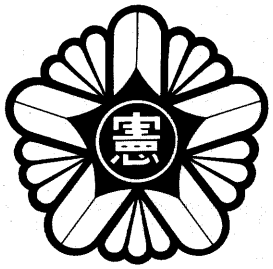
DECISIONS
OF
THE KOREAN CONSTITUTIONAL COURT
(2001)



THE CONSTITUTIONAL COURT OF KOREA

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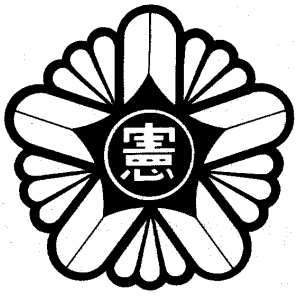

THE CONSTITUTIONAL COURT OF KOREA
2002

PREFACE

The publication of this volume is aimed at introducing to foreign readers those important cases decided from January 1, 2001 until December 31, 2001 by the Korean Constitutional Court.

This volume contains 18 cases, five full opinions and thirteen summaries.

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

Professor Park Kyung-sin, Seoul National University (Part-time Lecturer), translated the original. Assistant Constitution Research Officer Park June-hee proofread the manuscript. The Research Officers of the Constitutional Court provided much needed support. I thank them all.

December 31, 2002

Park Yong-sang
Secretary General
The Constitutional Court of the Republic 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

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(13-1 KCCR 301, 99Hun-Ma365, February 22, 2001)

Contents of the Decision

1. Whether the article of the National Pension Act which stipulates a coercive collection of pension premium, thus presupposing compulsory subscription to the pension program, and occurrence of the income redistribution, violates the principle of statutory taxation and the right to property.
2. Whether the article of the National Pension Act stipulating compulsory subscription violates the right to pursue happiness.
3. Whether the aforementioned articles are in violation of the market economy principle adopted by the Constitution.

Summary of the Decision

1. The National Pension Program is designed to give monetary benefits to its members based on the payment made by the members during their subscription period. The pension premium, however, is not a form of taxation which can be defined as a coercive collection of money by the government without entailing performance of a specific deed in return. Although Article 79 of the National Pension Act stipulates a coercive collection of pension premiums, it is due to the strong social or public nature of the national pension program, not because the pension premium is a form of taxation. While the National Pension Program brings about a redistribution of income, it is an essential element of any social insurance program, and the extent of the redistribution of income is a matter of government policy. It can also be said that collection of pension premiums is within the social limits inherent in the right to property. Thus, the National Pension Program does not violate the principle of statutory taxation nor the right to property.

2. The National Pension Program, based on compulsory subscription and coercive collection of the pension premium, can be said to be in violation of the right to pursue happiness of individuals who opt to prepare for social uncertainties on their own. However, the National Pension Act, which aims to contribute to the maintenance

of standards of living, and the improvement of social welfare of citizens by providing monetary benefits to old age, invalidity, or death of citizens has a legitimate purpose. As a social insurance program which uses a national insurance system to diversify risks, the National Pension Program is appropriate as a means to achieve legislative objectives. The National Pension Program also restricts individual choice using the least restrictive means. Regarding the balance of interest test, the public interest sought by the National Pension Program is much greater than the private interest at hand, namely, respect for the individual's personal choice to use personal savings. Hence, the National Pension Program does not violate the principle of proportionality, and does not violate the right to pursue happiness.

3. In light of the economic order of the constitution, the National Pension Program, a coercive savings program designed to give social security at old age by raising funds through the social insurance program, is based on the principle of mutual assistance and social solidarity. The Program, which brings about the redistribution of income between high-income groups and low-income groups, working people and retirees, and current generation and future generations, is in accordance with the social market economy, and does not violate the market economy principle adopted by the Constitution.

Provisions on Review

National Pension Act (amended by Act No. 5623 on December 31, 1998)

Article 75 (Collection of Pension Premiums)

(1) To meet the expenses needed for the national pension service, the Corporation shall collect each month pension premiums from insured persons and employers during the subscription period.

(2) In the case of a workplace insured person, the contribution fee will be borne by the insured person while additional changes will be borne by the employer, and the pension premiums to be paid by each will be equivalent to 45/1000 of the standard monthly income amount of the insured person.

(3) The pension premium of locally, voluntarily, and voluntarily and continuously insured persons, shall be borne by the locally, voluntarily, or voluntarily and continuously insured persons themselves, but the amount shall be 90/1000 of the standard monthly income amount.

Article 79 (Demanding to Pay Pension Premiums and Disposition of Arrears)

(1) If the pension premium of a workplace insured person and a locally insured person or other impositions under this Act fail to be paid within the time limit, the Corporation shall demand the payment thereof within the period of time which it fixes, in accordance with the Presidential Decree.

(2) In demanding to pay under paragraph (1), the Corporation shall fix the period of more than ten days and issue a note of demand.

(3) If a person demanded to pay under paragraph (1), fails to pay the pension premiums and other money to be collected under this Act in the prescribed time limit, the Corporation may collect it according to the example set out in the disposition on national taxes in arrears with the approval of the Minister of Health and Welfare.

Related Provisions

The Constitution

Articles 10, 23, 59, 119(1)

National Pension Act (revised by Act No. 5623 on December 31, 1998)

Article 6 (Persons to be Insured)

All citizens residing in the Republic of Korea whose age is not less than eighteen and is less than sixty shall become insured persons for the national pension: Provided, That public officials, military personnel, and private school teachers and staff, who are governed by the Public Officials Pension Act, the Veterans' Pension Act, and the Pension for Private School Teachers and Staff Act, and other persons as prescribed by the Presidential Decree, shall be excluded.

Article 8 (Workplace Insured Persons)

(1) Workers and employers in a workplace (hereinafter referred to as the "obligatory applicable workplace") as prescribed by the Presidential Decree on the basis of the type of business and the number of employed workers, etc., whose age is not less than eighteen and is less than sixty, shall obligatorily become the workplace insured persons: Provided, that those persons who fall under any of the following categories shall be excluded:

Beneficiaries of retirement pensions, disability pensions, or lump sum of that retirement pension under the Public Officials Pension Act, the Pension for Private School Teachers and Staff Act, or the Special

Post Offices Act, or those of retirement pension, wounded veterans' pension, or lump sum of retirement pensions under the Veterans' Pension Act (hereinafter referred to as the "beneficiaries of retirement pension, etc.");

(2) - (3) [omitted]

Article 10 (Locally Insured Persons)

Persons other than workplace insured persons under Article 8, whose age is not less than eighteen and is less than sixty, shall obligatorily become locally insured persons: Provided, That persons who fall under any of the following subparagraphs shall be excluded :

1. Spouses of persons falling under any of the following items, who do not have independent sources of income:

(a) Persons who shall be excluded from insured persons for the national pension under the proviso of Article 6;

(b) Workplace insured persons and locally insured persons;

(c) Staff of special post offices; and

(d) Beneficiaries of retirement pension, etc.;

2. Beneficiaries of retirement pensions, etc.;

3. Persons whose age is not less than eighteen and is less than twenty-three and who do not have any income because they are students, soldiers or any other similar status.

Related Precedents

3. 10-1 KCCR 522, 96Hun-Ka4, May 28, 1998
8-1 KCCR 370, 92Hun-Ba47, April 25, 1996

Parties

Complainants

Kim Ki-oh and 115 others
Counsel: Jung Ki-seung and 38 others

Holding

Request for adjudication is rejected.

Reasoning

1. Overview of the Case and the Subject Matter of Review

A. Overview of the Case

Complainants are insured by the National Pension Plan through their workplaces or local programs, and have been notified by the National Pension Corporation to pay the pension premium by May 10, 1999. On June 22, 1999, the complainants filed this constitutional complaint, arguing that Article 75 and Article 79 of the National Pension Act, which stipulate compulsory subscription to the pension program and aims to achieve the redistribution of income, are incongruent to the principle of statutory taxation, infringe on their property right and right to pursue happiness, and are in violation of Article 119(1) of the Constitution, which stipulates the respect for the freedom and creative initiative of individuals in economic affairs.

B. Subject Matter of Review

The subject matter of review is the constitutionality of Article 75 and Article 79 of the National Pension Act (revised by Act No. 5623 on December 31, 1998). The provisions are as follows:

Article 75 (Collection of Pension Premiums)

(1) To meet the expenses needed for the national pension service, the Corporation shall collect each month pension premiums from insured persons and employers during the subscription period.

(2) In case of a workplace insured person, the contribution fee will be borne by the insured person while additional changes will be borne by the employer. The pension premium to be paid by each will be equivalent to 45/1000 of the standard monthly income amount of the insured person.

(3) The pension premium of locally, voluntarily, and voluntarily and continuously insured persons shall be borne by the locally, voluntarily, or voluntarily and continuously insured persons themselves, but the amount shall be 90/1000 of the standard monthly income amount.

Article 79 (Demanding to Pay Pension Premiums and Disposition of Arrears)

(1) If the pension premium of a workplace insured person and a locally insured person or other impositions under this Act fail to be

paid within the time limit, the Corporation shall demand the payment thereof within the period of time which it fixes, in accordance with the Presidential Decree.

(2) In demanding to pay under paragraph (1), the Corporation shall fix the period of more than ten days and issue a note of demand.

(3) If a person who is urged to pay under paragraph (1), fails to pay the pension premium and other money to be collected under this Act in the prescribed time limit, the Corporation may collect it according to the example of a disposition of national taxes in arrears with the approval of the Minister of Health and Welfare.

