with equal opportunities (Article 4). They should meet the requirements prescribed in the Act, such as Purification of Educational Environment (Article 5), Standards for Facilities (Article 8), Qualifications of Instructors (Article 9, 13).

Especially, Article 15 states the lecture fees shall be determined by the founder etc., taking into account teaching contents, hours but they shall be restricted by the Ministry of Education (According to the 'Study,' the economic burdens felt by parents in relation to

extracurricular lessons are 'a little burdensome' in 41.7%, 'very burdensome' in 28.7%, and 'little burdensome' in 20.0%.). We know from experience that extracurricular lessons become more expensive and frenzied due to the social environment focusing more on schools than merits, parents' overzealous educational fervor, inferior school education, and admission system, but also in large parts due to private lessons, which are the subject matters of this case. Permitting private lessons to ordinary people is likely to make extracurricular lessons more expensive and frenzied, and the resulting side-effects will lead to uncontrollable social problems. The necessity of complete ban on private lessons must be acknowledged.

According to the Study, 50.9% of parents agreed with the maintenance of the status quo supplemented by strengthened enforcement, and 40.7% with the complete ban. Only 6.1% called for complete emancipation. Additionally, 45.6% of the parents found the reality demanding extracurricular lessons a little dissatisfactory in 45.6%, very satisfactory in 42.0%, and little dissatisfactory in 10.9%. The results are that of June 1997, but probably today's results will not be very different.

3) A) The State by principle does not intervene in parents' education of their children in private education. It restricts only private lessons in order to normalize school education, a public project. However, even private lessons can be given by ordinary people by establishing and operating private teaching institutes and lesson halls or working there as instructors. Students can receive extracurricular lessons through school-administered supplementary education, lessons given by relatives in the same family register, private lessons given by college (graduate) students, private teaching institutes, and arts lessons at lesson halls.

If private extracurricular lessons in school subjects are freely given to middle or high school students, as our past experience tells us, students will be ranked more prominently by academic achievement in school education, and therefore their free development of personality and their growth into an autonomous person will be obstructed. An excessive frenzy necessarily leads to the escalation of lesson fees, denying equal protection in substantive educational opportunity to those families unable to shoulder the fees. The majority finds it conforming to the constitutional ideology that parents are on their own in deciding how much burden they will carry for children's private education. Such view justifies the discrimination against the children of low-income families. If the difference in academic achievement depends not on the potential and efforts of individual students but on their parents' economic resources, it will turn education into a tool of solidifying social inequality and passing

the same on to successive generations. However education is supposed to be a forum for dissolving social inequality, making changes and co-existing to reach an open society.

B) If, as the majority opinion finds, the ban is lifted on relatives' or neighbor housewives' lessons and prominent artists' private lessons and therefore violates the principle of proportionality, such lessons of secret nature will interfere with the accomplishment of the legislative purpose and may threaten the public value of school education. Given the public interest obtained by the ban on extracurricular lessons, their inability to provide extracurricular lessons and the resulting losses to them do not disturb the balance among competing interests. The ban on extracurricular lessons on school subjects to elementary school students causes undesirable physiological, emotional, and educational effects on them. The extracurricular lessons through computer communications emerged only recently and should not be considered as a decisive factor for invalidating the ban.

This statutory provision does not seem to be unreasonable. It was a legislative attempt at harmony and compromise between school education, the common tasks for the State and parents, on one hand, and extracurricular lessons, the sole jurisdiction of the parents, on the other. The legislative decision must be respected. This statutory provision does adopt the regulatory method of prohibiting as the rule and permitting only in exceptions. However, this statutory provision permits those extracurricular lessons that sufficiently supplement the academically challenged students, and bans only those private extracurricular lessons that are substantially likely to cause social evils and side-effects.

A minor defect in the legislative format and content or a difficulty or side-effect in the enforcement of law does not make this statutory provision unconstitutional.

C) The Constitutional Court already accepted Articles 71 and 112-6 of the Enforcement Decree of the Education Act limiting admissions to middle or high schools on the basis of residence as a legislative means to prevent the side-effects of the frenzy over admissions race. There, the Court found that the difference between urban areas and rural areas in the environment for secondary education is not severe, and that the Enforcement Decree includes various measures aimed at resolving the problems arising out of the administration of a uniform system. Therefore, the Court held that, the legislative means is just and therefore does not infringe on the essential content of parents' right to educate children and does not restrict the right excessively (7-1 KCCR 267, 91Hun-Ma204, February 23, 1995)

Now, we do not leave college admission to the autonomy of colleges but require them to follow the results (scores) of the College Scholastic Ability Test. In light of our decision upholding the restriction on parents' right to choose middle or high schools, we should also uphold this statutory provision that restricted private extracurricular lessons supplementary to school education. Whether to allow private lessons should be decided in line with our attitude toward the right to choose schools or the colleges' autonomy in admissions.

(3) For these reasons, I find this statutory provision being geared toward the accomplishment of a educational and social policy goal, and also being equipped with the legitimacy of end as well as the appropriateness of means. It does not infringe on the essential content of the basic rights of extracurricular lesson instructors, parents, and students.

Despite that, the majority decision invalidates this statutory provision by pointing out the problems with the minimality of restriction and the balancedness of interests in the statutory provision as a means to the accomplishment of the legislative purpose. I do not find the decision persuasive. Firstly, in relation to extracurricular lessons directly related to the publicly natured purpose of school education, the restriction on parents' right to educate children and the children's freedom of learning is a legislation aimed at policy goals based on Article 31(6) of the Constitution. As we examined above (A. (2) (A)), pursuant to the precedents of the Constitutional Court, the reasonableness of the discretion exercised in the legislative formation and the policy judgment is the standard of review. However, the majority states that the State cannot intervene in extracurricular lessons, which the majority believes to be subject to parents' power in private education, and the State's intervention is allowed only in the situation described below as the third point. This is questionable. Secondly, the majority seems to protect more strongly the economic right of extracurricular lesson instructors, namely the right to choose occupations, than the socially and economically weak without means to receive extracurricular lessons. Such lack of concern negates the policy discretion of the legislature in endeavoring to accomplish substantive equality and ignores the concept of public interest, a prerequisite to a restriction on basic rights. Thirdly, the majority states, the legislature can take legislative action, the effects of which are limited, for instance, to extracurricular lessons given for exorbitant fees, extracurricular lessons given by college professors and others related to college admissions to those students preparing for exams, extracurricular lessons given by school teachers to those students whose student evaluations and grades they can influence,

and other cases of threatening the fairness of admissions or causing other grievous social harms(3. B. (3) (B) 5) Sub-conclusion). This is because any legislative revision will not guarantee effectiveness due to the secrecy of instructions.

C. Additional Notes

(1) We call the year 2000 opening to the new century the age of information and communication (digital) revolution. While preoccupied with the relief efforts ensuing the foreign currency crisis in the so-called IMF (International Monetary Fund) period, which began in December 1997, our society is now facing the age of the growing number of the unemployed, the expanding number of the poor, the diminution of the middle class, and the polarization of wealth. We have a dire need to administer social security and social welfare policies to protect the substantive equality of people and thereby dissolve the sense of alienation among different classes. Social stability and integration has never been more important than now. At the same time, we have no dispute on the fact that the economic system of the new century runs on the basis of capitalism dependent on people's selfishness. Our task is how to adjust to or accommodate the weakness of capitalism, the growing separation and discord between the classes, which grows as the rich are getting richer and the poor are getting poorer, so that we can maintain and replenish the sense of community.

Therefore, from the perspective of a social welfare state, it is unavoidable to affirmatively restrict the economic liberties of the socially strong, namely the right to property, freedom of contracts, and freedom of occupations (the Constitution, Articles 23(2) and 37(2)). Through the restrictions, the socially and economically weak can enjoy the social rights stated in the Constitution (Articles 31 to 36) and then humane life.

(2) The important issues of this age is an educational revolution and a human resources development policy as well as economic ones. An educational revolution and a human resources development policy is a necessary means for our survival.

However, school education, the womb and birth place of human resources development, is about to be destroyed by the rapidly changing social phenomena and the side-effects of the College Scholastic Ability Test and extracurricular lessons. What is clear, adjusting the permitted scope of extracurricular lessons and revising the College Scholastic Ability Test amounts only to a localized, partial, and temporary cure and a symptomatic treatment. Such measures can neither accomplish this age's dire demand, an educational

revolution, nor quell the pending collapse of the educational institutions. Like other social institutions, schools now must confront the new age and hasten broad curricular revision, improvements on educational environment, and other reforms and repairs in order to respond to the rapidly changing social phenomena. Therefore, we must reexamine all educational systems from kindergartens to graduate schools and formulate a plan of reform befitting the new century.

(3) This statutory provision aims to normalize school education, the public good, by restricting elementary, middle, and high school students' private extracurricular lessons, which are related to school education, and accomplish equal opportunity in education. We value normalcy in school education more than anything else because of the immovable fact that school education is the place where the students develop their creativity, learn the concepts of liberties and responsibilities, and nurture their cooperative minds and sense of community needed for being democratic citizens.

The decision of unconstitutionality on this statutory provision is equivalent to unlimited permission of private extracurricular lessons. This is the time for the haves to restrain themselves and listen to the cries of the socially and economically weak. In disregard to this periodic background and without any mention of the precedent concerning parents' right to choose schools, which is directly or indirectly related to extracurricular lessons, or of the legitimacy of the College Scholastic Ability Test, the majority believes it just to permit private extracurricular lessons. Such decision causes the feeling of deprivation and frustration to many parents and their children who barely obtain extracurricular lessons from private teaching institutes or cannot even think about receiving extracurricular lessons, and makes them feel tantalized and restricted by poverty. I am concerned that this decision will cause the profound injuries on the young ones' minds. I only hope that my fears will prove groundless and unnecessary.

8. Reply of Justices Kim Yong-joon, Kim Moon-hee, Koh Joong-suk, Shin Chang-on, and Ha Kyung-chull to the Dissenting Opinion of Lee Young-mo

A. The dissent, in discussing extracurricular lessons, divides people into the socially and economically strong and the week. It also divides capitalism and socialism (social welfare state), and liberty-rights and social rights. Then, the dissent speaks on behalf of the latter in each division, stating, it is unavoidable to affirmatively restrict the economic liberties of the socially strong . . . .

Through the restrictions, the socially and economically weak can enjoy the social rights . . . and then humane life.

The dissent applies the above logic directly to the issue of extracurricular lessons. Those who can afford extracurricular lessons are the former of the two groups, and those who cannot the latter. The dissent characterizes the position of unconstitutionality, namely that of allowing extracurricular lessons in principle, as siding with the former group and the position of constitutionality, namely that of banning extracurricular lessons, as siding with the latter. In view of the principle of free democracy, the basic order of our country, such theory has a logical leap or is an opinion of bigotry.

B. The dissent misunderstands or ignores the following points made by the majority decision.

The majority's position is not that the prohibition of high-expenditure extracurricular lessons is itself unconstitutional. It is that the chosen means of suppressing high-expenditure extracurricular lessons is unconstitutional because it . . . excessively restricts people's basic rights. We accept the legitimacy of the purpose of restricting basic rights and the appropriateness of the means employed. We yet find the statute in violation of the principle of proportionality because it does not satisfy the requirement of the least restrictive means and the balancing of interests. As concretely and clearly explained, even after we issue the decision of unconstitutionality the legislature can take legislative action, which bans extracurricular lessons given for exorbitant fees, extracurricular lessons given by college professors and others related to college admissions to those students preparing for exams, extracurricular lessons to the students given by school teachers who can influence students' evaluations and grades, and other cases of threatening the fairness of admissions or causing other grievous social harms.

Despite that, the dissent insists that the decision of unconstitutionality on this statutory provision is equivalent to unlimited permission of private extracurricular lessons. The dissent then finds in the decision of unconstitutionality a lack of concern for the socially and economically weak and a betrayal on substantive equality and the concept of public welfare. Also, according to the dissent, the majority decision corrupts the role of education, supposed to be a tool to dissolve social inequality, into a vehicle of passing it on within families, and frustrates the socially and economically weak in a time that we need to listen to their cries.

C. Also, the dissent mentions the year 2000 opening to a new century, the age of information and communication (digital) revolution,

so-called the important issue of this age, and educational revolution and human resources development policy. The dissent especially emphasizes on educational revolution, stating Adjusting the permitted scope of extracurricular lessons and revising the College Scholastic Ability Test amounts only to a localized, partial, and temporary cure and a symptomatic treatment. Such measures can neither accomplish this age's dire demand, an educational revolution, nor quell the pending collapse of the educational institutions. We do not find it easy to understand how the above references are related to this case; or how they lend logical support to the opinion of constitutionality that extracurricular lessons should be banned; or how they can become the bases for criticizing the opinions of unconstitutionality.