2. Complainants' Arguments and Opinions of Related Agencies

A. Complainants' Arguments

(1) The National Pension Act presupposes the validity of the redistribution of income caused by the National Pension Program. Under the current National Pension Program, individuals in high-income groups receive less benefits than individuals in low-income groups: The ratio between benefits and total pension premiums paid during the subscription period of an individual in a low-income bracket is larger than that of an individual in a high-income bracket. In substance, this amounts to a coercive collection of money by the government without entailing performance of a specific deed in return, and is equivalent to collection of tax. The National Pension Act which makes possible the usurpation and transfer of purchasing power from high-income groups to low-income group is contrary to Article 59 of the Constitution, which stipulates the principle of statutory taxation and violates the right to property protected by Article 23(1) of the Constitution.

(2) All citizens are free to make their own plans for their lives without any restrictions, and the State only needs to guarantee such individual freedom, including the freedom of choice in preparing for the future. The State only needs to make exceptional interference for those who cannot support themselves because of old age and illness, and in such cases, the State should provide public assistance apart from the pension program. Any other income redistribution efforts by the State will be excessive and will be considered a socialist policy. Thus, the National Pension Program is contrary to Article 119(1) of the Constitution, stipulating respect for the freedom and creative initiative of enterprises and individuals in economic affairs,

and violates the right to pursue happiness by limiting the right to choose one's own retirement plan.

B. Opinions of the Minister of Health and Welfare and Chairman of the National Pension Corporation

(1) The National Pension Program is designed to give benefits based on each subscriber's pension premiums. Under the Program, even an individual in a high-income bracket receives more benefits than the pension premium he or she paid, and thus, the pension premium is different from taxation, which can be defined as a coercive collection of money by the government without entailing performance of a specific deed in return. In addition, such elements as the basis for premium computation, criterion for premium assessment, date of payment, conditions to receive benefits, and benefits criterion are determined by the Act itself, and thus the Act is not contrary to the principle of statutory taxation.

(2) The National Pension Program brings about income redistribution from high-income groups to low-income groups by the means of a public pension plan, thereby closing the gap in income inequality and ensuring a minimum standard of living for the poor. The National Pension Program is in accordance with Article 34(1) of the Constitution which provides the basis for the right to a humane livelihood, Article 34(2) of the Constitution which stipulates the State's responsibility to promote social security and welfare of its citizens, Article 119(1) of the Constitution which stipulates the principle of economic order, and Article 119(2) of the Constitution which provides the ground for the regulation and coordination of economic affairs by the State.

(3) The basic characteristics of the public pension program as social insurance include ① compulsory subscription, ② guarantee of a minimum standard of living, ③ combination of individual equality and social adequacy, and ④ right to benefits. These characteristics distinguish a public pension program from a private pension program such as a corporate pension plan or an individual pension plan. Compulsory subscription and the redistribution of income reflects the nature of any public pension program, and is not contrary to the Constitution.

3. Review

A. Extension of Subject Matter of Review

Complainants filed this constitutional complaint only against Article 75 and Article 79 of the National Pension Act. However, Article 75 and Article 79 of the Act stipulating coercive collection of pension premiums, and Article 6, Article 8(1) and Article 10 specifying compulsory subscription to the National Pension Program must be viewed in a single context. The complainants argue that their right to pursue happiness is violated by compulsory subscription to the National Pension Program which limits the right to choose one's own retirement plan. Thus, the Court will extend the scope of review to these provisions on compulsory subscription.

B. History, Nature, and Current Status of the National Pension Program

(1) The National Welfare Pension Act (Act No. 2655) enacted on December 24, 1973, and revised twice thereafter, provided the initial foundation for the public pension program in Korea, but economic depression and general social conditions caused a delay in launching of the public pension program. With changes in socioeconomic conditions, the social awareness and desire to secure improved standards of living after retirement have increased, and individual abilities to bear the expense necessary for such social program have significantly improved. The trend toward nuclear families and increasing life expectancy called for the design of new retirement plans, and the protection of having standards of individuals who lost income due to injury or illness from work has become a compelling social issue. In accordance with such social demand, the National Assembly on December 31, 1986, legislated the National Pension Act (Act No. 3902) a comprehensive revision of the old National Welfare Pension Act. On August 14, 1987, the Administration revised the Enforcement Decree of the National Welfare Pension Act by the Enforcement Decree of the National Pension Act (Presidential Decree No. 12227), which entered into force on January 1, 1988. Initially, the compulsory subscription provision only applied to workers and employers at workplaces with 10 or more workers. The August 10, 1991 revision of the Enforcement Decree (Presidential Decree No. 13449) which was put into effect on January 1, 1992, extended those subject to the compulsory subscription provision to workers and employers at workplaces with 5 or more workers. Then, the National Pension Act was revised by Act No. 4909 (effective date : July 1, 1995) on January 5,

1995 to compel residents at farming and fishing villages, and farmers and fishermen residing in urban areas, to subscribe to the National Pension Program. Finally, the December 31, 1998 revision by Act No. 5623 subjected residents in urban areas to the compulsory subscription provision.

(2) The objective of the National Pension Program is to contribute to the stabilization of livelihood and promotion of welfare of citizens by paying pensions for old age, invalidity or death of citizens (Article 1 of the National Pension Act). It is a social insurance program which devises relief through the national insurance system by dissipating a financial burden put on an individual when the aforementioned events occur. Article 34(1) of the Constitution stipulates that "all citizens shall be entitled to a life worthy of human beings," thereby guaranteeing the right to livelihood, and Article 34(2) provides the ground for the State's responsibility to promote social security and welfare. Article 34(5) of the Constitution declares the State's duty to protect citizens incapable of earning a livelihood. In order to clearly define the constitutional stipulations on social security, the National Assembly enacted the Framework Act on Social Security, articulating basic elements of a social security program. Article 3[1] of the Act defines "social security" as "social insurance, public aid, social welfare service, and other related welfare systems, which are provided to protect citizens from social danger, such as illness, disability, ageing, unemployment and death, to overcome poverty, and to improve every citizens' quality of life," thereby classifying social insurance as an element of social security. Article 3[2] of the Act defines "social insurance" as "a system of insurance, which guarantees citizens's health and income by the from social dangers that can harm the citizens by means of an insurance system."

(3) Social security programs began with social insurance, and social insurance is still the most widely used social security program. Social insurance began with worker's compensation insurance. In the beginning, worker's insurance only protected workers who had permanently lost their labor abilities, but over the years, worker's insurance extended its coverage to workers who had temporarily lost labor opportunities. Social insurance shares the principles and objectives of worker's insurance, and the only difference between social insurance and worker's insurance is that the eligibility for social insurance is not limited to workers. Considering the objectives of social insurance, it can be said that the following principles are generally adopted in any social insurance program:

① The minimum income guaranteed by social insurance shall be above the minimum cost of living;

② The instituted program will redistribute income by requiring individuals in high-income brackets to contribute more and receive less than individuals in low-income brackets. The extent of the redistribution of income will be decided by the State with due consideration to social efficiency and individual equality;

③ In order to achieve unity among its members and bring about national solidarity, all citizens shall be made subject to the program. If any social insurance program is designed for a special group, all members of that social group shall become involved in the program; and

④ Funds necessary for the social insurance program will be allocated and raised by employers, workers, and the State.

(4) The United Kingdom, Germany, France, the United States of America, Japan, and other developed nations around the world have adopted social insurance programs incorporating the above principles.

(5) Currently, all citizens residing in the Republic of Korea whose age is not less than eighteen and is less than sixty are to become insured under the national pension program, and the insured are classified into workplace insured persons, locally insured persons, voluntarily insured persons, and voluntarily and continuously insured persons. There are two types of workplace insured persons: compulsory subscribers and voluntary subscribers. Workers and employers in workplaces with 5 or more workers are required to subscribe to the national pension program, and workers and employers in all other workplaces can choose to join the program. Persons who are not workplace insured persons and whose age is not less than eighteen and is less than sixty, are locally insured persons. The kinds of benefits as prescribed by the National Pension Act include old age pensions, disability pensions, survivors' pensions, and lump sum refunds which an insured person receives when he or she fails to meet the eligibility requirement for a pension prescribed by the Act. All pension benefits are composed of basic pension payments and additional pension payments. Income and subscription period of the insured person will be considered in calculating the basic pension payments, and families to be supported will be accounted for in computing additional pension payments. The basic pension payment will be calculated by multiplying 1800/1000 with the sum of ① the average monthly income for the year preceding the year a pension is paid (average standard monthly income of all insured persons) and ② the average standard monthly income of the insured person during his or her subscription period. The pension premium collected from insured persons and employers make up the principal source of funding for the national pension service. In the case of a workplace insured person, the contribution fee will be borne by the insured person while

additional charges will be borne by the employer, and the pension premiums to be paid by each will be equivalent to 45/1000 of the standard monthly income of the insured person. In the case of locally insured persons, voluntarily insured persons, and voluntarily and continuously insured persons, the pension premium will be borne by insured persons themselves, and the amount of premium will be equivalent to 90/1000 of the standard monthly income.

C. Violation of the Principle of Statutory Taxation and the Right to Property

(1) The National Pension Program is designed to give monetary benefits to its members based on the payment made by insured persons during their subscription period, and thus, it is not a form of taxation which can be defined as a coercive collection of money by the government without entailing performance of a specific deed in return.

Although Article 79 of the National Pension Act stipulates coercive collection of pension premiums, through disposition of arrears it is because of the strong social or public nature of the national pension program, not because the pension premium is classified as taxation.

The complainants argue that under the current National Pension Program, and the income redistribution principle it upholds, individuals who paid less pension premiums receive more benefits than what they paid for, and individuals who paid higher pension premiums receive less benefits than what they paid for. The complainants argue that since individuals who paid higher pension premiums receive less benefits than what they paid for, it can be said that the difference between the benefits and payments of these individuals are being collected by the State under the disguise of pension premiums, and that this is tantamount to taxation by the State in that it is collecting money without performing a specific deed in return. However, one of the basic principles adopted by the National Pension Program, a form of social insurance, is to achieve the income redistribution effect. As examined above, the relationship between the pension premiums and benefits is to be decided by the legislature with due consideration to social efficiency and individual equality. This means that there is no direct correlation between the pension premium and benefits *per se*, and thus, complainants' argument is based on a wrong premise. The current National Pension Program does bring about a fairly large degree of income redistribution since the ratio between benefits and total pension premiums paid during the subscription period of an individual in the highest-income bracket is

much smaller than those given to an individual in the lowest-income bracket (under the current National Pension Program, individuals in the highest-income group pay a pension premium more than 16.4 times that paid by individuals in the lowest-income group, and receive benefits 3.2 times more than that received by individuals in the lowest-income group). Yet, individuals in the highest-income bracket still receive more benefits than the total pension premiums they paid during their subscription period (pension premium ratio is 1.31 exceeding 1.0.). As such, the current National Pension Program does not bring about a redistribution of income between individuals in the current generation, but places a financial burden on the future generation. This means that there is no ground for complainants' argument that individuals in high-income groups suffer a loss because of the redistribution of income between the wealthy and the poor.

(2) The complainants argue that because the National Pension Program is designed to bring about a redistribution of income, it leads to an usurpation and transfer of purchasing power from high-income groups to low-income groups, and this is in violation of Article 23(3) of the Constitution banning infringement on the right to property without just compensation.

But as we have seen previously, there is no direct correlation between pension premiums and benefits, and individuals in high-income groups cannot argue that they receive less benefits than what they are entitled to. Thus, there is no usurpation of purchasing power from high-income groups, and there is no encroachment on the right to property.

D. Violation of the Right to Pursue Happiness

Article 10 of the Constitution states that "all citizens shall be assured of human dignity and worth and have the right to pursue happiness." The right to pursue happiness includes, as its concrete manifestation, the general freedom of action and the freedom to act according to one's natural personality. The general freedom of action includes the freedom of contract, which refers to the freedom to enter into a contract as well as the freedom not to form a contract. The National Pension Program, which takes no heed of personal choice, forces compulsory subscription, and collects pension premiums in a coercive manner. The system may seem to be in violation of the right to pursue happiness of individuals who choose not to join the National Pension Program and prepare for future social dangers on their own.

However, all liberties and rights of people may be restricted by a statute when such restriction is necessary for national security,

maintenance of order, or for public welfare, as long as the statute is not in violation of the rule against excessive restriction. The National Pension Program purports to contribute to the stabilization of livelihood and promotion of welfare of citizens by paying pension for the old age, invalidity or death of citizens (Article 1 of the National Pension Act). Such purpose of the National Pension Program is in accordance with Article 34(1) of the Constitution providing for the general right to life and Article 34(2) stipulating the State's duty to promote social security and welfare. Therefore, the National Pension Program has a legitimate purpose. The National Pension Program is a social insurance program which aims to diversify risks utilizing national insurance system when citizens come across obstacles such as old age, disability, and death of family members, and it is appropriate as the means. The National Pension Act has gradually extended the scope of compulsory subscription to the Pension Program. In calculating the pension premiums, the monthly income of 3.6 million won is regarded as the maximum earnings by an insured person (see Article 5 and Table 1 of the Enforcement Decree of the National Pension Act). Individuals earning more than 3.6 million won a month need not pay extra pension premiums for income in excess of 3.6 million won, and they are free to use excess income any way they want. Therefore, the present National Pension Program restricts the freedom of choice using the least restrictive means. The public interest sought by the National Pension Program, which upholds the principle of social insurance to make all citizens subject to the program and dissipates social dangers of individual citizens among all members of the society, thereby playing the role of a social safety net for retirees and their families, is far greater an interest than the private interest that the complainants assert, namely, respect for individual's personal choice to use personal savings in order to prepare for the future.

In sum, the National Pension Program based on compulsory subscription and coercive collection has a legitimate purpose, and the means of restricting the right does not violate the rule against excessive restriction. Therefore, it does not violate the right to pursue happiness.

E. Violation of the Market Economy Principle

Article 119(1) of the Constitution states that "the economic order of the Republic of Korea shall be based on a respect for the freedom and creative initiative of enterprises and individuals in economic affairs," thereby declaring the adoption of a free-market economy based on the right to private property, the principle of private auto-

nomy, and the principle that the liabilities for general torts are allocated according to fault. Article 119(2) provides that "the State may regulate and coordinate economic affairs in order to maintain balanced growth and stability of the national economy, to ensure proper distribution of income, to prevent the domination of the market and the abuse of economic power, and to democratize the economy through harmony among the economic agents." Furthermore, Article 34(1) stipulates that "all citizens shall be entitled to a life worthy of human beings," and Article 34(5) pronounces that "citizens who are incapable of earning a livelihood due to a physical disability, disease, old age or other reasons shall be protected by the State under the conditions as prescribed by Act." Such provisions reflect the fact that the Constitution has adopted the principles of a social state. In sum, the Constitution declares the free-market economy as a foundation, but has also adopted the principles of a social state to allow governmental interference to achieve substantial freedom and equality of all citizens (10-1 KCCR 522, 533-534, 96Hun-Ka4 and etc., May 28, 1998). In other words, while the economic order adopted by the Constitution can be classified as a free-market economy based on the protection of the right to private property and respect for free competition, it also has characteristics of a social market economy in that the Constitution allows regulation and coordination of the State to rid the adverse effects of the free-market economy, to promote social welfare, and to achieve social justice (8-1 KCCR 370, 380, 92Hun-Ba47, April 25, 1996). Considering such principles of economic order adopted by the Constitution, a coercive savings program designed to give social security at old age by raising funds through the social insurance program. The Program, which brings about the redistribution of income between high-income groups and low-income groups, working people and retirees, and current generations and future generations, is in accordance with the social market economy, and the complainants' argument that the National Pension Program is in violation of the economic order adopted by the Constitution is without basis.

4. Conclusion

All Justices unanimously decide that articles of the National Pension Act stipulating compulsory subscription to the National Pension Program and the coercive collection of pension premiums are constitutional, and hereby reject the complainants' claims.

Justices Yun Young-chul (Presiding Justice), Lee Young-mo, Ha Kyung-chull, Kim Young-il, Kwon Seong, Kim Hyo-jong, Kim Kyoung-il (Assigned Justice), and Song In-jun

Aftermath of the Case

When a proposal to revise the National Pension Act, thereby forcing all urban residents to subscribe to the National Pension Program, was suggested, the ruling party and the opposition party could not agree on whether to accept the proposal, and even the ruling party and the Administration did not share common views. As some newspapers pointed out the improper timing, lack of preparation, and disregard for the principle of equity in revising the Act to compel urban residents to subscribe to the National Pension Program, the standoff between opposite sides worsened, and some people started questioning the legality of the National Pension Program forcing compulsory subscription. Under such circumstances, the Constitutional Court declared that the National Pension Act was constitutional through the instant case, thereby putting an end to disputes about the constitutionality of the National Pension Program. This decision provided a solid foundation for continued implementation of the National Pension Program.

2. *One-Person One-Vote* Case

[13-2 KCCR 77, 2000Hun-Ma91, 2000Hun-Ma112, 2000Hun-Ma134 (consolidated), July 19, 2001]

Contents of the Decision

1. Whether Article 56(1)[2] of the Act on the Election of Public Officials and the Prevention of Election Malpractices (hereinafter called the "Public Election Act"), requiring a candidate for the National Assembly election to make a deposit of 20 million won when submitting the application for candidate registration, is constitutional.
2. Whether Article 57(1) and Article 57(2) providing grounds for the return and forfeiture of election deposits is constitutional.
3. Whether the present election system allocating seats for proportional representatives in the National Assembly and allowing only one vote per voter is constitutional.
4. Decision of unconstitutionality rendered on ancillary provisions related to the provisions on review.

Summary of the Decision

1. The amount of deposit required for public elections shall remain at a minimum level, great enough to prevent insincere applicants' candidate registration, and it should not be so excessive as to restrict the right to hold public office of people who are serious about running for election. Article 56(1)[2] requires a candidate for the National Assembly election to make a deposit of 20 million won when submitting an application for candidate registration. The deposit requirement of 20 million won is excessive considering the economic conditions of average citizens. The requirement of such an excessive deposit money will prohibit potential candidates, who qualify for the office in all other aspects, from running for office only for the reason that he or she cannot raise the deposit money. This would ultimately prevent candidates representing the poor and the younger generations from taking office in the National Assembly. By contrast, in the case of wealthy people to whom 20 million won is not a significant amount, this deposit requirement will not be able to serve its legislative purpose, namely, to prevent registration of insincere candidates. In sum, the present requirement of depositing 20 million won when registering for the National Assembly election

does not bring about the desired effect of preventing insincere candidates from running for office in a fair and suitable manner, but it forces many potential candidates who are sincere about running for office to give up candidate registration. Therefore, the instant statutory provision violates the right of equality and the right of potential candidates to hold public office, and it violates the voters' freedom of choice.