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

Aftermath of the Case

A legal critique of the decision was rare but there was a widely shared concern that a new frenzy over extracurricular lessons will start and shrink school education. The Government announced its plans to formulate a concrete standard for regulating high-expenditure extracurricular lessons, require all extracurricular lessons to be reported or investigate the financial sources of those receiving high-expenditure extracurricular lessons for any tax evasion. However, neither the Government nor people could not decide on which high-expenditure extracurricular lessons will be subject to regulation.

On March 8, 2001, the National Assembly passed a bill revising the Act on the Establishment and Operation of Private Teaching Institutes, which now imposes a reporting duty on those giving private extracurricular lessons and punish them for the failure to report. Also, the National Tax Service, in response to the administration of the reporting system for extracurricular lessons, announced its plan to tighten tax collection on the income generated through extracurricular lessons.

After the decision, a social discourse on public education was invigorated. On February 7, 2001, Korean Educational Development Institute issued a report titled 'A Study to Determine the Appropriate Level of Educational Expenditure and Obtain Financial Resources for Education.' According to the Study, our investment in public education, especially that by the Government, is inferior, and needs extra 369 trillion won by 2004 to catch up with the level of an OECD

(the Organization for Economic Cooperation and Development) member country, where the number includes the money needed to make up for the past shortage in facilities and to build new facilities for future, and the money for the overhead. A public educational expenditure on each student from elementary school to college is $2,189 in the year 1999, very low compared to $6,334 of the United States, $7,533 of Japan, and $7,742 of France.

2. *Nationality Act* case

(12-2 KCCR 167, 97Hun-Ka12, August 31, 2000, Full Bench)

Contents of the Decision

1. When a statutory provision on constitutional review upon request is revised during the review, it loses its character as the precondition of the underlying trial.
2. Whether the former Nationality Act (enacted by Act No. 16 on December 20, 1948 and prior to being wholly amended by Act No. 5431 on December 13, 1997) in which nationality by heredity follows father's nationality (the Old Law, hereinafter) violates the constitutional principle of equality.
3. a decision that finds nonconforming to the Constitution and gives only temporary effects to Article 7(1) of Supplementary Provisions ('Supplementary Provision', hereinafter) of the new Nationality Act (revised by Act No. 5431 through major revision, December 13, 1997; the New Law, hereinafter), which are transitional clauses that extended the benefit of the New Law applicable to those borne by a foreigner-father and therefore formerly ineligible for Korean nationality under the Old Law only to those born within 10 years before the effective date of the New Law.

Summary of the Decision

1. The Old Law provision would have been the precondition of the underlying trial since, had it been unconstitutional, the Complainant with the Korean mother would have acquired Korean nationality and therefore the deportation order issued on the basis of petitioner's presupposed status as an alien would have been unenforceable. However, the Old Law was revised, and acquisition of nationality by heredity followed either father's or mother's nationality in the New Law (Article 2 (1)[1]), which governed the underlying case, starting June 14, 1998 (according to Supplementary Provision, Article 1). Therefore, the Old Law provision lost its character as the precondition of the underlying trial during its pendency and is not legally valid as the subject mater at this constitutional review.

2. A. The transitional clauses of the New Law extended its benefit to the formerly ineligible borne to a foreigner mother under the Old Law but only to those borne within 10 years of the enactment

of the New Law. In deciding whether the transitional clauses are constitutional, one must first decide whether the limiting of acquisition of nationality by heredity to father's nationality in the Old Law was constitutional.

B. The Old Law adopted the paternal lineage system that coincided a child's nationality at birth to its father's nationality and discriminatingly granted the mother's nationality only supplementary importance. Such discrimination between the child of a Korean father and a foreigner mother and that of a Korean mother and a foreigner father disadvantages the children of Korean mothers and the mothers themselves, and therefore violates the principle of male-female equality in Article 11(1) of the Constitution.

Among marriages between Koreans and foreigners, the ones by Korean males and the ones by Korean females are not particularly different because of the sexual difference. Children of the two types of marriages are equipped with the equal abilities and potential to adapt to Korea's legal order and culture and to live without default in the community. The Old Law, however, connects the nationality of the whole family only that of the father, violating the principle that family life shall be entered into and sustained on the basis of equality of the sexes in Article 36(1) of the Constitution.

Children with Korean mothers are foreign nationals. Therefore, they cannot be public officials of the Republic of Korea. They either cannot enjoy or can enjoy only limitedly the freedom to move one's residence, the freedom to choose occupations, the right to property, the right to elect and be elected, the right to petition for the State's compensation, and social rights. Therefore, the Old Law severely discriminates against the children of Korean mothers in comparison to those of Korean fathers, and violates the principle of equality of the Constitution.

3. A. When the paternal lineage system of the Old Law was changed to the paternal-maternal lineage system of the New Law, Supplementary Provisions extend the benefit of the New Law to those formerly ineligible borne by Korean mothers as long as they were borne within 10 years before the effective date of the New Law and has taken certain steps. Supplementary Provisions again discriminate on the basis of whether the children were less than 10 years old at the time of the putting into effect of the New Law in providing relief from the unconstitutional discrimination of the Old Law. Supplementary Provisions violate the principle of equality of the Constitution.

B. If the Constitutional Court issues a decision of unconstitutionality or a simple decision of nonconformity to the Constitution,

Supplementary Provisions will become ineffective on the day of the issuance. Then, even those borne by Korean mothers within 10 years before the effective date of the New Law will lose the basis to acquire the nationality (Supplementary Provisions), leaving the country governed by the principle of the rule of law with an unacceptable vacuum in law. Therefore, Supplementary Provisions, though unconstitutional, must be held temporarily effective until the legislature enacts a new provision.

Provisions on review

The former Nationality Act (enacted by Act No. 16 on December 20, 1948 and prior to being wholly amended by Act No. 5431 on December 13, 1997)

Article 2 (Qualifications of a National)

(1) Those who fall under one of the following subparagraphs are Korean nationals.

1. A person whose father is a national of the Republic of Korea at his or her birth.

2.-4. omitted.

(2) omitted.

Nationality Act (Wholly Amended by Act No. 5431 on December 13, 1997) Supplementary Provisions

Article 7 (Special Cases of Acquisition of Nationality for Persons of Maternal Line by Adoption of Jus Sanguinis to Both Lines of Parents)

(1) A person who falls under one of the following subparagraphs among the persons who have been borne by a mother of a national of the Republic of Korea within ten years before this Act enters into force may acquire the nationality of the Republic of Korea through reporting to the Minister of Justice as determined by the Presidential Decree within three years after the enforcement date of this Act:

1. A person whose mother is currently a national of the Republic of Korea; and

2. A person whose mother was a national of the Republic of Korea at the time of her death, where his mother died,

(2)-(4) omitted.

Related Provisions

The Constitution

Article 11(1), 36(1)

Nationality Act (Wholly Amended by Act No. 5431 on December 13, 1997)

Article 2 (Acquisition of Nationality by Birth)

(1) A person falling under one of the following subparagraphs shall be a national of the Republic of Korea at the time of his or her birth:

1. A person whose father or mother is a national of the Republic of Korea at the time of his or her birth;

2.-3. omitted.

Nationality Act (Wholly Amended by Act No. 5431 on December 13, 1997) Supplementary Provisions

Article 1 (Enforcement Date)

This Act shall enter into force six months after its promulgation.

Related Precedents

2. 11-2 KCCR 770, 98Hun-Ma363, December 23, 1999
   9-2 KCCR 1, 95Hun-Ka6, July 16, 1997
3. 11-2 KCCR 383, 97Hun-Ba26, October 21, 1999

Parties

Requesting Court

Seoul High Court (97Bu776 Request for Constitutional Review)

Petitioner

Kim Gwang-ho
Counsel: Ahn Sang-woon

Original Case

Seoul High Court 96Gu10128, Cancellation of Deportation

Holding

1. The request for constitutional review of Article 2(1)[1] of the former Nationality Act (enacted by Act No. 16 on December 20, 1948 and prior to being wholly amended by Act No. 5431 on December 13, 1997) is dismissed;

2. The portion that reads '. . .within 10 years' in Article 7(1) of Supplementary Provisions of the Nationality Act (Wholly Amended by Act No. 5431 on December 13, 1997) is nonconforming to the Constitution. This statutory provision shall be effective until the legislature revises it.

Reasoning

1. Introduction to the case and the subject matter for review

A. Introduction to the Case

(1) The petitioner argued that the constitutionality of Article 2(1)[1] of the former Nationality Act (enacted by Act No. 16 on December 20, 1948 and prior to being wholly revised by Act No. 5431 on December 13, 1997; the Old Law, hereinafter) that had the paternal lineage system in effect at the time of his or her birth on September 3, 1955, is a precondition of a trial, and requested constitutional review. The requesting court granted the request on August 20, 1997 and referred to the Constitution.

The outlines of the underlying cases as found by the requesting court are in the Separate Attachment (2. Outlines of Review on Merits of Reason for Requesting Constitutional Review in the decision of the Seoul High Court, 97Bu776, Request for Constitutional Review).

(2) During the pendency of the review, the Old Law was wholly revised by Act No. 5431 on December 13, 1997 into a system that accepted either a father's or a mother's lineage (the New Law, hereinafter). Article 7 (1) of the Supplementary Provisions (Supplementary Provisions, hereinafter) included a transitional measure whereby those born by Korean national mothers within 10 years before the effective date of the New Law could acquire the nationality of the Republic of Korea.

B. Subject Matter for Review

(1) The petitioner, born on September 3, 1955, cannot acquire the nationality of the Republic of Korea even in reliance on the New Law due to the 10 year period specified in the Supplementary Provision. The petitioner, however, will be able to do so if the Constitutional Court invalidates the Supplementary Provision or finds it nonconforming to the Constitution and then the National Assembly revises it. From the perspective of the integrity of the legal system and the efficiency in litigation, it is desirable to include it in the subject matter for review, and we do so. (11-1 KCCR 14, 98Hun-Ka17, January 2, 1999)

(2) The subject matter for review is the constitutionality of Article 2(1)[1] of the Old Law and the portion that reads ". . .within 10 years" in Article 7(1) of Supplementary Provisions of the New Law. They are as follows:

former Nationality Act

Article 2

(1) Those who fall under one of the following subparagraphs are Korean nationals.

1. A person whose father is a national of the Republic of Korea at his or her birth.

Nationality Act (Wholly revised by Act No. 5431 on December 13, 1997)

Article 2 (Acquisition of Nationality by Birth)

(1) A person falling under one of the following subparagraphs shall be a national of the Republic of Korea at the time of his or her birth:

1. A person whose father or mother is a national of the Republic of Korea at the time of his or her birth.

Supplementary Provisions, Article 7 (Special Cases of Acquisition of Nationality for Persons of Maternal Line by Adoption of Jus Sanguinis to Both Lines of Parents)

(1) A person who falls under one of the following subparagraphs among the persons who have been borne by a mother of a national of the Republic of Korea within ten years before this Act enters into force may acquire the nationality of the Republic of Korea through reporting to the Minister of Justice as determined by the Presidential Decree within three years after the enforcement date of this Act:

1. A person whose mother is currently a national of the Republic of Korea; and

2. A person whose mother was a national of the Republic of Korea at the time of her death, when his mother died.

2. Opinions of the Requesting Court and the Related Parties

A. Reason for Requesting Constitutional Review

The Old Law specifies the paternal lineage system in violation of Article 11(1) of the Constitution that bans discrimination based on gender. It also treats the position of father or husband as superior to that of mother or wife in violation of the equality of the gender in Article 36(1) of the Constitution.

B. Opinion of the Petitioner

The New Law allows, among those born by Korean mothers, only those born within 10 years before the effective date of the New Law to acquire nationality, and therefore continues the infringing state of affairs upon the basic rights of the petitioner who was born before June 13, 1988.

C. Opinion of the Minister of Justice

(1) Whether to use the place of birth (*jus soli*) or the lineage (*jus sanguinis*) as the qualification for one's nationality, and how to determine other matters concerning nationality belongs to legislative discretion.

The Old Law allows a marital child to acquire nationality using its father's nationality and a non-marital child to do the same using their mother's nationality. It is customary that the legitimate child of a foreigner father acquires its father's nationality. Therefore, the Old Law adopts the paternal lineage system to prevent dual nationality, and therefore does not constitute discrimination between males and females.

The paternal lineage system has been questioned on its reasonableness as a policy due to the changes in the social environment. However, it is not unconstitutional when judged in view of the historical, social, and cultural traditions at the time of its enactment.

(2) The New Law limited the period of retroactivity to 10 years in the Supplementary Provision, firstly because retroactivity is an exception that harms the stability of law and therefore its effects

should be minimized as much as possible, and secondly because the New Law was aimed at providing relief to the children without any nationality. Most people born by Korean national mothers and alien fathers more than 10 years ago acquired nationality either through naturalization or acknowledgement under the Old Law or the New Law. The special provisions on the New Law did not have to cover them.

D. Opinion of the Minister of Reunification

The petitioner has stayed in China for a significant period of time, and his base of living is also in China. Thus the petitioner does not fall under a North Korean escapee under Article 2(1) of the Act on the Protection and Settlement Support of Residents Escaping from North Korea.