2. An election is a process through which citizens express their diverse political opinions. It follows that an unsuccessful candidate should not be labeled "insincere" and made subject to legal sanctions based on election result alone. So if the number of votes obtained is to be used as a criterion to determine whether to return the candidacy deposit, the minimum number of votes to be obtained should be a small fraction of the total number of valid votes. Article 57(1) and Article 57(2) mandate the forfeiture of candidacy deposit when the number of votes obtained by a candidate is less than the number given by dividing the total valid votes by the number of candidates, or is less than 20/100 of the total valid votes. Such requirement of votes for the deposit refund is too great to invite a serious would be candidate's participation in the National Assembly election, and in effect, it improperly penalizes an unsuccessful but sincere candidate based on the election result. When there are two or three major political parties, it would be very difficult for candidates from smaller political parties or newly organized political parties to meet such a requirement. Thus, the instant provisions discourage and excessively restrict the participation of these individuals in political affairs, thereby infringing on their right to hold public office through elections.

3. (1) The Public Election Act permits only one vote for each voter, (Article 146(2)), and does not allow an independent vote for the political party of one's choice. Article 189(1) of the Act states that the allocation of seats for proportional representatives will be proportional to the sum of votes obtained by all candidates of a particular political party in the nationwide district elections, thereby assuming that the voter's choice of a candidate is in accordance with his or her support for a particular political party. Under the present proportional representative system, when an elector supports either a candidate or a political party, but not both, half of the value of his or her vote is either misused or wasted whether he or she votes for his or her favorite candidate or for the political party of his or her choice. Also, the current system cannot accurately reflect support for the newly formed political party, and is inherently prejudiced in favor of the existing major parties by allocating seats that exceed the actual support for them. This is contrary to democratic prin-

ciples which call for the accurate reflection of people's opinions and guarantee people's freedom of choice in public elections.

(2) The principle of direct election applied to the proportional representative system requires that elections of proportional representatives, as well as the acquisition of the number of seats of proportional representatives of a particular political party, be decided by the result of the direct election. Since the election of proportional representatives in the National Assembly and the election of district assemblyperson are two different elections, the voter should be allowed to cast two separate ballots, one for his or her favorite candidate in the electoral district and the other for the political party of his or her choice. The present election system, however, only allows one vote for the candidate in the electoral district, and does not allow a separate vote for the slate of party nominees for seats of proportional representatives. This means that nomination by the political party has the final and decisive effect in electing the proportional representatives to the National Assembly, and voters cannot exert a direct and conclusive influence in the election of the proportional representatives. This is contrary to the principle of direct election.

(3) Under the present election system allowing one vote per person and adopting the seat allocation for proportional representatives in the National Assembly, when a person votes for a party nominee in the electoral district, his or her vote contributes to the election of the district member of the National Assembly as well as to the allocation of seats for the proportional representatives. On the other hand, a vote for an independent in the electoral district is only counted for the election of the district Assembly member, and has no value in the allocation of seats for proportional representatives. Hence, there arises the problem of inequality in the value of a vote. When a person votes for an independent because the party of one's choice did not nominate a candidate in the electoral district, he or she is forced to suffer inequality in the value of his or her vote. This is unreasonable discrimination of voters who support independent candidates, and it violates the principle of equality in election.

(4) Article 189(1) of the Public Election Act is unconstitutional because of the above reasons. Article 146(2) stating "one person shall be entitled to one vote" is unconstitutional as long as a separate vote for a political party is not allowed, while the election system implements both the majority representation system and the proportional representation system based on party nomination. The basic rights in violation are the right to vote for proportional representatives and the right of equality of people voting for independent candidates.

4. If Article 189(1) of the Constitution providing the foundation for the allocation of seats for proportional representatives in the National Assembly is unconstitutional, independent existence of ancillary provisions to Article 189(1), namely, Article 189(2), (3), (4), (5), (6) and (7), will be meaningless. Although these provisions are not provisions on review, it would be proper to declare them unconstitutional to achieve legal clarity, and the Court hereby declares them unconstitutional.

Justice Kwon Seong's Concurring Opinion

3. Under the current election system allowing one vote per person, if the candidate of one's choice is not from the political party that he or she supports, the voter is forced to forsake his or her support for either the candidate or the party in the particular election. This is tantamount to forcing individual voters to cast a ballot for a political party that he or she does not support or a candidate that he or she does not favor. In some instances, it would be difficult to decide whether to cast a ballot for the candidate of his choice or for the party he supports, and the voter may choose not to vote at all. This excessively restricts the freedom to form an opinion or the freedom of choice, thereby encroaching on the right to exercise the freedom of choice in public election and violating the principle of free election.

Provisions on Review

Act on the Election of Public Officials and the Prevention of Election Malpractices

Article 56 (Deposit Money)

(1) A person who applies for candidate registration shall pay the following deposit money, per candidate, to the competent constituency election commission at the time of the application for registration, pursuant to the National Election Commission Regulations:

1. [omitted];

2. 20 million won, in the case of an election of a National Assembly member;

3. - 6. [omitted]

(2) - (3) [omitted]

Article 57 (Return, etc. of Deposit Money)

(1) Where a political party or candidate falls under any of the

following subparagraphs or a candidate (excluding candidates for the seats of proportional representatives in the National Assembly and for proportional representatives in the City/Province council) is elected or is deceased, an amount of money left after the expenses borne with the deposit money as provided in Article 56(3) are subtracted from the deposit money and shall be returned to the depositor within 30 days after the election day.

1. In cases where the number of votes obtained by a candidate is not less than the number given by dividing the total valid votes by the number of candidates or is 20/100 or more of the total valid votes, in the presidential election, the election of local council members and that of the head of a local government;

2. - 3. [omitted]

(2) Where no candidate on the list for the proportional representatives in the National Assembly or for the proportional representatives in the City/Province council is elected, or the candidate (excluding candidates for the seats of proportional representatives in the National Assembly and for proportional representatives in the City/Province council) resigns or his registration becomes nullified, or the number of votes obtained is short of what is provided in paragraph (1) 1, the amount that remains after the expenses to be borne with the deposit money as provided in Article 56(3), are subtracted from the deposit money and shall be reverted to the State or the local government concerned within 30 days from the election day. In this case, if the expenses to be borne with the deposit money as provided in Article 56(3) exceed the deposit money, the depositor shall pay the amount in excess to the constituency election commission within 10 days from being notified thereof, in accordance with notification of the constituency election commission concerned, and if he fails to make payment within the provided period, the State or the local government concerned shall disburse the amount first, and shall entrust the chief of the competent tax office with the collection thereof, and have the chief collect the amount according to an example set out in the disposition on national tax in arrears and pay the collected amount to the State or the local government concerned.

(3) - (5) [omitted]

Article 189 (Allocation of Seats of Proportional Representatives in the National Assembly and Decision, Announcement and Notification of Elected Persons)

(1) In the election for a proportional representative in the National Assembly, the National Election Commission shall allocate the seats of the proportional representative National Assembly to each

political party which has obtained five or more seats in the general election for the district National Assembly members or upward of 5/100 of the total valid votes [including the valid votes of the local constituency for the National Assembly member where no person is elected as provided in the latter part of Article 188(4)] (excluding the political party which fails to submit the list of candidates for the proportional representatives in the National Assembly; hereafter referred to in this article as the "seat-allocated party"), in proportion of the votes obtained in the general election for the district National Assembly members: Provided, That one seat of the proportional representative in the National Assembly shall be allocated to each political party which has obtained more than 3/100 and fewer than 5/100 of the total valid votes in the general election for the district National Assembly members.

(2) The percentage of votes obtained as provided in paragraph (1) shall be calculated by dividing the number of votes obtained by each seat-allocated party (including the number of votes obtained in the local constituencies for the National Assembly where no person is elected as provided in the latter part of Article 188(4); hereinafter, the same shall apply in this paragraph and paragraph (4)) by the sum of votes obtained by all seat-allocated parties in the general election for the district National Assembly members, and by rounding off the number to five decimal places.

(3) The seats of the proportional representatives in the National Assembly shall be allocated to each political party by the integral number of seats calculated by multiplying the percentage of votes obtained by each political party, as provided in paragraph (2), by the number obtained by deducting the number of seats allocated as provided in the provision of paragraph (1) from the full number of seats of the proportional representative in the National Assembly, and thereafter the remaining seats, if any, shall be allocated one by one to each political party in the descending order of resulting fractions.

(4) In the case of paragraph (3), where there are equal fractions, the seat shall be allocated to the political party which has obtained more votes, and where the number of votes obtained is equal, then the seat shall be allocated by lot among the political parties concerned.

(5) If the number of the seats for the proportional representative in the National Assembly allocated to a political party exceeds the number of candidates for the proportional representative in the National Assembly nominated by the party, the seats in excess shall be left vacant.

(6) The National Election Commission shall assign the elected persons to the seats for the proportional representative in the Na-

tional Assembly allocated to the political party in accordance with the order on the submitted list of candidates for the proportional representative in the National Assembly.