E. Opinion of the Minister of Diplomacy and Trade

Our country does not recognize the nationality of North Korea. Therefore, a resident of North Korea can be considered as having our nationality. It may cause a diplomatic problem with a third country if we recognize as our nationals those North Koreans residing in the third country outside the reach of our effective control. There is no diplomatic problem in recognizing the nationality of a North Korean resident who already entered our country.

3. Decision

A. Concept and Nature of Nationality

(1) People are one of the three elements of a State, together with territory and sovereignty. Nationality means the qualifications or status of being a national of the State. Those who are not nationals are foreigners (foreign nationals, dual nationals, those of no nationality, etc.). Thus, nationals are permanent members who bear the duty to obey the State's governing power no matter where they happen to be, and only in exceptional situations, they should obey the governing power of the residing state.

Historically, before the establishment of modern states serfs belong to estates and were treated as the belongings of lords. Even in modern states, an individual belong to and was demanded of loyalty to the place of birth or to the lineage, and therefore did not have a choice in nationality. However, inborn human rights ideology

gave birth to a free democratic constitution based upon people's sovereignty, and this constitution, in respect of human dignity and worth, recognized as a basic right an individual's right to choose his or her political community that will influence his or her fate profoundly, namely, the right to choose nationality. Article 15 of the United Nation's Universal Declaration of Human Rights (December 10, 1948) declares "① Everyone has the right to a nationality ② No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality". In fact, each country restricts individuals' right to choose nationalities, and nationality has not become something that one can choose as a matter of right.

(2) One acquires nationality by birth or by naturalization. Acquisition by birth follows either the lineage or the place of birth (According to a study by the Ministry of Justice, 72 countries out of 118 countries surveyed follow lineage and the other 46 follows the places of birth).

Among those following lineage, European countries usually follow both father's and mother's lineage. In Asia, our old law, Muslim countries in the Middle East, Taiwan, Indonesia, and Thailand follow father's lineage while all remaining countries including Japan and China follow both father's and mother's lineage. On the other hand, the countries in North and South Americas mostly follow the places of birth while extending nationality to those born outside the country by either a father or a mother of the same nationality.

(3) Nationality is a legal union between the State and its members. It means protection and subjugation. It cannot be thought of separately from the State. In other words, nationality arises with the formation of a state and disappears with the collapse of a state. Nationality comes into being not through statutory provisions but through the formation of a state. Therefore, although a constitution delegates the task to a nationality statute, the statute itself governs the matters of constitutional dimension by concretizing and realizing the definition of people, the element of a state.

B. Scope of Nationals

(1) The Founding Constitution of July 17, 1948 states the qualifications of becoming a Korean national shall be prescribed by law (Article 3). In the same year, the Nationality Act was enacted by Act No. 16 on December 20. The Nationality Act was revised three times but only to strengthen the element of one-nationality-one-person by eliminating the possibilities of dual nationality, and has kept the original structure. The basic principles of the Old Law can be summarized as the principles that nationality must be prescribed

by statute; the father's lineage takes precedence in determining one's nationality; the father takes the central role in determination of one's nationality; one can have only one nationality; the whole family should have one nationality, etc.

The New Law, wholly amended by Act No. 5431 on December 13, 1997, coincided with our withdrawal of the reservation on the male-female equality clause in the United Nation's 1984 Convention on the Elimination of All Forms of Discrimination against Women which we had reserved when we signed on it. There, the father's lineage clause was revised to conform to the principle of equality and was otherwise revised to conform to the reality and to improve on inadequate provisions reasonably.

(2) Our Constitution has stated since the Founding Constitution, The territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands. (Article 4 of the Founding Constitution; Article 3 of the current Constitution)

The Supreme Court has ruled accordingly that North Korea is part of the Korean peninsula and therefore subject to the sovereignty of the Republic of Korea, and therefore that North Korean residency should not interfere with the acquisition of the nationality of the Republic of Korea. Therefore, the Provisional Ordinance on Nationality (South Korean Provisional Government Act No. 11, May 11, 1948) stated in Article 2(1) that a person born to a Korean father shall acquire the nationality of *Chosun*. Then, the Founding Constitution, in Article 3, stated that the qualifications of nationality of the Republic of Korea should be prescribed by statute, and in Article 100, stated that all current laws and rules were effective unless they violated then Constitution. So, the Supreme Court ruled that, a person born to a Korean father even though he or she had already acquired a North Korean nationality according to the North Korean law, acquired the nationality of Chosun according to the Provisional Ordinance and then became a national of the Republic of Korea upon the promulgation of the Founding Constitution on July 17, 1948 (Kong 1996 Ha, 3602, 96Nu1221, Supreme Court, November 12, 1996)

The Minister of Diplomacy and Trade said that, although it may cause a diplomatic problem with a third country or North Korea if we recognize as our nationals those North Koreans residing in the third country or in North Korea outside the reach of our effective control. There is no diplomatic problem in recognizing the nationality of a North Korean resident who already entered our country.

(3) The requesting court made a finding that the mother of the petitioner is a national of the Republic of Korea. Therefore, we limit our decision to whether the petitioner acquires the nationality of the

Republic of Korea by birth under the Constitution and the Nationality Act.

C. Whether the Old Law is the precondition of the original trial

At the time the court requested this constitutional review, the Old Law provision would have been the precondition of the underlying trial since, had it been unconstitutional, the petitioner with the Korean mother would have acquired Korean nationality and therefore the deportation order issued because of the petitioner's status as an alien would have been unenforceable (The April 13, 1996 deportation order against the petitioner was suspended by the Seoul High Court, and the petitioner released from custody). However, the Old Law was revised on December 13, 1997, and acquisition of nationality by heredity now followed both a father's and a mother's nationality in the New Law (Article 2 (1)[1]), which governed the original case, starting June 14, 1998 (according to Supplementary Provision, Article 1).

Therefore, the Old Law provision lost its character as the precondition of the original trial during its pendency, and the relevant portion of the constitutional review should be dismissed according to Holding 1.

D. Decision on Supplementary Provision

(1) The Nature of Supplementary Provision

Supplementary Provision is a transitional clause of the New Law occasioned by the revision of the paternal lineage system of the Old Law into the paternal-maternal lineage system of the New Law that extended its benefit to the formerly ineligible borne to a foreigner mother under the Old Law but only to those borne within 10 years before the effective date of the New Law.

In deciding whether the transitional clauses are constitutional, one must first decide whether the limiting of acquisition of nationality by heredity to that of father's nationality in the Old Law was constitutional.

(2) Unconstitutionality of the Old Law Provision

(A) The preamble of the Constitution shows that it is people that legislated the Constitution. Article 1(2) states that the sovereignty of the Republic of Korea shall resided in the people, declaring people as the owner of the sovereignty. Chapter 2 of the Constitution is

titled 'Rights and Responsibilities of People', and each provision of the Chapter explicitly shows that 'people' are the owners of basic rights. Article 2(1) states, the qualifications of becoming a Korean national shall be prescribed by law, leaving the matters about the owners of basic rights to the formation of the legislature.

The Minister of Justice argues that, since the legislature has a broad discretion in determining the qualifications of a national, whether to use the place of birth (*jus soli*) or the lineage (*jus sanguinis*) as the qualification for one's nationality. The Minister argues also that, even if the lineage system is adopted, whether it will consider the place of birth or requires both parents to be Korean and whether one can be a dual national at birth all belong to the legislative discretion. However, when the qualifications of being a national are determined by statute under the delegation of the Constitution, human dignity and worth, the principle of equality, and other constitutional mandates protecting basic rights restrict the legislation. Therefore, we reject the argument by the Minister of Justice that all provisions about nationality should reviewed under the standard of whether the legislature exceeded the scope of reasonable discretion.

(B) Article 11(1) of the Constitution states "all citizens shall be equal before the law, and there shall be no discrimination in political, social or cultural life on account of sex, religion or social status", announcing the principle of equality.

The principle of equality in Article 11(1) of the Constitution is a fundamental mandate of the order of rule of law. It prohibits all state agencies from treating adversely a person or a certain group without just cause in applying laws. Therefore, all people bear the same obligations and enjoy the same rights under the laws, and no state actor can apply or cannot apply law to certain people disadvantageously or advantageously. The normative meaning of Article 11(1) does not stop at 'equality in application of law.' It also requires the legislature to justify its standard of value used in distributing the rights and responsibilities through legislation. Hence 'equality in law-making.' Therefore, the principle of equality rejects any criterion of discrimination aimed at extending different legal effects to people if the criterion cannot be objectively justified. How much the legislature is bound by the Article 11(1) principle of equality is determined by the regulated subject matter and the characteristics of the criterion of discrimination.

The Constitution ruled in Discharged Soldiers' Assistance Act Article 8(1) Unconstitutionality Case as follows (11-2 KCCR 789-791, 98Hun-Ma363, December 23, 1999);

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 of 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.

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' of '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.

The standard of constitutional review concerning a violation of the principle of equality and the reasoning that male-female discrimination is unconstitutional proposed in the above case can be adopted for this case. The Old Law adopted the paternal lineage system that coincided a child's nationality at birth to its father's and discriminatingly granted the mother's nationality only supplementary importance. Such law is unconstitutional. In other words, a discrimination between the child of a Korean father and a foreigner mother and that of a Korean mother and a foreigner father disadvantages the children of Korean mothers and the mothers themselves, and is clearly against the principle of male-female equality in Article 11(1) of the Constitution. It is constitutionally unacceptable.

(C) The Constitution in Article 36(1) states, "marriage and family life shall be entered into and sustained on the basis of individual dignity and equality of the sexes, and the State shall do everything in its power to achieve that goal."

Article 36(1) of the Constitution states the constitutional principle of the institution of marriage and family. It declares that the institution of marriage and family must be structured with due respect to human dignity and pursuant to the principle of democracy. (9-2 KCCR 17, 95Jun-Ka6, July 16, 1997) This provision codifies the requirement that family life be established and maintained on the basis of the equality of the two sexes. When the legislature forms the institution of family, it must consider that.

Let us review the situation governed by the Old Law provision. Among marriages between Koreans and foreigners, the ones by Korean males and the ones by Korean females are not particularly different because of the sexual difference. Children of the two types of marriages are equipped with the equal abilities and potential to adapt to Korea's legal order and culture and to live without default in the community. The Old Law, however, connects the nationality of the whole family only that of the father. The father is made the leader or the center of the family. It is questionable whether such practice is just in light of the provisions of the Constitution that declares the equality of the two sexes in family life.

Acquisition of nationality based on lineage guarantees a membership in the social unit, a family, and a membership in a particular national community, while providing the basis for strengthening the parent-child relationship. If this relationship is recognized only between the father and the child but not between the mother and the child, such result amounts to the denigration of women's status within the family and a threat to maternal authority.

Therefore, the Old Law provision violates the principle of the equality of the two sexes in family life in Article 36(1) of the Constitution.

(D) The Old Law provision that governs the nationality of a child of parents with different nationalities discriminates on the basis of one parent's nationality. As a result, Korean mothers and their children are significantly disadvantaged in comparison to Korean fathers and their children in legal status.

Children with Korean mothers are foreigners. They enjoy exemption from military services but most of the disparate treatments are disadvantageous to them. As foreigners, they cannot be the public officials of the Republic of Korea (the State Public Officials Act, Article 35; the Local Public Officials Act, Article 33; the Diplomatic Public Officials Act, Article 8). They cannot enjoy freedom of residence and the right to move at will (Constitution, Article 14; Immigration Control Act, Article 7, 17), freedom of occupation (Constitution, Article 15; Fisheries Act, Article 5; Pilotage Act, Article 6), right of property (Constitution, Article 23; Foreigner's Land Acquisition Act, Article 3; Patent Act, Article 25; Aviation Act, Article 6), right to vote and right to hold public office (Constitution, Article 24, 25; Act on the Election of Public Officials and the Prevention of Election Malpractices, Article 15, 16), right to claim compensation (Constitution, Article 29(2); State Compensation Act, Article 7), right to receive aid for injury from criminal acts (Constitution, Article 30; Crime Victims Aid Act, Article 10), right to vote on Referendum

(Constitution, Article 72; National Referendum Act, Article 7) and other social rights or enjoy only limitedly. There is no substantive public interest that justifies this discrimination in granting children different nationalities depending on their father's or mother's nationality.

The Minister of Justice argues that the Old Law allows a marital child to acquire its father's nationality and a non-marital child to do the same using its mother's nationality and therefore does not constitute discrimination between males and females. Since it is customary that the marital child of a foreigner father acquires its father's nationality, the Old Law on the basis of the paternal lineage system is reasonable as a measure to prevent dual nationality. However, the above said discrimination is not justified just because the Old Law Provision contributes to the prevention of dual nationality in the relationship between the children and the State. From the children's perspective, the demerits of dual nationality are not greater than the merits in obtaining the additional nationality of the mother. There is no absolute public interest that mandates rejection of the children's joining of the State. Thus, the Minister of Justice's argument should be rejected.

Therefore, the Old Law Provision clearly discriminates against the children of Korean mothers in comparison to those of Korean fathers from the children's perspectives, and therefore violates the principle of equality of the Constitution.

(E) As examined above, the Old Law Provision based on the paternal lineage system violates the principle of equality of Article 11(1) of the Constitution and the principle of equality of the two sexes in family life in Article 36(1) of the Constitution, and through such discrimination, materially restricts basic rights of the children. It is unconstitutional.

(3) The Supplementary Provision is nonconforming to the Constitution

(A) The legislature revised the Old Law by Act No. 5431 through major revision on December 13, 1997, and changed the rule on acquisition of nationality by heredity from that of a paternal lineage system to a paternal-maternal one (the New Law, Article 2(1)[1]). As a result, the unconstitutionality of the Old Law Provision was cured. However, in restoring to the children of Korean mothers basic rights formerly infringed by the Old Law Provision, the Supplementary Provision granted Korean nationality only to those children born within 10 years before the effective date of the New Law, and not to those children like the petitioner born more than 10 years before the effective date of the New Law. The issue is whether the

time limit of '10 years' can be constitutionally justified.

The Minister of Justice argues that most people born by Korean national mothers and foreigner fathers more than 10 years before the effective date of the New Law already resolved their nationality issues by acquiring Korean nationality either through naturalization or acknowledgement under the Old Law or the New Law.

However, there is no reasonable proof that people older than 10 years had resolved their nationality issues. There is no believable statistics proposed for those older than 10 years without any nationality.

Also, the fact that the Supplementary Provision grants the opportunity for acquiring nationality only to those born within 10 years before the effective date of the New Law may be explained by the recent change in the standard of values concerning sex. However, there is no reasonable basis to believe that the legal conception of anti-sex-discrimination came into being during the ten years before the effective date of the New Law. Article 8 of the Founding Constitution stated, all citizens shall be equal before the law, and there shall be no discrimination in political, economic, social, or cultural life on account of sex, religion or social status. The change in the legal conception about sex discrimination had already taken place then at the latest.

Therefore, we do not find much weight in the argument of the Minister of Justice that the broad application of the Supplementary Provision to all victims of the Old Law Provision may threaten the stability of law because it is retroactive legislation. When the Supplementary Provision provides relief to those disadvantaged by the unconstitutional discrimination due to the Old Law Provision, the age 10 years is not a constitutionally appropriate standard to use. The Supplementary Provision thereby works yet another discrimination and violates the principle of equality of the Constitution.

(B) When a statutory provision violates the Constitution, we must in principle issue a decision of unconstitutionality and thereby protect the normative power of the Constitution. However, when the elimination of the statutory provision from the codes may cause vacuum or confusion in law, we can issue a decision of nonconformity to the Constitution and leave the statutory provision effective temporarily. In other words, if a constitutional state of leaving the unconstitutional statutory provision temporarily effective is far more constitutionally desirable than an unconstitutional state of vacuum in law brought on by a decision of unconstitutionality, the Constitutional Court may need to subscribe to the perspective of the stability of law and prevent vacuum in law and the resulting disorder, which are

unacceptable to the government by rule of law, by leaving the unconstitutional statutory provision temporarily effective for a limited period until the legislature improves it in the manner consistent with the Constitution (11-2 KCCR 417, 97Hun-Ba26, October 21, 1999).

In this case, the Supplementary Provision is absolutely needed as a transitional measure to give relief to the children of Korean mothers who formerly could not acquire nationality because of the Old Law Provision. If the Constitutional Court issues a decision of unconstitutionality or a simple decision of nonconformity to the Constitution, the Supplementary Provision becomes immediately void upon the Constitutional Court's announcement of its decision. As a result, the provision opening the door to acquisition of nationality at least to those born within 10 years of the enactment of the New Law will become void, and we will have vacuum in law unacceptable to the government by rule of law. Then, it will be another violation of the Constitution to bring about vacuum in law with respect to those who could benefit from the Supplementary Provision or to sow another cinder of legal instability with respect to the responsible administrative agencies and the related families. The Supplementary Provision shall remain effective for those who can benefit from it until it is revised.

Therefore, the Supplementary Provision is nonconforming to the Constitution but is hereby ordered to be effective temporarily until the legislature enacts a new law.

4. Conclusion

For the above reasons, all Justices decide upon a unanimous decision that the request for constitutional review of Article 2(1)[1] of the Old Law is dismissed. The portion that reads '. . .within 10 years' in Article 7(1) of Supplementary Provisions of the New Law is nonconforming to the Constitution, but it shall remain effective until the legislature revises it.

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

[Separate Attachment]

Summary of the Original Cases

(1) The petitioner was born on September 3, 1955 to the father

Kim Tae-ik (born October 13, 1928) and the mother Yum Hae-soo (born March 27, 1933), grew up in the City of Manpo in North Pyungan Province, and moved to China.

(2) The petitioner entered the Republic of Korea secretly through the sea shore of Mooan-Gun of Chonnam Province around 3 a.m. on November 4, 1955 and came up to Seoul. On the following day, when stopped for a questioning by a police officer, the petitioner expressed the intent to defect but was detained at the Seoul Foreigner Protection Facility on the eighth of the same month. The manager of the Seoul Foreigner Protection Facility issued a forceful deportation order against the petitioner.

(3) The petitioner then argued that he was a national of the Republic of Korea under the Constitution and the Nationality Act of the country, and he was not a 'foreigner' subject to the deportation order. The petitioner then sought cancellation of the deportation order in this instant suit.

(4) The petitioner argues that it is a Korean national on the basis that its father Kim Tae-ik was a Korean national. Under Article 2(1) of the Provisional Ordinance Regarding Nationality (Announced on May 11, 1948 by South Korean Provisional Government Act No. 11) and Articles 3 and 100 of the Founding Constitution, the said Kim acquired nationality of the Republic of Korea as soon as the Founding Constitution was announced, and then the petitioner was born to the said Kim on September 3, 1955, thereby acquired nationality of the Republic of Korea under Article 2(1)[1] of the Nationality Act enacted by Act No. 16 on December 20, 1948. However, the records show that the said Kim, although born a Korean (Chosun-in), acquired Chinese nationality while living in China before the said Provisional Ordinance Regarding Nationality was enacted. The records are not sufficient in showing that the said Kim later abandoned his Chinese nationality. Therefore, the petitioner born to the said Kim while he was a Chinese national was not a national of the Republic of Korea.

(5) The petitioner alternatively argues that it is a Korean national on the basis that its mother Yum Hae-soo was a Korean national. Her father was a Korean (Chosun-in). Also, under Article 2(1) of the Provisional Ordinance Regarding Nationality (Announced on May 11, 1948 by South Korean Provisional Government Act No. 11) and Articles 3 and 100 of the Founding Constitution, the said Yum acquired nationality of the Republic of Korea as soon as the Founding Constitution was announced. The petitioner was then born to the said Yum on September 3, 1955, and it argues that it should have rightfully acquired the nationality of the Republic of Korea. The petitioner points out that Article 2(1)[1] of the Nationality Act en-

acted by Act No. 16 on December 20, 1948 is based on paternal lineage and therefore allows the children only of the fathers who are the nationals of the Republic of Korea to acquire the nationality of the Republic of Korea. The petitioner argues that it violates the principle of equality of the Constitution and unjustly discriminates males from females, and filed this request for constitutional review.

Aftermath of the Case

This decision opened the way for the children of Korean mothers born before June 13, 1988 to acquire Korean nationality.

There was a series of positive reviews of the case in the media. One characterizes the decision as reflecting the Constitutional Court's resolve that 'sexual discrimination is unconstitutional' as the December 23, 1999 decision on the Discharged Soldiers' Extra Point provision (*Legal News*, September 4, 2000).

Ⅱ. Summaries of Opinions

1. *Corporate Special Assessment Tax* case
(12-1 KCCR 16, 96Hun-Ba95 and etc., January 27, 2000)

In this case, the Court found nonconforming to the Constitution the provision of the Corporate Tax Act that delegated the determination of the tax basis for the special assessment on transfer income to the Presidential Decree, on the ground that it violated the principle of statutory taxation and the rule against blanket delegation.

A. Background of the Case

The Special Assessment is imposed on a corporate capital gain arising out of the disposition of lands and buildings. The corporation, in addition to paying corporate tax on the real estate transfer income, which is included in the annual income, must pay the special assessment separately for that transfer income. The Special Assessment is aimed at closing the gap in taxation between corporations and natural persons (corporate tax rate being lower than transfer income tax imposed on natural persons) and thereby deterring corporations from speculation in real estate.

The Corporate Tax provision in controversy, without any restriction, described the tax basis for the Special Assessment as 'transfer of real property identified in the Presidential Decree', thereby delegating the authority to determine the tax basis wholly to the Administration. Therefore, the Administration determined through a Presidential Decree that 'gains arising out of the sale of a newly constructed residential building, land of limited size annexed to that building and commercial buildings, and other welfare facilities annexed to that building newly constructed and sold' shall not be subject to the Special Assessment.

Complainants constructed residential buildings for lease together with ancillary welfare facilities including commercial buildings and sold the latter to another. The tax authority determined that residential buildings for lease cannot be sold for a limited period according to the Residential Buildings for Lease Act, and therefore that, the complainants' buildings do not qualify as 'a residential building newly constructed and sold' under the Enforcement Decree provision, therefore imposing the Special Assessment.

Complainants sought cancellation of the Special Assessment, and

filed this constitutional complaint when their request for constitutional review of the relevant laws and regulations was denied by the presiding court.

B. Summary of the Decision

The Constitutional Court issued a decision of nonconformity, suspending the Corporate Tax Act provision, on a majority vote of seven Justices, as follows:

Article 75 of the Constitution states the President may promulgate Presidential Decrees in regard to those matters delegated by statutes with concretely defined scope. It specifies the basis and limit of delegated rule-making, and thereby prevents arbitrary interpretation and enforcement of law by executive powers and accomplishes the principle of parliamentary legislation and the rule of law. In light of the intent behind the Constitution, the phrase 'concretely defined scope' means that the content, scope, and other basic matters to be prescribed by lower rules such as Presidential Decrees must be determined concretely and clearly by Status so that anyone can predict from the statue itself the overall content of the lower rules. Especially, for the rules tending to restrict or infringe people's basic rights directly, the requirement of concreteness and clarity is strengthened, and the element and scope of delegation need to be defined more strictly than other administrative laws and rules. Only when the subject to be regulated is extremely diverse and transient, the requirement of concreteness and clarity can be loosened. (Constitutional Court, 1995. 11. 30, 91 Hun-Ba 1, et al.)

The instant statutory provision does not itself specify which land is to be assessed upon and leaves the issue to be determined by Presidential Decrees. One cannot predict the scope of the subject matter to be taxed even through an organic and comprehensive understanding of the statutory provision, the legislative intent and system of the Corporate Tax Act, the Income Tax Act, the Tax Exemption Regulation Act, and other related laws.

Therefore, the instant statutory provision does not permit the Special Assessment taxpayer any prediction on the scope of the taxed subject matter, and leaves room for an infringement on people's property rights by the Administration's arbitrary exercise of the administrative rule-making power. It violates the Article 75 rule against blanket delegation and violates the Article 59 principle of statutory taxation.

On the other hand, although the instant provision deserves to be invalidated immediately as a matter of principle, its immediate invali-

dation upon a simple decision of unconstitutionality will cause a vacuum in law in which the Special Assessment cannot be imposed at all. Its invalidation will also cause a result unequal with those who already paid the Special Assessment. Furthermore, its unconstitutionality does not arise out of the National Assembly's failure to use the correct legislative form, a statute. Therefore, this Court finds the statute nonconforming to the Constitution without a decision of simple unconstitutionality suspends the application of the statutory provision by the Court and other state agencies, and local governments.

When the Constitutional Court leaves the task of revising or repealing provisions with unconstitutional elements to the legislature's formative discretion, it is a matter of principle that those cases affected by this decision retroactively or those cases to be disposed of under this statutory provision shall be governed by the new statutory provision rid of unconstitutionality by the legislature after this decision.

Presiding Justice Kim Yong-joon and Justice Kim Moon-hee dissented as follows:

The Constitutional Court, since its inception and on numerous occasions, has reviewed those tax laws that did not define the prerequisites to taxation clearly or set the scope of taxation concretely and delegated those matters all-inclusively to Presidential Decrees, and invalidated them or found them nonconforming to the Constitution on the ground that they violate the constitutional principle of statutory taxation and the rule against blanket delegation. Nonetheless, the state agency charged with revision of tax laws has not been diligent in revising and bringing the laws into constitutional conformity. Therefore, it is the time not to stop at a decision of nonconformity but to issue a decision of unconstitutionality in order to accomplish the Constitutional Court's duty to defend the constitutional order and ensure and guarantee people's basic rights more effectively.