(7) Where the election in all the local constituencies for the National Assembly is not completed due to a cause as provided in subparagraph 1 and the beginning part of subparagraph 2 of Article 195 [excluding the case as provided in the latter part of Article 188(4)], Article 196 or 198, the National Election Commission shall deduct from the full number of seats of the proportional representative in the National Assembly the integral number obtained by multiplying by the full number of seats of the proportional representatives in the National Assembly the quotient obtained by dividing the number of electors in the local constituency for the National Assembly where the election is not closed by the number of electors in the whole country [excluding the number of electors in the local constituency for the National Assembly where no voting is held as provided in Article 188(2) and (3)], and then allocate the seats of the proportional representative in the National Assembly as provided in paragraphs (1) through (6), and assign the elected persons: Provided, political parties excluded from the allocation of seats for the proportional representatives in the National Assembly, as provided in paragraph (1), are added to the list of the seat-allocated political parties if it is anticipated that these parties will meet the requirement for seat allocation for proportional representatives in the National Assembly based on the election result in the local constituencies where the election is not yet completed, and the integral number corresponding to 5/100 of the full number of the proportional representatives in the National Assembly shall be deducted for each political party to be added to the list of seat-allocated parties thus.

(8) - (9) [omitted]

Article 146 (Method of Election)

(1) [omitted]

(2) A vote shall be made in person or by mail, and one person shall be entitled to one vote.

(3) [omitted]

Related Provisions

The Constitution

Articles 41(1), (3)

Act on the Election of Public Officials and the Prevention of Election Malpractices

Article 47 (Nomination of Candidates by Political Parties)

(1) [omitted]

(2) A political party, when nominating a candidate as provided in paragraph (1), shall observe the democratic procedure as provided in Article 31 of the Political Parties Act.

Political Parties Act

Article 31 (Nomination of Candidates for Elective Public Office)

(1) The nomination of candidates for any elective public office by a political party shall be democratic.

(2) A political party shall nominate candidates for public office in such a manner that the intention of the representative organ of the party having the jurisdiction over the election district of the public office, which nominates the candidates, is reflected, and a concrete procedure shall be determined by the party constitution.

(3) Only those members of the political party who pay the party expenses or serve voluntarily without pay in the respective level of party departments as prescribed by the party constitution shall be enfranchised for the candidates of public office of the relevant party or the party executives.

(4) At least 30/100 of total candidates recommended by political parties for the seats of proportional representatives in the National Assembly and for proportional representatives in the City/Province council shall be females.

Related Precedents

1. 1 KCCR 199, 88Hun-Ka6, September 8, 1989

3. 7-2 KCCR 760, 771, 95Hun-Ma224 and etc., December 27, 1995

4. 1 KCCR 329, 89Hun-Ka102, November 20, 1989
   3 KCCR 569, 91Hun-Ka6, November 25, 1991
   8-2 KCCR 808, 94Hun-Ba1, December 26, 1996

Parties

Complainants

1. Chang Ki-pyo and 3 others (2000Hun-Ma91)
   Counsel: Legal Corporation Joongwon

Attorney-in-charge: Lim Ho

2. Organizing Committee for the Democratic Labor Party
Representative: Kwon Young-gil and 2 others (2000Hun-Ma112)
Counsel
(1) Legal Corporation Changjo
Attorney-in-charge: Lee Ki-wook and 5 others
(2) Legal Corporation Simin-Jonghap
Attorney-in-charge: Ko Young-ku and 6 others
(3) Legal Corporation Ansan-Jonghap
Attorney-in-charge: Park Se-kyoung and 4 others

3. Lee Moon-ja and 28 others (2000Hun-Ma134)
Counsel: Yoo Sun-ho and 4 others

Holding

1. Provisions regarding the elections of the National Assembly members from electoral districts in Article 56(1)[2] and Article 57(1)[1] of the Public Election Act and the provision of Article 57(2) regarding the forfeiture of candidate deposit money when votes earned is less than the number given by Article 57(1)[1], and provisions of Article 189(1) - (7) are unconstitutional.

2. Article 146(2) stating "one person shall be entitled to one vote" is unconstitutional as long as a separate vote for a political party is not allowed, while the election system implements both the majority representation system and the proportional representation system based on party nomination.

Reasoning

1. Overview of the Case and the Subject Matter of Review

A. Overview of the Case

(1) 2000Hun-Ma91

Complainants are members of the so-called "Citizens' Coalition for Clean Politics" and are promoters of a new political party. On February 10, 2000, the complainants filed a constitutional complaint against Article 146(2) of the Public Election Act allowing one vote per person in the election of public officials, alleging that the statutory provision infringes on their basic rights, namely, the right to

vote, the right to be elected into the public office, and the right to equality.

(2) 2000Hun-Ma112

Complainant Shin Jang-sik is a voter who plans to participate in the National Assembly election on April 13, 2000. Complainant Lee Sang-hyun is a voter and plans to run for the National Assembly from the district of Nowon-Ku, Seoul. Complainant the Organizing Committee for the Democratic Labor Party is a group planning to form the Democratic Labor Party and nominate members for the National Assembly election. The complainants filed a constitutional complaint against Article 56, Article 57, and Article 189 of the Public Election Act, alleging that the statutory provisions violate their constitutional rights, namely, the right to equality and the right to be elected into public office.

(3) 2000Hun-Ma134

Complainants Lee Moon-ja and 25 others are voters who plan to participate in the National Assembly election on April 13, 2000. Complainants Yoo Jae-geun and Cho Soon-hyung are assemblypersons from the Millennium Democratic Party and are nominated by the Party as candidates for the National Assembly election. Complainant Kim Han-gil is a member of the Millennium Democratic Party, and is to be nominated as a candidate for proportional representative in the National Assembly. On February 22, 2000, the complainants filed a constitutional complaint against Article 189 of the Public Election Act, alleging that the statutory provision violates their constitutional rights, namely, the right to vote and the right to be elected into public office.

B. Subject Matter of Review

As will be seen later, the complainants do not contest the constitutionality of all provisions in Article 56, Article 57, and Article 189 of the Public Election Act, but only challenge the constitutionality of Article 56(1)[2], the part of Article 57(1)[1] about the election of district Assembly member, the part of Article 57(2) regarding forfeiture of candidate deposit money when a number of votes earned by the candidate is less than the number given by Article 57(1)[1], and Article 189(1). In case of Article 146(2) of the Act, the complainants only challenge the constitutionality of the statutory provision stating "one person shall be entitled to one vote" when applied to the

National Assembly election. Then the subject matters of review in this case will be whether the specific parts of the aforementioned statutory provisions in the Act infringe on the basic rights protected by the Constitution. The provisions on review and related provisions are as follows:

Act on the Election of Public Officials and the Prevention of Election Malpractices

Article 56 (Deposit Money)

(1) A person who applies for candidate registration shall pay the following deposit money, per candidate, to the competent constituency election commission at the time of the application for registration, pursuant to the National Election Commission Regulations:

2. 20 million won, in the case of an election of a National Assembly member;

Article 57 (Return, etc. of Deposit Money)

(1) Where a political party or candidate falls under any of the following subparagraphs or a candidate (excluding a candidate for the proportional representative National Assembly and for the proportional representative City/Province council) is elected or is deceased, an amount of money left after the expenses borne with the deposit money, as provided in Article 56(3), are subtracted from the deposit money and shall be returned to the depositor within 30 days after the election day.

1. In case where the number of votes obtained by a candidate is not less than the number given by dividing the total valid votes by the number of candidates or is 20/100 or more of the total valid votes, in the presidential election, the election of local council members and that of the head of a local government;

(2) Where no candidate on the list for the proportional representative National Assembly or for the proportional representative City/Province council is elected, or the candidate (excluding the candidates for the proportional representative National Assembly and for the proportional representative City/Province council) resigns, or his registration becomes nullified, or the number of votes obtained is short of what is provided in paragraph (1) [1], the amount that remains after the expenses to be borne, with the deposit money as provided in Article 56(3), are subtracted from the deposit money and shall be reverted to the State or the local government concerned within 30 days from the election day. In this case, if the expenses to be borne with the deposit money, as provided in Article 56(3), exceed the deposit money, the depositor shall pay the amount in

excess to the constituency election commission within 10 days from being notified thereof, in accordance with notification of the constituency election commission concerned, and if he fails to make payment within the provided period, the State or the local government concerned shall disburse the amount first, and shall entrust the chief of the competent tax office with the collection thereof and have the chief collect the amount according to an example set out in the disposition on national tax in arrears and pay the collected amount to the State or the local government concerned.

Article 146 (Method of Election)

(2) A vote shall be made in person or by mail, and one person shall be entitled to one vote.

Article 189 (Allocation of Seats for the Proportional Representative National Assembly and Decision, Announcement, and Notification of Elected Persons)

(1) In the election for a proportional representative National Assembly seat, the National Election Commission shall allocate the seats of the proportional representative National Assembly to each political party which has obtained five or more seats in the general election for the local constituency National Assembly or upward of 5/100 of the total valid votes [including the valid votes of the local constituency for the National Assembly where no person is elected as provided in the latter part of Article 188(4)] (excluding the political party which fails to submit the list of candidates for the proportional representative National Assembly; hereafter referred to in this article as the "seat-allocated party"), in proportion of the votes obtained in the general election for the local constituency National Assembly: Provided, That one seat for the proportional representative National Assembly shall be allocated to each political party which has obtained more than 3/100 and fewer than 5/100 of the total valid votes in the general election for the local constituency National Assembly.

(2) The percentage of votes obtained as provided in paragraph (1) shall be calculated by dividing the number of votes obtained by each seat-allocated party (including the number of votes obtained in the local constituencies for the National Assembly where no person is elected as provided in the latter part of Article 188(4); hereinafter, the same shall apply in this paragraph and paragraph (4)) by the sum of votes obtained by all seat-allocated parties in the general election for the local constituency National Assembly, and by rounding off the number to five decimal places.