C. Aftermath of the Case

Before the Constitutional Court announced this decision, the National Assembly on December 28, 1998, through Act No. 5581, conducted overall revision of the Corporate Tax Act and legislated into the statute the method of determining the standard price of the lands being taxed. The National Assembly, after this decision, further specified the criteria of taxation by Act No. 6259 on February 3, 2000.

2. *Teachers' Corporal Punishment* case (12-1 KCCR 90, 99Hun-Ma481, January 27, 2000)

In this case, the Constitutional Court cancelled a decision of exemption from prosecution[1] by the Prosecutor's Office based on mere battery on the ground that a teacher's corporal punishment is permitted to some extent under the education-related laws in effect.

A. Background of the Case

Overheated races for college admission increases extracurricular lessons (*gwa-wue*), the importance of private education focused on entrance examinations more and more, and culminated in a tendency to minimize and look down upon the role of public schools these days. Furthermore, while the elements of oppression in various parts of the society has been carried away one by one in the wind of liberalization, a teacher's authority, traditionally an absolute, has now been seriously threatened. Amidst this social change, teachers' right to administer corporal punishment on students, which has been accepted without much objection in the past, is now being contested on its righteousness in social discourse. The issue has led even to courtrooms, so that many teachers abandoned their right to administer corporal punishment. In present-day schools of each level, teachers cannot control students, lecture rooms are left in disorder, and juvenile violence and other forms of delinquency are on the rise. Many are raising their voices of concern over the worsening educational environment. From a corner of the society, it is criticized that a rash reformist trend, which reformed the conventional order around schools such as in the self-regulation on hairdo and school wear, ended up incriminating even the most legitimate bodily punishment, and thereby contributed to the worsening environment.

Against this background, this case happened as follows in summary:

A, a third year in middle school, was disciplined for having extorted valuable items from other students and committed other wrongs, and was ordered by the school to participate in intramural services for a limited period. The student made noises and caused commotion while waiting in the corridor to receive detailed instructions on the services. A's homeroom teacher and his/her student life advisor, complainants in this case, took A to the principal's office and scolded the student. A, as soon as out of the principal's office, reported

1). A decision to exempt from prosecution, is based on a finding of suspicion.

to the police, alleging that the complainants battered him/herself severely and caused injuries. The prosecutor in charge of the final investigation and decision of indictment on the case accepted A's allegations on the force of a testimony of another student B, who had committed delinquencies with A and received suspension from the school in spite of the complainants' denial of the alleged battery. The prosecutor disposed of the case on a decision of exemption from prosecution on the ground that the complainants were first-timers, the case was not severe, and the case arouse out of bodily punishment of educational purposes.

The complainants filed this constitutional complaint, arguing that the respective decisions of exemption from prosecution were arbitrary exercises of prosecutorial power that infringed their constitutionally guaranteed right to equality and right to testimony during trial.

B. Summary of the Decision

The Constitutional Court decided that the prosecutor did not investigate the case fully and judged on evidence arbitrarily, and thereby infringed on the complainants' right to equality, and cancelled the decision of exemption from prosecution as follows:

According to the investigative file, the prosecutor did not hear from other teachers and students who witnessed the scene, and built his/her acceptance of A's allegations only on the testimony of B, which was questionable in its trustworthiness given various circumstances and revealed only that B did not see any other instance of violence than the petitioners' several slaps on A's face.

Putting aside whether corporal punishment is pedagogically effective, education-related laws do not prohibit teachers from administering bodily punishment pursuant to the school rules made by the principal in unavoidable situations. Therefore, if a teacher's punishment does not exceed the permitted scope of disciplinary power in method and severity, it is a justifiable act under criminal law (an act pursuant to laws and regulations, an act pursuant to work duty, and other acts not violating social customs and rules) and should not be punished. The complainants were teachers, responsible for advising on students' life and monitor their compliance with school rules, and therefore their conduct. Their restrain by violence of A, who was causing commotion even after having been disciplined for another severer infraction and ordered to participate in intramural services, could be seen as educational punishment aimed at disciplining and reforming A. In this case, the prosecutor should have investigated in detail the method and severity of punishment and the extent of injury, and, if found them within the permitted scope of corporal

punishment, should have announced a decision of 'no crime.'

The prosecutor's decision of exemption from prosecution infringed the petitioners' right to equality by not fully investigating the case.

C. Aftermath of the Case

In this case, the Constitutional Court recognized that teacher's corporal punishment is allowed to an extent when it is educationally unavoidable, and demanded that the investigative practice determine whether the punishment falls under a privileged act under the laws and regulations. However, it should be pointed out that the Constitutional Court merely found the current education-related laws not barring bodily punishment and did not make a constitutional judgment on whether to allow that form of punishment. Teachers' groups welcomed this case as a turning point to stabilize teachers' authority being shaken by the growing disrespect, and parents' associations issued a statement of concern that teachers may apply the standards of punishment arbitrarily only to suit their moods.

3. *Bill Passage* case
(12-1 KCCR 115, 99Hun-Ra1, February 24, 2000)

In this case, Vice Chairman of the National Assembly sitting on behalf of the Chairman (respondent) announced the passage of the bills while some assembly members were disrupting the conducting of the proceeding, and the Constitutional Court reviewed whether such passage infringed the assembly members' power to deliberate and vote on the bills.

A. Background of the Case.

(1) The Constitution defines 'competence disputes between state agencies' as one of the competence disputes under the jurisdiction of the Constitutional Court. The Constitutional Court Act enumerates 'competence disputes between the National Assembly, the Administration, the Court, and the Central Election Commission' as the only subject matter for 'review of competence disputes between state agencies.'

The Constitutional Court in 1995 dismissed an individual assembly member's competence dispute against Chairman of the National Assembly for being outside its jurisdiction granted by the Constitu-

tion or the Constitutional Court Act on the ground that the Chairman or a member of the National Assembly is only a componental entity constituting a state agency, the National Assembly. However, in 1997, the Constitutional Court departed from its precedent in a case of the same type, and asserted jurisdiction over a competence dispute between a member and Chairman of the National Assembly on the ground that it qualifies as a competence dispute between state agencies under the Constitution. In 1998, the Constitutional Court confirmed the changed precedent.

(2) According to the former National Assembly Act, the Chairman can ask whether there is any objection to an agenda item, and upon finding no objection, can announce the passage of a bill. If there is an objection, the Chairman must follow a stand-to-vote, a non-anonymous vote, an anonymous vote, and other formal measures of voting.

The deliberation on a bill in our National Assembly centers around committees. The reviews and resolutions of the relevant Standing Committees are almost always passed at the Plenary Sessions. Most bills on agenda are passed unanimously upon all parties' consent including the incumbent and all opposition parties.

In this case also, all the parties had agreed that the bills would be deliberated and voted on at their respective Committees and would be passed without any objection at the Plenary Session. However, just before the opening of the Plenary Session, a certain incident of political significance unrelated to the bills took place and the members of the largest opposition party, not having the majority, changed their minds and passed a party resolution that they will block the passage of the bills. According to the party resolution, the members of the opposition party denied the Chairman and the incumbent party members the entrance to the Plenary Session Hall. The incumbent party members, who constituted the quorum under the National Assembly Act (the quorum for *resolution* being the majority of those present), forced their way through the opposition party members into the Plenary Session Hall. Soon thereafter, the Vice Chairman was delegated the right to conduct the proceeding by the Chairman. The Vice Chairman, amidst the disruptions of the opposition party members, received each bill into the agenda, asked whether there is any objection, and, as soon as hearing one assembly member announce 'no objection', announced the passage of the bill.

The petitioners, the opposition party members, filed this competence dispute, on the ground that, when the Vice Chairman asked whether there was any objection to each bill, they clearly announced their objections and yet the Vice Chairman ignored the objections and announced the bills had passed unanimously, violating their power to

deliberate and vote on bills.

B. Summary of the Decision

When the Constitutional Court reviewed this case, seven Justices approved the standing of the petitioners but four of them denied and three of them upheld the dispute. The remaining two Justices denied the standing and dismissed the case.

(1) The majority opinion of seven Justices on the standing

Disputes between Chairman of the National Assembly and its members are not simply internal problems between the two constituents of the National Assembly but disputes between separate state agencies under the Constitution. There is no other means of resolving them than competence disputes. This Court has adhered to the precedent that Chairman of the National Assembly and its members can be the parties to competence disputes defined by the Constitution, and has no reason to depart from that.

(2) Denial decision of four Justices

In this case, the minutes of the Plenary Session shows only that a few assembly members answered 'no objection' to the Chairman's question and that there was 'commotion in the hall.' It does not show that anyone explicitly stated his/her objection. The entry of 'commotion in the hall' cannot be accepted as an objection. There is no other evidence to accept the commotion as the petitioners' statement of objection.

According to the National Assembly Act, the minutes of the Plenary Session transcribe in short-hand all statements of the proceeding without omission from the beginning and to the end of the Session. They also record the plan of proceeding, the items to report, and items on agenda, and all other matters concerning the Session. Also, the entries on the minutes and any objection related to correct them are to be decided on through resolution at Plenary Sessions pursuant to certain procedures. Nonetheless, the petitioners did not file any objection to the entries on the minutes.

The minutes are official records of a meeting, and are powerful evidence in case of a dispute over the meeting. The effect of resolution, decision, election, and other actions at a meeting is to be proven by entry on the minutes. Therefore, the Chairman, the Vice Chairman acting as a chairman, a Chairman-pro-tem, the Executive Director or his/her representative sign and fix their seals on the minutes to authenticate the content of the minutes, which are then stored in the National Assembly.

The Constitutional Court must respect the autonomy of the National Assembly, and cannot but help relying on the entries on the minutes of the Plenary Session of the National Assembly in finding facts concerning the passage of bills. We find no evidence contrary.

Therefore, in absence of any evidence that the Vice Chairman's passage and announcement of the bills violated the Constitution or statutes, the petitioners' competence dispute based on the allegations of an infringement on their power to deliberate and vote must be denied.

(3) Upholding Decision of Three Justices

If, as in this case, there is a dispute among the parties as to the accuracy of the minutes of the Plenary Session of the National Assembly, and other circumstances reduce the reliability of the entries on the minutes, the Constitutional Court must not be tied down to the entries on the minutes and must field all materials and circumstances produced at trial and decide in light of sound common sense and experience.

In view of the entry of 'commotion in the hall' on the minutes, and other materials produced at trial and various circumstances of this case, we find it sufficient to find that some petitioners answered 'I have an objection' when the Vice Chairman of the National Assembly asked the members for any objection to each bill. Therefore, as the acting Chairman, he should have conducted an official vote pursuant to the National Assembly Act but announced the passage of the bills, refusing to register any objection. He unambiguously violated the National Assembly Act and infringed the petitioners' right to vote on the bills in this case.

(4) Dissenting Opinions of Two Justices on the Standing

A correct reading of the Constitution dictates that those agencies not enumerated in the Constitutional Court Act or those lower-level agencies within the enumerated agencies cannot be the parties to competence disputes even if they are in positions to exercise public authority. We, two Justices, have adhered to this view through a similar line of cases, and find no reason to change our minds.

C. Aftermath of the Case

The Constitutional Court has been criticized that a commotion in the Plenary Session Hall, when the opposition party was opposing the incumbent's attempt to pass the bills, meant at least that an objection was not entirely non-existent. (Park Sung-ho, the Constitutional Court Decisions on Competence Disputes between Members and the Chairman of the National Assembly, *Constitutional Practice*

Research, Vol. 1 (2000), Page 473, 492.)

4. *Compliance Enforcement Fee on Unapproved Change of Use in Building* case (12-1 KCCR 286, 98Hun-Ka8, March 30, 2000)

In this case, the Constitutional Court invalidated a provision in the Building Act that deemed as a construction those unapproved changes in use of buildings set forth in Presidential Decrees.

A. Background of the Case

Pursuant to Article 8(1) of the Building Act, one must receive an approval from related authorities before constructing a new building or conducting major renovation within urban planning districts or even outside the districts if the buildings are of a certain size. Article 14 of the same Act states an act of changing the use of a building is considered a construction as determined by Presidential Decrees. Therefore, a change in the use of a building must be approved by the related authorities if it falls under those categories set forth in Presidential Decrees.

Article 69(1) of the same Act authorizes the related authorities to order the owners of the non-complying buildings to demolish or rebuild the buildings. Article 83(1) imposes a Compliance Enforcement Fee on those building owners not complying with the compliance orders of the authorities.

The petitioner owned a nine-story building, the ninth floor of which was zoned for ancillary living space, and renovated it without approval into a church and constructed on the top of the building a 10-meter-high steel tower. The related agencies ordered the petitioner to demolish the steel tower and restore the original use of the ninth floor of the building, and when the petitioner did not comply, imposed a Compliance Enforcement Fee of a certain amount. The petitioner brought the issue to the Court, which *sua sponte* requested constitutional review of Article 14 of the Building Act.

B. Summary of the Decision

The Constitutional Court invalidated Article 14 of the Building Act as exceeding the scope of delegated rule-making on a unanimous decision as follows:

The Constitution states in Article 75 that, pursuant to the prin-

ciple of separation of power, parliamentarism, and the rule of law, Presidential Decrees can be promulgated only with respect to 'those matters delegated by statutes with concretely defined scope,' and thereby sets the scope and limit of delegated rule-making. Here, the phrase 'those matters delegated by statutes with concretely define scope' means that the content, scope, and other basic matters to be determined by lower rules such as Presidential Decrees must be defined concretely and clearly so that anyone can predict from the statute itself the overall content of the lower rules. The degree of requisite concreteness and predictability must vary according to the types and nature of the subject matter regulated. But, the delegation of the rule-making that causes substantial influence on people's basic rights and liberties such as those laws and rules of punitive nature must be limited to emergency situations or to those matters unavoidably undefinable in statutes.

The Compliance Enforcement Fee is a method to obtain compliance with the compliance orders concerning the non-complying buildings. It restricts people's rights and liberties, and therefore constitutes administrative indirect coercion, or namely, *intrusive administrative act*. The strict standard to be applied to the delegation of punitive laws and rules should be also applied to the case of intrusive administrative act. Therefore, the prerequisites to the compliance orders, which are in turn the prerequisites to the imposition of Compliance Enforcement Fees, must be strictly defined in statutes.

Article 14 of the Building Act left all matters concerning the restrictions on the use of buildings through blanket delegation to lower laws and regulations. The general public cannot predict from the provisions themselves the regulation of Presidential Decrees and determine whether their change of use may constitute a construction and therefore need to be approved. Furthermore, there is no urgent need to leave the task of defining of change in use of buildings entirely to Presidential Decrees or no unavoidable reason that it cannot be defined in detail in statutes.

Therefore, the act of issuing a compliance order and imposing a Compliance Enforcement Fee by deeming the change in use of buildings here as a construction under the instant statutory provision violates Article 75 of the Constitution that defines the limit of delegated rule-making.

5. *Ban on Clearing Hangover Advertisement* case (12-1 KCCR 404, 99Hun-Ma143, March 30, 2000)

In this case, the Constitutional Court invalidated the Food Labeling Standard that banned the use of such phrases as "before or after drinking" or "clearing hangover" on food items or the containers or packaging thereof.

A. Background of the Case

According to the Food Sanitation Act, the Minister of Health and Welfare is authorized to set and put on public notice a standard of marking food items for the purpose of sale if the Minister finds it necessary for public health. Food items subject to the noticed standard cannot be sold unless they comply with that labeling standard.

The public health authorities found that the recently popular hangover-fighting drinks are encouraging drinking, and thereby does harm to the public health. Therefore, they added to the labeling standard a provision that 'bans such content as before-or-after-drinking, hangover-clearing, or other phrases inducing drinking.'

The complainants obtained a patent titled hangover-clearing organic tea and its manufacturing method' but could not place on the tea manufactured through the patented process a patent mark 'hangover-clearing organic tea.' They filed this constitutional complaint, arguing that the promulgated standard violates their basic rights.

B. Summary of the Decision

The Constitutional Court decided on a unanimous vote that the instant public notice infringes on the complainants' basic rights as follows:

The legislative purpose of the instant statutory provision is to ban those markings that encourage drinking and protect public health from drinking-related threats.

However, whether and how much to drink is determined by one's liking of drinking, economic conditions, moods, and other circumstances. People consume hangover-clearing food items when they obtain an opportunity to drink, out of expectation that the items will dilute or clear hangover. The markings such as the instant cannot be said to contribute to drinking. A ban on such markings, if applied against effective anti-hangover agents, blocks consumers' ac-

cess to accurate information and genuine goods, thereby depriving them of an opportunity to be cleared of hangover. Whether a product can be marked as hangover-clearing directly and profoundly affects the sales of the affected food items. Entrepreneurs and inventors, if they cannot mark their products as such, will lose any incentive to invent or develop them.

Misplaced over-reliance on the hangover-clearing products may lead to such side-effects as over-drinking. Whether to rely on such products should be left to the sound judgment and responsibility of consumers, and not be intermeddled in by the State. The State may enact a policy measure requiring all hangover-clearing products to have a warning that exorbitant drinking in reliance on the products will hurt health, but a flat ban on all the markings referring to hangover-clearing definitely constitutes excessive restriction.

Therefore, this regulation does not constitute the minimum restriction, does not uphold the balance of interests, and therefore does not satisfy the elements of a legitimate legislation that restricts basic rights. It infringes the right to manufacture and sell hangover-clearing products and the right of expression through advertisement in violation of the rule against excessive restriction.

Furthermore, the constitutional mandate to protect inventors' rights through statutes and the legislative purpose of the Patent Act establish a patent holder's right to sell his or her products as the essential content of a patent right. If one cannot mark his or her product using the name or content of the patented invention, that product will not benefit from the explanatory power and the selling and attraction point of that patent. The patented product will not fully realize its role and effects. Then, a right to exercise a patent as an occupation will be made hollow. Since such restriction violates the constitutional principle of excessive restriction, it also violates the constitutional guarantee to the complainants of their property right: patent.

C. Aftermath of the Case

The labeling standard became void, and food items or their containers or packaging could be marked 'before-or-after-drinking' or 'hangover-clearing.' The hangover-fighting products marked as such are being sold.

6. *Automatic Termination of Purchase Agreement under the Forfeited Assets Disposal Act* case (12-1 KCCR 568, 98Hun-Ka13, June 1, 2000)

In this case, the Constitutional Court invalidated a provision in the Forfeited Assets Disposal Act that automatically cancelled a purchase agreement of a forfeited property upon which the purchaser did not make the instalment payment on time even when there was just cause for the non-payment.

A. Background of the Case

Forfeited Assets means those Japanese-owned assets left behind after the Liberation, which were transferred to the government of the Republic of Korea pursuant to an agreement between the newly formed Korean government and the U.S. government (Initial Financial and Property Settlement Between the Government of the Republic of Korea and the Government of the United States of America).

The requesting petitioners for constitutional review entered in an agreement with the government to purchase a Forfeited Asset on June 30, 1961, on which a third party A had provisionally recorded preservation of a right to transfer title. Under the agreement, they were to pay the purchase money in instalments until June 15, 1964 and paid the instalments up to 1962. The third party A sought transfer of ownership in a suit against the State and won on January 25, 1963, and successfully transferred the title on May 14, 1963. From that point, the petitioners withheld any instalment payment and the State did not demand any more payment.

Then, on December 31, 1964, the Forfeited Assets Disposal Act was revised so that those purchasers who had payments due until June 30, 1964 had to complete those payments by March 31, 1965 or the purchase agreement would be automatically terminated. The State, on the other hand, successfully sued the above said A for declaration of ownership and cancellation of the transfer of title and won the title to the above said property. The petitioners at that point filed suit against the State demanding transfer of title pursuant to the said purchase agreement and requested constitutional review of the automatic termination provision in the Forfeited Assets Disposal Act, which the presiding court granted and referred to this Court for review.

B. Summary of the Decision

The Constitutional Court found it unconstitutional to apply the automatic termination provision even when a purchaser did not make the instalment payment for just cause, on the following unanimous decision:

How to penalize one's breach of a duty under public law such as a duty to make the instalment payment for the purchase of Forfeited Assets belongs to the domain of the legislature's policy-making, but the method and severity of penalty, and other aspects of the means of accomplishing the legislative intent must be reasonable. The above said automatic termination provision is a proper penalty aimed at accomplishing the legislative purpose of settling down the legal relations around Forfeited Assets early, and in principle cannot be said to be an excessive restriction on the purchaser's right to property.

However, if the non-payment is attributable to the fault of the State or the purchaser has just cause for the non-payment due to other special circumstances, the principle of due process dictates that the agreement be terminated only after such special circumstances disappeared and the purchaser did not make the payment even in absence of the circumstance.

Therefore, automatic termination of the purchase agreement of Forfeited Assets in case of justified non-payment of the instalment violates the principle of due process and the rule against excessive restriction.

7. *Attorney Disciplinary Procedure* case (12-1 KCCR 753, 99Hun-Ka9, June 29, 2000)

In this case, the Constitutional Court invalidated related provisions in the Attorneys-At-Law Act that require an attorney disciplined by the Attorney Disciplinary Committee of the Korean Bar Association to appeal directly the Supreme Court, without having an opportunity to appeal to the Administrative Court or the High Court, on the ground that they infringe the right to trial by judge, the right to equality, and other basic rights.

A. Background of the Case

According to related provisions in the Attorneys-At-Law Act, the Attorney Disciplinary Committee of the Korean Bar Association can

discipline an attorney upon a finding of reason for such discipline. The disciplined can file an objection to the discipline to the Attorney Disciplinary Committee of the Ministry of Justice. On the other hand, he or she can appeal the decision of the Attorney Disciplinary Committee of the Ministry of Justice directly to the Supreme Court if the ground of the appeal is that the decision violated the Constitution, statutes, regulations, or rules.

Attorney A was disciplined on a penalty of 3 million won by the Attorney Disciplinary Committee of the Korean Bar Association for cohabitating with a woman other than his spouse and thereby damaging the integrity of the profession, and for failing to pay the annual fees to the regional bar association that he belonged to. He filed an objection with the Attorney Disciplinary Committee of the Ministry of Justice but the objection was dismissed. He then sought cancellation of the penalty by filing judicial review of administrative action in the Seoul Administrative Court. The Seoul Administrative Court found that its jurisdiction over the case depended on the constitutionality of the above statutory provisions and requested constitutional review *sua sponte*.

B. Summary of the Decision

The Constitutional Court invalidated the statutory provision upon the following unanimous decision:

Generally, an objection to administrative action can be received by a fact-finding court in the Administrative Court or the High Court. Only the objection to the attorney discipline does not go through factual review. It is transferred directly from the Attorney Disciplinary Committee of the Ministry of Justice to legal review at the Supreme Court, and therefore limited to an appeal on the ground that the decision violates laws and regulations. Therefore, the attorney objecting to the disciplinary action is not given the full opportunity for fact-finding by a judge.

The Constitution in Article 27(1) states all people have rights to receive a trial pursuant to statutes before a judge selected pursuant to the Constitution and statutes. It guarantees all a right to receive a trial conducted in accordance with the substance and procedure defined by constitutional statutes, and by a judge, who is appointed in accordance with the qualifications and procedures set forth by the Constitution and statutes and guaranteed material and personal independence. A guarantee of a right to receive a trial by a judge means a guarantee of a right to have a judge determine the facts and interpret and apply laws. If such right is insufficiently guaranteed, the essential content of the constitutionally guaranteed right to

trial is infringed. In other words, the right to receive a trial by a judge, guaranteed as a basic right by the Constitution, means a right to have a judge determine the facts and 'interpretation and application of laws' by that judge to the facts of the concrete case. The instant statutory provision deprives one of an opportunity of fact-finding by a judge and therefore infringes on the constitutionally guaranteed right to receive a trial by a judge.

Doctors, certified public accountants, tax accountants, architects, and other professionals can appeal their disciplinary actions for cancellation to the Administrative Court. They therefore go to the Supreme Court after having obtained factual review at the Administrative Court and the High Court. An attorney may be a special occupation, but it is unreasonable discrimination to require only him or her to appeal directly to the Supreme Court without granting a factual review by a judge.

C. Aftermath of the Case

The Ministry of Justice proposed a bill to revise the Attorneys-At-Law Act according to this decision around November 2000.

8. *Materials Harmful to Juveniles* case (12-1 KCCR 767, 99Hun-Ka16, June 29, 2000)

In this case, the Constitutional Court upheld related provisions in the Juvenile Protection Act that punished sale to juveniles of materials harmful to them and granted the Juvenile Protection Committee the power to determine the harmfulness of materials.

A. Background of the Case

The Juvenile Protection Act bans the sale, rent, or distribution to juveniles of materials harmful to juveniles and the offering of the materials for viewing or use by juveniles. It punishes those who engage in the banned conduct for profit. Then, the Act grants the Commission on Youth Protection and other agencies capable of reviewing materials on their ethical value and soundness the power to determine what should be banned as materials harmful to juveniles.

Therefore, the Korean Performance Arts Promotion Council found the CD-ROM titled 'Starcraft' to be a material harmful to juveniles for highly violent content. The defendant in this case allowed juveniles to play Starcraft in his PC game room operated for profit.

He was indicted for the offering of use of materials harmful to juveniles for profit, and the Court *sua sponte* requested constitutional review of the said statutory provisions.

B. Summary of the Decision

The Constitutional Court upheld the grant of the power to determine whether a certain material is materials harmful to juveniles to the Commission on Youth Protection in the following unanimous decision:

Punitive laws and rules must be in principle legislated in the form of statutes. The making of punitive law and rules can be delegated to administrative rule-making only in exceptional situations where there is urgent need for such delegation or the circumstances do not allow detailed definitions in statutes. Even when so delegated, the statutes must define concretely the elements of the crimes so that the punished conduct can be predicted, and state clearly the types, limit and scope of punishment.