(3) The seats of the proportional representative National Assembly shall be allocated to each political party by the integral number of seats calculated by multiplying the percentage of votes obtained by

each political party, as provided in paragraph (2), by the number obtained by deducting the number of seats allocated as provided in the provision of paragraph (1), from the full number of seats of the proportional representative National Assembly, and thereafter the remaining seats, if any, shall be allocated one by one to each political party in the descending order of resulting fractions.

(4) In the case of paragraph (3), where there are equal fractions, the seat shall be allocated to the political party which has obtained more votes, and where the number of votes obtained is equal, then the seat shall be allocated by lot among the political parties concerned.

(5) If the number of the seats of the proportional representative National Assembly allocated to a political party exceeds the number of candidates for the proportional representative National Assembly nominated by the party, the seats in excess shall be left vacant.

(6) The National Election Commission shall assign the elected persons to the seats of the proportional representative National Assembly allocated to the political party in accordance with the order on the submitted list of candidates for the proportional representative National Assembly.

(7) Where the election in all the local constituencies for the National Assembly is not completed due to a cause, as provided in subparagraph 1, and the beginning part of subparagraph 2 of Article 195 [excluding the case as provided in the latter part of Article 188(4)], Article 196 or 198, the National Election Commission shall deduct from the full number of seats of the proportional representative National Assembly the integral number obtained by multiplying by the full number of seats of the proportional representative National Assembly the quotient obtained by dividing the number of electors in the local constituency for the National Assembly where the election is not closed by the number of electors in the whole country [excluding the number of electors in the local constituency for the National Assembly members where no voting is held as provided in Article 188(2) and (3)], and then allocate the seats of the proportional representative National Assembly, as provided in paragraphs (1) through (6), and assign the elected persons: Provided, That where it is anticipated that some of the political parties excluded from the allocation of seats of the proportional representative National Assembly as provided in paragraph (1), shall be added to the list of the seat-allocated political parties as a result of the election in the local constituencies where the election is not completed, the integral number corresponding to 5/100 of the full number of the proportional representative National Assembly seats shall be separately deducted for each political party expected to be added.

2. Complainants' Arguments

A. 2000Hun-Ma91

(1) The proportional representation system requires seats for the proportional representatives in the National Assembly allocated according to the percentage of total valid votes that a particular party obtained from all electoral districts in a general election. However, under the present election system of allowing one vote per person, adopted by the Public Election Act, each voter can only cast one ballot to express his or her support for the candidate in the electoral district. While the voter may be unaware of the party nominees to the seats of proportional representatives in the National Assembly, his or her ballot is counted toward allocation of seat for a proportional representative for a particular party as he or she votes for a party nominee in the district election. Such a system cannot accurately reflect the political opinions of the populace, and it actively distorts the public opinion. Thus, the present proportional representative system violates the citizens' freedom to choose their representatives (the right to vote).

(2) Complainants are members of the so-called "Citizens' Coalition for Clean Politics" which is organized to overcome the public distrust of parliamentary politics and to reflect diverse opinions of various social groups. The statutory provision of the Public Election Act permitting one vote per person in the election of public officials distorts the political opinions of the populace and hinders the newly formed political party from earning a seat in the National Assembly, thereby infringing on the complainants' basic rights, namely, the right to be elected into public office and the right to equality.

B. 2000Hun-Ma112

(1) Article 56(1)[2] of the Public Election Act amended on February 16, 2000 did not repeal the statutory provision requiring excessive deposit money of 10 million, but raised it to 20 million won. Such requirement of excessive deposit makes it extremely difficult, if not impossible, for potential candidates with ordinary means and progressive tendencies, to run for any public election. Such discrimination in terms of one's financial resources effectively takes away political opportunities from the have-nots. Article 57(1)[1] of the Public Election Act mandates the forfeiture of deposit money when the number of votes obtained by a candidate is less than the number given by dividing the total valid votes by the number of candidates, or is less than 20/100 of the total valid votes. Such high require-

ment of votes for the deposit refund excessively restricts people's participation in political affairs.

(2) According to Article 189(1) of the Public Election Act, a voter cannot cast a ballot in support of a particular political party directly to contribute to the election of proportional representatives from the party. Each voter's support for the party is assumed through his or her vote for the candidate in the electoral district. Moreover, the seats for proportional representatives in the National Assembly allocated to a particular party are distributed to party nominees according to the order in the slate of party nominees. Since ordinary voters do not have any say in preparing the slate, such practice cannot reflect the voters' political expression accurately, and it allows the party to act as a *de facto* middleman in public election, thereby violating the constitutional principle of direct election.

(3) Article 189(1) of the Public Election Act states that the seats for the proportional representatives in the National Assembly will be allocated to parties which have obtained five or more seats in the general election for the National Assembly or upward of 5/100 of the total valid votes, and that one seat of the proportional representative is to be allocated to each political party which has obtained more than 3/100 and fewer than 5/100 of the total valid votes in the general election (Such statutory provision is called the "blockade clause"). Such a requirement for a minimum amount of votes to be obtained for seat allocation for proportional representatives is excessive, and is contrary to the principle of equality in public election.

C. 2000Hun-Ma134

(1) According to Article 189(1), voters cannot cast a ballot for the party of one's choice to elect the proportional representatives in the National Assembly. Instead, votes cast for a party nominee in electoral districts are assumed to be votes for the party which nominated the candidate. This is in violation of the constitutional principle of direct election.

(2) The above provision also mandates the allocation of seats for proportional representatives in proportion to the percentage of votes each party has received in the nationwide district elections. This means that a voter is deprived of his or her choice for either a district lawmaker or a proportional representative, should his or her preference for a district candidate and a proportional candidate differ. This violates the right to vote protected by Article 24 of the Constitution and the right to form the National Assembly protected by Article 41(1) of the Constitution.

(3) From the perspective of a party nominee for proportional representatives, when a voter supporting the nominee does not vote for the candidate nominated by the same party in the electoral district, the nominee will be deprived of the opportunity to be elected as a proportional representative, and this would constitute an infringement on the nominee's right to be elected (right to hold public offices). In case of a candidate from the electoral district, voters supporting the candidate may not vote for the candidate because they do not support the party that nominated the candidate. This would deprive such candidate an opportunity to become an elected official and violate the candidate's right to be elected.

3. Review

A. Constitutionality of a Deposit Requirement

(1) Constitutional limits of a deposit requirement

The freedom to run for the National Assembly is protected under the constitutional right to be elected (the right to hold public offices). It is one of the most important liberty rights in realizing democratic ideals, and should not be subject to unnecessary regulation and restriction. Restriction on the right to be elected should only be allowed when a particular skill or qualification is required for proper service in the office or when such restriction is necessary to achieve fairness in elections. The statutory provisions in the Public Election Act that stipulates age eligibility for candidates running for National Assembly elections (Article 16(2)), listing reasons for ineligibility for elections (Article 19), and limiting public officials from running for elections (Article 53) are some examples of exceptional conditions under which restriction of the constitutional right to be elected is permitted.

The purpose of the deposit requirement for candidates running for the National Assembly is to prevent insincere candidates from running for office, thereby enabling efficient election management, and to secure money which would be used as financial sanctions for illegal election activities during election campaigns. The public interest sought, through the requirement of a candidacy deposit is effective management of election, a purely administrative interest. On the other hand, the people's right that is being infringed at hand is the right to be elected, a very important basic right. Given that, even if the deposit requirement for candidates is constitutional, the amount of deposit required should remain at a minimum level, just enough to prevent insincere applicants' candidate registration, but it

should not be so excessive as to restrict the right to hold public office of people who are serious about running for election.

It is very difficult, if not impossible, to suggest a criterion for the adequate number of candidates or the maximum number of candidates in excess of which would be called a "disorderly array of candidates." Furthermore, it is not certain whether the deposit requirement indeed brings about the desired effect of preventing the participation of a disorderly array of candidates in public elections. Therefore, discretion is called for when requiring the candidacy deposits and deciding on the minimum deposit requirement. It would be prudent to keep the amount of deposit at a symbolic level so as not to infringe the constitutional right to hold public office.

(2) Constitutionality of the Amount of Candidacy Deposit

(A) Earlier, the Court found Article 33 of the Election of National Assembly Members Act, which required each candidate to deposit 20 million won (for party nominee, 10 million won) non-conforming to the Constitution (1 KCCR 199, 88Hun-Ka6, September 8, 1989). The Court decided that the deposit requirement of 10 or 20 million won was prohibitive to people of ordinary income, or people in their twenties or thirties, and that it formed an artificial obstacle to permit only the wealthy to be candidates. The Court ruled that the provision requiring such an excessive election deposit was against the principle of democracy and violated the right to political participation.

(B) People of ordinary means cannot easily raise 20 million won, the amount of deposit that a candidate registering for the National Assembly election has to make to the competent election commission, as mandated by Article 56(1)[2] of the Public Election Act, and this state of affairs has not changed since the Court's decision in 1989. And deposit requirement of 20 million won would make most people give up their political aspiration to become a member of the National Assembly. It is in itself a large sum of money for people in low-income groups and people in their twenties or thirties. Moreover, it could be said that such deposit requirement may be a financial burden even for members of the middle class (The average monthly real income of all industries of Korea in 2000 was 1.422 million won. The consumer price index was 68.2 in 1989 and 121.5 in 2000 if it is set at 100 in 1995.). As such, a political aspirant who cannot raise the money to make the candidacy deposit would be as a matter of fact prevented from running for the National Assembly election even if he or she qualifies for the office in all other respects and has excellent credentials. The problem goes beyond the infringement on the rights of individual political aspirants, and it becomes a problem

of social classes and generations. Excessive deposit requirements would make it difficult for people of ordinary means and members of younger generations from running for the National Assembly, and this means that representatives reflecting their voices would be absent in the National Assembly. These people are not a mere minority of the Korean society, but form an integral part of the society. If their voices are not reflected in the state affairs, it is against the principle of representative democracy and contrary to the principle of democracy which holds pluralism as one of its basic virtues.

(C) In case of the wealthy people to whom 20 million won is not a significant amount, this inflexible candidate deposit requirement will not be able to serve its legislative purpose, namely, to prevent the registration of insincere candidates. And also, the deposit requirement will not be useful against people who think running for the National Assembly election, in itself, would bring them benefits worth more than 20 million won even if it is forfeited. In these cases, the problem would persist no matter what the amount of required deposit is. The deposit requirement would have a preventive effect only against those to whom the required sum is financially burdensome, and therefore does not serve its legislative purpose of preventing participation of insincere candidates who do not think of the deposit as a burden from running for election. There would be other reasonable ways of deciding the minimum deposit requirement such as requiring a deposit proportional to one's earnings or to the pay to be received from the public office that one runs for. At any rate, the deposit requirement should not be too excessive.

(D) Article 48(2)[2] of the Public Election Act requires an independent candidate to obtain the recommendation of more than 300 but fewer than 500 electors when running for the National Assembly. Since the elector recommendation requirement can serve as a reasonable and effective means to prevent insincere candidates from registering for public election, additional deposit requirement of a large sum would constitute an excessive regulation.

(E) Even if a sum of 20 million won is not burdensome for most political aspirants, so that only a minority of them are forced to give up registration for candidacy, it is still unjust so long as it deprives even a minority of people of an opportunity to participate in public elections. It is because overlooking the right to participate in political affairs of members of a minority group would result in neglecting the protection of basic rights of the 'alienated minority' inevitably produced by the constitutional principle of a rule of majority, thereby violating the constitutional protection of rights.

(F) In conclusion, uniform and absolute deposit requirement of 20 million won for all candidates in the National Assembly election

does not serve its legislative purpose to prevent the registration of insincere candidates. On the other hand, it forces many people, especially those of ordinary means or individuals from younger generations, who are sincere about running for public election, to renounce their aspiration to run for the National Assembly, because of the financial burden imposed by the excessive deposit requirement. Such requirement infringes on the right to equality and the right to be elected, and unduly restrict the freedom of the general public to choose their representatives.

B. Constitutionality of the Provision on the Return of Deposit

(1) Article 57(1) and Article 57(2) of the Public Election Act mandate the return and forfeiture of a candidacy deposit. Statutory provisions provide the ground for return of deposit money when a candidate is elected or dies during the campaign, and forfeiture of the deposit when a number of votes obtained by a candidate is less than the number given by dividing the total valid votes by the number of candidates or is less than 20/100 of the total valid votes (hereinafter, such statutory provision will be called "deposit return clause"). Forfeiture of the deposit is inseparable from the issue of the candidacy deposit requirement. If the deposit requirement is necessary to prevent the participation of a disorderly array of candidates in public elections, forfeiture of the deposit following a pre-set criterion is necessary to keep the deposit requirement provision effective. However, the criterion for forfeiture of the candidacy deposit, like the amount of the candidacy deposit, needs to be within the constitutional boundary in order not to infringe on the right to be elected.

Even when the deposit required for candidacy registration is relatively a large amount, it may not excessively restrict the exercise of the right to be elected if it is very easy to satisfy the conditions for the return of the candidacy deposit. However, if it is very difficult to fulfill the conditions set out for the return of candidacy deposit, a political aspirant cannot partake in the public election unless he or she is ready to give up the deposit money. Needless to say, this would limit the exercise of the right to be elected. Therefore, the criterion for the return of the deposit should not be so harsh as to act as an obstacle against sincere candidates.

(2) An election is not merely a process to decide the winner of an election campaign. It is a process through which citizens express their diverse political opinions, and candidates contribute to the formation and conveyance of political opinions. An election contributes to the maintenance of peace in a democratic society as constituents

find a vent for their political desires through the election process. In this light, labelling of an unsuccessful candidate as "insincere", and making him or her subject to a legal sanction based on the election result alone, would be against the fundamental principles of democracy. A candidate might lose an election because he or she represents the voices of a minority group, but if he or she sincerely participated in the election process, due respect should be paid to the voices of a social minority in order to be faithful to the constitutional principle of democracy based on pluralism and protection of the minority. It follows that the minimum number of votes to be obtained for the return of the candidacy deposit should be a small fraction of the total number of valid votes, if the number of votes obtained is to be used as a criterion to determine whether to return the candidacy deposit.

(3) Under such constitutional guideline for the return of a candidacy deposit, we can conclude that the current deposit return clause sets forth too strict a standard to encourage the participation of sincere political aspirants in public election, and that the clause improperly penalizes serious candidates who exerted their best efforts to win the campaign with unreasonable emphasis on the election result alone. While a candidate may have received votes less than 20/100 of the total valid votes, the candidate may have contributed to achieving democratic ideals by exerting his or her best efforts as a minority candidate. It would be improper to call such a candidate insincere and confiscate his or her candidacy deposit. When there exist two or three major political parties, it would be very difficult for candidates from smaller political parties or newly organized political parties to win more than 20/100 of the total valid votes, and the above criterion will restrict participation of smaller political parties or newly organized parties in political affairs.

[For example, in the 2000 general election, there were 63,862 valid votes cast in the electoral district of Kangbuk-Ku B, Seoul. When this was divided by the number of candidates (seven), the resulting figure is 9,123. The number of votes equivalent to 20/100 of the total valid votes is 12,772. In this case, candidates receiving less than 9,123 votes would not be able to get their candidacy deposit back under the present election law. According to the election results, only two candidates received more than 9,123 votes. A candidate who received 8,381 votes, or 13.26% of the total valid votes, did not get his deposit back (reference to "Facts on the 16th National Assembly Election" published by the Central Commission on Election Management). It is not reasonable to sanction a candidate who received more than 13.26% of the total valid votes or to label candidates other than the two who received more than 9,123 votes as "insincere" based on

the final ballot count alone.]

(4) In conclusion, the instant provisions excessively restrict the right to hold public office, and the provisions are against principles of democracy.

C. Constitutionality of Proportional Representatives in the National Assembly and Constitutionality of the Election System Allowing One Vote for Each Voter

(1) Matters in Dispute

(A) The Public Election Act adopts the proportional representation system in National Assembly election. The electoral district of a proportional representative consists of the entire nation (Article 20). The current election system adopts the proportional representation system with a fixed slate of party nominees (under this system, the seats of the proportional representatives are allocated to each party according to the order in the preset list of nominees submitted by the party, and changes in the order of the slate are not allowed). Under the present election system, the National Assembly is composed of lawmakers elected from individual electoral districts and proportional representatives from a national constituency. The Public Election Act permits only one vote for each voter, (Article 146(2)), and does not allow an independent vote for the political party of one's choice. Article 189(1) of the Act states that the allocation of seats for proportional representatives will be proportional to the sum of votes obtained by all candidates of a particular political party in the nationwide district elections. Article 146(2) and Article 189(1) are closely related. Combined, the statutory provisions allow only one vote for the election of a district lawmaker and do not allow a separate vote for a political party of one's choice. With such statutory provisions in place, the current election system assumes that the voter's choice of a candidate in the electoral district is the same as his or her support for a particular political party. The question is whether such provisions are in accordance with the principle of democracy, the principle of direct election, and the principle of equality in public elections.

(B) The proportional representation system refers to an election system where parliamentary seats are allocated to political parties in proportion to voters' support for a particular party or its nominees. The proportional representation system has been implemented to supplement the majority representation system which is prejudiced in favor of major political parties. The system does not reflect diverse

voices, and produces a large quantity of wasted votes. When implemented properly, the proportional representation system can be used to produce representatives of various social groups, positively promote party politics, and prevent political monopoly by fostering competition among the political parties.

(C) Article 41(3) of the Constitution states that "the constituencies of members of the National Assembly, proportional representation and other matters pertaining to National Assembly elections shall be determined by Statute." Accordingly, the details to implement the proportional representation system are left to be decided by the legislature. The proportional representation system, however, should not violate the principle of democracy which is the constitutional guideline for governance, and it should be in accordance to Article 41(1) which states that "the National Assembly shall be composed of members elected by universal, equal, direct and secret ballot by the citizens."

(2) Violation of the Principle of Democracy

An election is a process through which people exercise their sovereignty. Therefore, the election system must be designed to accurately reflect people's opinions and guarantee the freedom of choice. Moreover, the process through which a party nominates a candidate for an election should be democratic. If these conditions are not met, such an election system is incongruous with the principle of democracy and the principle of people's sovereignty.

(A) It is not against the principle of democracy to only adopt the majority representation system and not the proportional representation system, as long as voters' support for a particular candidate in an electoral district is accurately reflected. However, when the proportional representation system requiring submission of a slate of party nominees is implemented, the election should also accurately reflect people's support for a particular political party, and allocation of seats for proportional representatives to a specific party should correspond to people's support and preference for that party. However, the present system of allocation of seats for proportional representatives in the National Assembly under Article 189(1) of the Public Election Act combined with the one-person one-vote system actively distorts the public support for a particular party.