Any attempt to ban sale and rent to juveniles of materials harmful to juveniles will necessarily involve case-by-case review of each material on its harmfulness. It is practically impossible to make laws or lower laws to condemn each of the materials, and the efficacy of the regulation will be lost. It seems unavoidable that whether a material falls under materials harmful to juveniles, although it is an element of the crime, is not defined in the statute itself but delegated to the administrative body such as the Commission on Youth Protection. The Juvenile Protection Act and its enforcement rules permit a rough prediction of which materials will be materials harmful to juveniles. They require the determinations by the administrative bodies to be published in the Official Gazette and to be entered into the List of Materials Harmful to Juveniles. Through these procedures, the scope of the punished conduct becomes clearer.

Therefore, the Juvenile Protection Act provision does not exceed the limit of delegation of punitive rule-making, and it is not vague enough to violate the principle of statutory punishment.

Furthermore, as long as the findings of the Commission on Youth Protection are made within the scope delegated by the Juvenile Protection Act, they only reinforce the contents of the definitions under this statute. When a trial proceeds on the basis of the findings, the judge's authorities in fact-finding or interpretation and application of laws are not deprived. Judges can make independent findings as to the legitimacy of the determinations of the Juvenile Protection Act, and conduct the proceeding on the basis thereof. Delegation of

determining whether a material falls under materials harmful to juveniles to the Commission on Youth Protection does not infringe one's right to receive a trial by a judge.

9. *Ban on Observation of the National Assembly proceedings* case
(12-1 KCCR 886, 98Hun-Ma443, June 29, 2000)

In this case, the Constitutional Court dismissed a constitutional complaint filed by civic organizations for the infringement on their rights to know when they were denied an application to observe the small committee proceeding and the National Audit of the National Assembly.

A. Background of the Case

(1) Denial of Application for Observation of Small Committee Proceedings of the National Assembly

Complainants, the members of the congressional budgeting monitoring committee of a civic group, called Citizen's Coalition for Economic Justice, applied for a right to observe the Numbers Adjustment Sub-committee of the National Assembly Budget Finalization Special Committee.

Complainants received a denial and sought a constitutional complaint, stating that the denial of their right to observe the Subcommittee proceeding infringes their rights to know, their rights to property, and other basic rights.

(2) Denial of Application for Observation of the National Audit of the National Assembly

The power of a national audit set forth in Article 61 of the Constitution is unique to the Korean Constitution. It means the power of the National Assembly to audit all affairs of the national government annually.

Article 55(1) of the National Assembly Act states "Those who are not the members of the National Assembly can observe the Committee proceedings by obtaining the permission of the Chairperson of the Committee."

Complainants are members of the Citizens' Coalition to Monitor the National Audit formed for the purpose of monitoring and criticizing the Assembly members' auditing activities. In order to observe the national audit of 1999, they submitted the requests to observe

each of the Committee proceedings to the corresponding Committee Chairpersons.

Complainants, when denied any right to observe the national audit proceedings in each of the proceeding venues, filed this constitutional complaint, alleging that the denial of their rights to observe the national audit and Article 55(1) of the National Assembly Act which formed the basis for such denial infringed their rights to know.

B. Summary of the Decision

The Constitutional Court denied both complaints on the following majority opinion of six Justices:

Article 50(1) of the Constitution states the proceedings of the National Assembly shall be open to public, making clear the principle of public proceedings. The National Assembly Act reflects this constitutional principle and makes the Plenary Session open to public. The same rule is applied to Committee proceedings.

Therefore, both the Plenary Session or Committee proceedings must be open to public in principle. However, the relevant provisions of the Constitution and the National Assembly Act do not adhere to the principle of opening to public but allow session with closed doors no-disclosure when the participants to the meetings autonomously decide not to open to public.

Article 55(1) of the National Assembly Act concerning observation of Committee proceedings is based on the principle of opening to public, and does not allow Chairpersons to deny observation requests at their sole discretion without restriction. It should be interpreted as authorizing the denial of observation requests only when it is necessary for the maintenance of the order of the meetings. When interpreted thus, the provision is not an unconstitutional provision that restricts people's basic rights.

Subcommittees carry out concrete and substantive reviews of bills, revise bills, and prepare the bills for Committees to review. Given their important and substantial role in the legislative process of the National Assembly, subcommittee proceedings should also be open to public. However, open proceedings will make the participants more conscious of their constituencies and therefore make substantive discussions or political compromises difficult to reach.

As examined above, in light of the intent of the Constitution which prescribes the principle of opening to public and yet allow the autonomous judgments of the meeting participants, whether to open Subcommittee proceedings to public can also be decided by each Subcommittee reasonably by taking into consideration various circum-

stances.

The Numbers Adjustment Subcommittee of the Budget Finalization Special Committee adjusts and finalizes line-items and numbers of the budget comprehensively. Opening to public of the Subcommittee proceeding to many state agencies and interested groups is not desirable. Not opening to public of the Subcommittee proceeding is established as a custom within the National Assembly, indicating that the members of the Budget Finalization Special Committee have effectively agreed to such non-disclosure. Therefore, the denial of the observation request in this case does not depart from the scope of the autonomy of the National Assembly over its proceedings, and does not constitute an unconstitutional exercise of public authority.

According to the National Assembly, the Citizens' Coalition has not been tested on the fairness of its criteria of evaluation when it evaluated the Assembly members' audit activities, and has worried the National Assembly that the publicity on its reviews through the media may grievously damage the political integrity or reputation of the Assembly members. If the National Assembly, for these reasons, decided that opening to public would make an efficient National Audit impossible and therefore completely or conditionally denied the complainants' requests to observe, such autonomous judgment must be respected, and the instant denial is not clearly without any reason or arbitrary to the extent that makes intervention of the Constitutional Court appropriate.

Three Justices objected the majority decision as follows:

[*Dissenting Opinion of Justices Lee Young-mo and Ha Kyung-chull*]

The denial of the request to observe the National Audit proceedings is understood as based on a view that, if the complainants and their civic organizations evaluate the Assembly members conducting the National Audit and publicize their evaluations, the resulting psychological pressure on the Assembly members will make an efficient proceeding difficult. Such reason does not qualify as the justifiable grounds for not opening the session to public, such as 'limitation on space' or 'the necessity for maintenance of order'. The instant denial of observation request departs from the scope of the discretion and violates the Complainants' freedom to observe or right to know.

[*Dissenting Opinion of Kim Young-il*]

According to the Constitution and the National Assembly Act, the Subcommittee proceedings can be held in behind closed doors only either when the Committee or the Subcommittee has passed a resolution to that effect or when the Chairperson makes a finding that such opening to public is necessary for national security. The

prerequisites to not opening to public have not been satisfied at the Numbers Adjustment Subcommittee. Denying civic organizations' observation requests selectively for the reason that the civic organizations' evaluations cause damage to the political reputation of assembly members does not even satisfy the prerequisites to a limitation on observation under the National Assembly Act. Therefore, the decision not to allow observation at the Subcommittee and the National Audit violates the complainants' right to observe the proceedings of the National Assembly, one of the rights to know.

10. *Merger of Medical Insurance* case (12-1 KCCR 913, 99Hun-Ma289, June 29, 2000)

In this case, the Constitutional Court upheld the relevant provisions of the National Health Insurance Act which unify medical insurance systems into one and regulate the process of transferring the deposit fund and unifying the finances.

A. Background of the Case

The National Health Insurance Act, enacted on February 8, 1999 and to be effective on July 1, 2000, was about to merge those insured separately under workplace insurances and under regional insurances under the National Health Insurance Corporation as the common insurer.

The National Health Insurance Act has provisions that govern the merger of the finances of workplace insurances and regional insurances, the involuntary dissolution of former workplace insurance unions, and the comprehensive assignment of the rights of the dissolving unions to the National Health Insurance Corporation.

Complainants are the members of the regional medical insurance unions, who alleged that, the dissolution of workplace insurance unions and the resulting assignment of the deposit funds to the newly created National Health Insurance Corporation violates their rights to property; the merger of the workplace insured and the regional insured pursuant to the National Health Insurance Act creates inequality between the workplace insured whose income can be easily monitored and the regional insured whose income is difficult to be detected, and thereby violates the right to equality of the workplace insured. They filed this constitutional complaint against the provisions of the National Health Insurance Act on May 20, 1999.

B. Summary of the Decision

The Constitutional Court decided on a unanimous decision that the provisions of the National Health Insurance Act do not violate the Constitution.

The Constitutional Court first ruled on whether the National Health Insurance Corporation's succession to the deposit fund of the workplace medical insurance unions violates the right to property or equality as follows:

Only when complainants have recognized legal rights to concrete compensations, their status under social insurance laws enjoy the protection of the right to property. In this case, the relevant statute did not specify the union members' right to receive the deposit fund upon the dissolution or merger of the union. A right under social insurance law is a public right that cannot receive the protection of the right to property unless the legal status under that right has also the characteristic of a private interest belonged to the holders of that right. The deposit fund lacks even the minimum characteristic of a property right under private law. Therefore, the deposit fund of the medical insurance unions is not included in the scope of protection of the right to property in Article 23 of the Constitution.

On the other hand, the right to medical insurance benefits is a public right protected by the right to property under the medical insurance law. However, the merger of the deposit funds neither threatens the right to medical insurance benefits nor effects adverse changes against the workplace insured in the concrete contents of the benefits specified under the medical insurance law. The merger of the deposit funds does not restrict the property right to medical insurance benefits.

Also, the purpose of the deposit fund is to secure the paying power of the insurer and thereby make possible the medical insurance program as part of social insurance. Even if the merging insurer and the merged insured make unequal contributions in forming the new deposit fund under the medical insurance merger, such difference does not affect the equality in insurance premiums after the merger. The merger of the deposit fund does not violate the complainants' right to equality.

The Constitutional Court then ruled on whether the merger of the medical insurances can guarantee the equality in insurance premiums between the workplace insured and the regional insured as follows:

The principle of equality in taxation and other public assessments requires that those burdened with public assessments bear a legally and factually equal burden pursuant to statute. In other words, the

principle of equal burdens in public assessments consists of two components: equality under the law in the duty to pay public assessments and equality in enforcing the duty to pay through collection of the public assessments.

When the insured whose income can be discovered and the insured whose income is difficult to detect are covered by one insurer, and the finances of the two groups are merged, the difference among the insured in *income detectability* leads to 'the difference in enforcement of the duty to pay insurance premiums,' a substantive difference that cannot be ignored constitutionally from the perspective of the principle of equal burdens in public assessments.

When the incomes of the self-employed are not properly being reported, the biggest obstacle to the merger of two essentially heterogeneous groups under the merger of the medical insurances is a problem of not only how to merge the finances of the two systems but also how to distribute fairly insurance premiums between the workplace insured and the regional insured after the merger.

However, the National Health Insurance Act allows about one and a half year of a deferral period until the time of the merger for determining the incomes of the regional insured or the objective criteria of inference in doing so. Even after January 1, 2002, the date of the merger of the finances and until the incomes of the regional insured can be determined or inferred through a reasonable and reliable plan, a democratic operation of the Finance Management Committee can take into proper accounts the interest of both the workplace insured and the regional insured and adjust the premium rates of the workplace insured and the regional insured so that the premium rates are not set disadvantageously to the former. Therefore, although the workplace insured and the regional insured are essentially heterogeneous groups in terms of the types and the detectability of income, the said merger of the finances of the workplace insured and the regional insured does not violate the Constitution.

C. Aftermath of the Case

As the provisions of the National Health Insurance Act concerning the merger of the finances were upheld by the Constitutional Court, the National Health Insurance Act became effective on July 1, 2000 as planned.

The said provisions of the National Health Insurance Act concerning the merger of the medical insurance systems are still being subject to constitutional debates fanned by the sharp disagreements

between different interest groups.

At the Constitutional Court, even after this case, other complainants filed constitutional complaints alleging that the provisions of the National Health Insurance Act that mandate the merger of all medical insurance systems for all people or specify the criteria in determining insurance premiums violate their rights to pursue happiness or the rights to equality.

11. *Exclusion of Appeal Period from Incarceration Period* case
(12-2 KCCR 17, 99Hun-Ka7, July 20, 2000)

In this case, the Constitutional Court found nonconforming to the Constitution Article 482(1) of the Criminal Procedure Act which allowed confinement *after* the filing of appeal and *before* the judgment on the appeal to be credited against the sentence period and yet remained silent on whether to include the confinement before the filing of the appeal to be credited.

A. Background of the Case

Article 57 of the Criminal Act states that *all or part* of the days of confinement before the announcement of the judgment may be included in the sentence served. Pursuant to the provision, *the judge has* discretion in determining how many days of the confinement before the announcement of the judgment be included in the time served. However, if the days of confinement before the judgment increase due to reasons not attributable to the defendant, it follows that those additional days should be included in the time served *automatically* without judicial intervention. In this light, while discretionary inclusion under Article 57 of the Criminal Act remains as the principle, Article 482(1) of the Criminal Procedure Act has been enacted to include in the time served those days not attributable to the defendant under limited circumstances. Article 482(1) of the Criminal Procedure Act states that when (1) the prosecutor has filed appeal; (2) the defendant or a person other than the defendant has filed appeal and the lower courts judgment is dismissed, the days of confinement after the filing of appeal and before the announcement of the judgment on that appeal are included as part of the ultimate sentence. However, because of this provision, the ultimate sentence ended up not including the days of confinement after the announcement of the judgment of the original trial and *before* the filing of the appeal.

Petitioner, a criminal defendant, stood a trial while incarcerated and was sentenced to imprisonment for seven years. The defendant appealed on the day of the judgment, the prosecutor appealed six days later, and both appeals were denied. The appellate court, however, did not issue any separate ruling on the inclusion of prejudgment confinement period in the time served. In executing the judgment after it was finalized, the prosecutor included in the time served only the period between the prosecutors filing of appeal and the announcement of the appellate judgment pursuant to Article 482(1) of the Criminal Procedure Act, and left out the six day period between the defendants filing of appeal and the prosecutors filing of appeal. The petitioner filed an objection to the execution of judgment in the ordinary court, which in turn referred the case to constitutional review of statute.

B. Summary of the Decision

The Constitutional Court found the said provision of the Criminal Procedure Act nonconforming to the Constitution in the following majority opinion of six Justices:

Prejudgment confinement is a compulsory measure before the conclusion of trial and does not constitute the execution of a sentence. It is not automatic by nature that its duration be credited against the ultimate sentence. However, prejudgment confinement is practically similar to imprisonment in its effect of depriving the liberty and thereby causing hardship on the defendant. Whether and how long he or she is confined prejudgment does not correspond to his or her culpability or the reasons thereof. It is usually determined by criminal-procedural reasons. Therefore, it is consistent with equity and with fairness among defendants that the prejudgment confinement period is included in or credited against the ultimate sentence in event that the defendant is found guilty.

Many foreign legislative precedents follow statutory inclusion and include the entire period, or at least the entire in principle, of prejudgment confinement in the sentence. Our country leaves the inclusion to the discretion of the courts (Article 57 of the Criminal Act) and at the same time supplements the system with a provision of statutory inclusion.

'The days of confinement after the filing of the appeal and before the announcement of the judgment' in this statutory provision means what it says. It does not support inclusion of the period between the date of the announcement of the judgment of the original trial and the finalization of that judgment when one decides not to appeal

or does not appeal before the deadline; the period between the announcement of the judgment of the original trial and before the filing of the appeal when one appeals before the deadline; and the period between the defendant's abandonment of appeal and the subsequent finalization of the judgment when the prosecutor fails to appeal before the deadline.

Prejudgment confinement restricts the important basic right of bodily freedom. Restriction on basic rights should be limited to an unavoidable extent. In principle, all prejudgment confinement period is subject to statutory or discretionary inclusion. There is no special reason to exclude from the inclusion the period for preparing the appeal. In view of the importance of appeal in the criminal justice system or the original reason for having the period for filing the appeal, we should allow the defendant to deliberate about appeal leisurely without being worried about any disadvantage in that period.

It is unreasonable to treat the passage of time during the period for filing the appeal disadvantageously. In comparison to other periods included in statutory inclusion under this statutory provision, this period cannot be any more attributed to the defendant's responsibility.

Therefore, this statutory provision infringes on bodily freedom and the principle of equality when it excludes the period for filing the appeal from statutory exclusion. Furthermore, it punishes the defendant with bodily confinement for taking time to decide whether to appeal in the same period, and therefore indirectly restricts the full exercise of the right to judicial process.

If the statutory provision loses its force or its application is suspended, the statutory basis for statutory inclusion will disappear and cause vacuum in law. We need to leave the statutory provision effective temporarily for a limited period until the legislature improves it in the manner consistent with the Constitution.

The legislature has a legislative duty to revise the statutory provision expeditiously, and this statutory provision shall remain effective until that time.

12. *Pharmacists' Sanitary Garments* case (12-2 KCCR 37, 99Hun-Ka15, July 20, 2000)

In this case, the Constitutional Court invalidated the related provisions of the Pharmacist Act that prescribed a penalty of fine for the pharmacist's failure to comply with the regulation concerning the matters necessary for the operation of the pharmacy in the Decree

of the Health and Welfare Ministry on the ground that the statutory provision violates the rule against blanket delegation and the principle of *nulla poena sine lege*.

A. Background of the Case

Article 19(4) of the Pharmacist Act states that a pharmacist operating a pharmacy shall comply with the Decree of the Health and Welfare Ministry in those matters necessary for the operation. The Administrative Rule of the Pharmacist Act, a decree of the Ministry of Health and Welfare, requires that pharmacists wear white sanitary garments and a name badge. Article 77[1] of the Pharmacist Act punishes the violation of such provision with a fine of up to two million Korean won.

A, the pharmacist operating a pharmacist, did not wear the white sanitary garment and the name badge while selling medicine, and was indicted. The ordinary court *sua sponte* requested constitutional review of Article 77[1] as applied to Article 19(4).

B. Summary of the Decision

The Constitutional Court found the statutory provision unconstitutional in the following unanimous decision:

The Constitution authorizes lower-level regulations only for those matters delegated to such regulation in statute with concretely defined scope. 'Concretely defined scope' means that the content, scope, and other basic matters to be prescribed by lower rules must be determined concretely and clearly in the statute so that anyone can predict from the statue itself the overall content of the lower rules. Especially, the delegation of punitive rules and regulations is not desirable in light of the principle of *nulla poena sine lege*, that of due process, and the constitutional ideology of the precedence of basic rights, and therefore the prerequisites to and the scope of such delegation shall be applied there more strictly. Delegation of punitive laws should be limited only to exceptional situations where there is urgent need for such delegation or the circumstances that do not allow detailed definitions in statutes. Even when so delegated, the statutes must define concretely the elements of the crimes so that the punished conduct can be predicted, and state clearly the types, limit and scope of punishment.

This provision does not define any more concretely 'the matters necessary for the operation of a pharmacy' or narrows the scope thereof when the phrase constitutes an element of the punishment.

It overbroadly delegates the entire contents to the lower rule, the Decree of the Ministry of Health and Welfare, and does not allow any concrete prediction as the content and scope of 'operating a pharmacy.' Also, there is no urgent necessity that requires those matters to be delegated to ministerial decrees or does not allow detailed definitions in statutes.

Therefore, this statutory provision does not allow pharmacists to predict the content and scope of the matters to comply with and leaves room for arbitrary administrative rule-making by the Administration. It violates the rule against blanket delegation in Articles 75 and 95 and the requirement of clarity of punitive laws in Articles 12(1) and 13(1) of the Constitution.

C. Aftermath of the Case

After this decision, this statutory provision lost force retroactively, and the person whose conviction was finalized could receive a new trial.

13. *Limit on the Number of Attempts at Judicial Examination*[1] case (*Preliminary Injunction*) (12-2 KCCR 381, 2000Hun-Sa471, December 8, 2000)

In this case, the Constitutional Court reviewed the related provisions of the Bar Admission Decree that prohibits one who has taken the first phase of the Judicial Examination four times from taking it again for four years, and temporarily suspended the force of the said provisions on a preliminary injunction before a decision on the merits.

A. Background of the Case

In August 1996, the Bar Admission Decree was revised so that whoever took the first phase of the Judicial Examination could not take it again for four years. Petitioners failed the first phase of the Judicial Examination four times in a row between 1997 and 2000, and became the first groups to be affected by the revision and could not sit for the Judicial Examination for four years starting 2001.

Petitioners alleged that the Decree, by prohibiting them from

1). The Judicial Examination is essentially a nationally administered bar examination after which the successful examinees receive two years of practice-oriented education at the Judicial Institute and then begin their practice as judges, prosecutors, or attorneys.

sitting for the Judicial Examination and thereby shutting down the path for them to become judges, prosecutors, and attorneys, infringed on their constitutionally guaranteed basic rights such as freedom to choose occupations, rights to hold public offices, rights to pursue happiness, and rights to equality. They further alleged that the Decree, being merely a presidential decree, cannot restrict basic rights that can be restricted only by statute. Therefore, they filed this constitutional complaint, and at the same time, a motion for a preliminary injunction suspending the force of the Decree in order to avoid the restriction for the 2001 Judicial Examination.

B. Summary of the Decision

The Constitutional Court granted the motion for preliminary injunction in the following unanimous decision.

The Constitutional Court Act authorizes preliminary injunctions in political party dissolutions and competence disputes but remains silent on whether they are authorized in other types of constitutional trials. The Constitutional Court does state that any matter not specified by the provisions in the Act shall be subject to the provisions of the laws and regulations of civil procedure, and that the matters concerning constitutional complaints are subject to the provisions of judicial review of administrative action.

Need for preliminary injunctions exists not only for the said two types of constitutional trials but also for other types such as constitutional complaints of Article 68(1) of the Constitutional Court Act. There is no substantial reason not to authorize them for constitutional complaints, and we hereby authorize them.

Therefore, when the review on merits is not legally insufficient or clearly without basis; maintaining the status quo on 'the exercise or non-exercise of public authority' being challenged through the constitutional complaint may cause irrecoverable damages; there is urgent necessity to suspend the force of that status quo; and the benefit of granting the preliminary injunction and then having to deny the ultimate remedy outweighs the cost incurred in denying the former and then having to grant the latter, the preliminary injunction should be granted.

It is not clear that the petitioners' claims are without basis. If the force of the said provision is maintained, the petitioners cannot sit for the first phase of the Judicial Examination for four years starting 2001 and will incur the irreparable injury of being shut out from the chance of passing the Judicial Examination. The first phase of the Judicial Examination is given early in the year, and therefore,

temporal urgency is recognized. Denying the preliminary injunction and granting the ultimate remedy will cause to the petitioners an irreparable loss of the opportunities to pass the Judicial Examination.

C. Aftermath of the Case

After this decision, petitioners and all others about to be excluded from the 2001 Judicial Examination due to the limitation on the number of attempts at the Judicial Examination were able to sit for the 43rd Judicial Examination.

The National Assembly, in response to critiques form various fields that the Judicial Examination Decree is a presidential decree and yet specifies the matters concerning the rights and the duties of the people without any statutory delegation, legislated the Judicial Examination Act on March 28, 2001. Article 5 of the Act concerning the qualifications of examinees, does not limit the number of times that they can take the exam. The Judicial Examination Decree was repealed on March 31, 2001.

The main complaint against the Judicial Examination Decree, out of which this motion for preliminary injunction arose, was dismissed for lack of justiciable interest because of the enactment and the repeal of the laws.

14. *Early Retirement of Educational Public Officials* case
(12-2 KCCR 399, 99Hun-Ma112 and etc., December 14, 2000)

In this case, the Constitutional Court upheld the related provisions of the Educational Public Officials Act that shortened the retirement age of educational public officials from 65 to 62 except for college teachers.

A. Background of the Case

The National Assembly on January 29, 1999, revised the Educational Public Officials Act with a plan to accelerate the retirement of primary and secondary school teacher, thereby create a youthful and dynamic learning environment, lower the labor cost, a large line-item in the educational expenditure, and thereby procure the capital necessary for the improvement of the educational environment. The revised Educational Public Officials Act lowered the retirement

age of all educational public officials other than college teachers from 65 to 62.

Complainants, teachers at primary schools, filed this constitutional complaint, alleging that this statutory provision infringes their basic rights.

B. Summary of the Decision

The Constitutional Court denied the complaint of the primary school teachers against this statutory provision in the following unanimous decision:

The legislature determined, after considering the educational conditions of this country and the people's aspiration for educational reform such as normalization of public education, that it is necessary and desirable to create a youthful and dynamic learning environment in the society of teachers. The legislature therefore shortened the retirement age of primary and secondary school teachers by three years to 62. We find that such judgment and decision associated with an educational policy has its own rational basis. Therefore, even in comparison to the retirement ages of other public officials of this country and that of teachers of other countries, the shortening of the retirement age to 62 does not depart from the formative power of the legislature, and cannot be said to have infringed on the right to hold public offices.

The Supplementary Articles of the Revised Act protects the teachers by applying the former retirement age in determining the beneficiaries and the amounts of honorary retirement pay. Such transitional measures, the extent of infringement on the teachers' expectation interest, and the importance of the public interest aimed at by the lowering of the retirement age lead us to think that this statutory provision does not violate the constitutional principle of protection of public confidence.

Primary, secondary and college teachers are different in their tasks, qualifications, processes of hiring and promotion. College teachers are usually older than primary or secondary school teachers when they are first hired. The nature of their tasks, namely higher education and research, requires college teachers to work into old age. The legislature relied on this point in setting the retirement age of college teachers at 65 three years higher than primary and secondary school teachers. Therefore, such system has a rational basis and therefore does not violate the right to equality of primary and secondary school teachers.

C. Aftermath of the Case

After this decision, the debate on a legislative policy concerning this matter continues in relation to a discourse on educational reform and has divided the political and educational societies into those supporting the early retirement and those advocating for the restoration of the older retirement age.