When an elector supports either a candidate in one's electoral district or a political party, but not both, half of the message in the elector's ballot is not conveyed whether the elector votes for one's favorite candidate or for the political party of one's choice. The present election system even distorts the honest political opinion of

electors. When an elector casts a ballot for one's favorite candidate, this is counted toward the party that nominated the candidate in allocating the seats of the proportional representatives in the National Assembly even if the elector does not support the party which nominated the candidate, and this would contribute to allocation of seats for proportional representatives to be directly against the elector's choice. On the other hand, when an elector casts a ballot for a party of one's choice, the vote would contribute to the election of a candidate that the elector may not support, and this does not accurately reflect the elector's choice for the candidate.

Moreover, the distribution of parliamentary seats under the current election system cannot accurately reflect the people's support for a newly formed political party, and the existing major parties may be assigned more proportional representative seats than actual support they receive from the people. Generally, a nominee of a newly formed party is in a relative disadvantage compared to a nominee of an existing major party, in terms of candidate recognition, party organization, and resources. An elector who supports a newly formed party may not want his or her vote wasted, and thus, may decide to cast a vote for a nominee from a major party instead of for a nominee from the newly formed party. Such votes will be counted as votes in support of the existing major party. If a separate vote is allowed for one's favorite political party, the voter in such a situation can express one's support for the newly formed party, contributing to the allocation of seats for proportional representatives to the same party. Thus, the present election system allows oligopoly of political parties, and hinders a new party from making its appearance in the National Assembly.

(B) Under the present election system, allowing one vote per person, a voter's support for a particular political party is assumed through one's vote for the candidate in the electoral district. This means that an elector has no option but to express one's choice of a candidate as well as one's support for a particular political party in a single vote. This poses a serious problem when the candidate of one's choice is not from the political party that he or she supports. In this case, the voter is in a dilemma. The elector has to choose whether to cast a vote for a candidate or for the political party, or has to find the best way to maximize the value of his or her vote. In another case when the voter's favorite party does not nominate a candidate in the electoral district, it is impossible for the voter to express his or her support for that party. In sum, the present election system deprives the voter of the freedom to choose either the candidate or the party. Such an awkward dilemma, combined with the general distrust of politics, may lead voters to choose not to vote

at all.

(C) Article 8(2) of the Constitution states that "political parties shall be democratic in their objectives, organization, and activities,", thereby fostering the principle of democracy in the political party system. Since one of the most important objectives and activities of a political party is to nominate and support a candidate in public elections, the nomination of and the final order of the slate of candidates, to the seats of the proportional representatives in the National Assembly, should be decided in a democratic process. In order to satisfy the constitutional requirement of democracy in party politics, the nomination process should be decided by democratic means in a general meeting of all party members or in a special meeting of a board of representatives.

However, the statutory provisions in the present Public Election Act do not provide sufficient basis for a systematic and procedural regulation to promote democracy in party politics. Article 47 (2) of the Act states that a political party, when recommending a candidate, shall observe the democratic procedure as provided in Article 31 of the Political Parties Act. Article 31 of the Political Parties Act stipulates that "A political party shall recommend candidates for public office in such a manner that the intention of the representative organ of the party having the jurisdiction over the election district of the public office, which recommends the candidates, is reflected, and a concrete procedure shall be determined by the party constitution." The constitutional requirement of democratic nominations of proportional representatives may not be satisfied if procedural details that "reflect the intention of the representative organ of the party" are left to the party constitution. If candidates for the seats of proportional representatives in the National Assembly are not nominated through a democratic process but are decided by the influence of a few party leaders, democratic legitimacy of elected proportional representatives will be very weak indeed.

(3) Violation of the Principle of Direct Election

(A) The principle of direct election demands that an election outcome should be decided by a direct count of electors' votes. In terms of the National Assembly election, it means that elections of lawmakers or the acquisition of seats in the National Assembly by a political party should not be decided by middlemen or the party, but by the direct result of electors' votes. Historically, the principle of direct election has meant the elimination of election middlemen. Under the majority representation system, this would be enough. But under the proportional representation system, allocation of seats to political

parties becomes an integral part of the election process. As such, the principle of direct election applied to the proportional representation system means that election of National Assembly members as well as the allocation of seats for proportional representatives to each party must be directly decided by electors' votes.

(B) The present Public Election Act has adopted the proportional representation system with a fixed slate of party nominees. Unlike the proportional representation system with the free slate or changeable slate, where electors can actually express individual support for particular party nominees, the party has the final say in nominating a candidate under the proportional representation system with a fixed slate. A question then arises whether this does not violate the constitutional principle of direct election. Under the fixed slate system, the nominees, the order of nominees, and methods of seat allocation are preset at the time of the election, and the party cannot change these factors after the election. Therefore, while electors cannot directly vote for individual candidates, the voters have the ultimate power to decide, and the election outcome is directly dependent on the voters' opinions expressed by participating in elections. Thus, implementation of the fixed slate system does not violate the principle of direct election in itself.

(C) The current election system, which assumes that the voter's choice of a candidate in the electoral district is the same as his or her support for a particular political party and does not allow a separate vote for the slate of party nominees for the seats of the proportional representatives, is contrary to the principle of direct election. Since the election of proportional representatives in the National Assembly and the election of district assemblyperson are two different elections, the voter should be allowed to cast two separate ballots, one for the voter's favorite candidate in the electoral district and the other for the slate of nominees of the political party of one's choice. As long as a voter can cast a ballot for a preset slate of party nominees according to one's preference, the minimum requirement for the principle of direct election, namely election of a public official by the direct votes of electors, is satisfied. However, since electors are not allowed to cast separate ballots expressing party preference under the present election system, the voters do not have the right to directly decide how to distribute the seats of proportional representatives in the National Assembly. Under the present system, an elector can contribute to the election of a proportional representative only indirectly and coincidentally through one's vote for a party nominee in the electoral district - if and only if the candidate of one's choice is from the party that he or she supports. Because a separate vote for the slate of party nominees for proportional repre-

sentatives is not allowed under the current system, nomination by the political party, not votes cast by electors, has the final and decisive effect in electing the proportional representatives in the National Assembly.

Here, another question arises: does a vote cast for a candidate in the electoral district imply support for a particular political party, and if so, to what extent? Currently, election outcomes in each electoral district depend more on qualifications of an individual candidate rather than on the party which nominated a particular candidate. An election at the electoral district level is mainly decided by individual qualifications, regional interests, regional connections, and campaign management, whereas the outcome of a party election, an election in which the voters cast ballots for their favorite political parties, is decided by national platforms, social and economic policy goals, and the political ideology of particular parties. While it may be true that a ballot cast for a certain candidate in an electoral district reflects not only one's choice of candidates, but also support for the party which nominated the candidate, the outcome of the election at the district level does not reflect support for a particular political party accurately: support for a particular party only carries secondary implications in the election outcome at the district level. There is a limit in equating votes for a candidate in an electoral district with support for the party which nominated the candidate. This is especially so in Korea, where there is little, if any, difference between the existing parties in their ideologies, policies, and party platforms, and where many voters assert that they do not support any political party (According to a newspaper article concerning a survey about the individual voting criterion conducted before the 16th general election for the National Assembly in 2000, 35.8% of the respondents suggested that they would vote based on candidate's individual qualifications; 24.3% according to contents of campaign promises; 17.3% according to career records; 11.2% according to regional connection; and 8.4% according to the political party which nominated the candidate).

(D) In conclusion, the present proportional representation system is contrary to the principle of direct election because voters cannot exert a direct and conclusive influence on elections for proportional representatives in the National Assembly.

(4) Violation of the Principle of Equality in Election

(A) The principle of equal elections is a manifestation of the principle of equality in elections. It mandates not only equality in the number of votes but also equality in their weight, that is, the extent that one vote contributes to the entire election system of election

(7-2 KCCR 760, 771, 95Hun-Ma224 and etc., December 27, 1995).

(B) Under the present election system adopting the allocation of seats for proportional representatives in the National Assembly, when an elector votes for a party nominee in the electoral district, his or her vote contributes to the election of a lawmaker from the electoral district, and to the allocation of seats for proportional representatives. On the other hand, when an elector votes for an independent in the electoral district, his or her vote only contributes to the election of a lawmaker from the electoral district, and the vote has no value in the allocation of seats for proportional representatives. Hence, there arises inequality in the value of a vote. One has to endure such inequality if it is a result of his or her choice - under an election system where separate votes are allowed for individual candidates and the party, an elector may choose to vote for an independent, and not cast a ballot expressing one's support for a political party. On the other hand, when a person votes for an independent because the party of one's choice has not nominated a candidate, the elector is forced to suffer against his or her will inequality in the value of one's vote (If separate votes are allowed for individual candidates and the party, such individual will be able to enjoy equality in the value of vote by casting a separate vote for the party of one's choice).

In this light, the present election system discriminates against voters who support independent candidates from voters who support party nominees, without a reasonable basis, and it violates the principle of equality in election.

(C) Article 189(1) of the Public Election Act states that the seats of the proportional representatives in the National Assembly will be allocated to the Party which has obtained five or more seats in the general election for the National Assembly or upward of 5/100 of the total valid votes, and that one seat of the proportional representative is to be allocated to each political party which has obtained more than 3/100 and fewer than 5/100 of the total valid votes in the general election. Such statutory provision setting forth a limit for allocation of seats for proportional representatives is called the "blockade clause." The blockade clause is designed in such a way as to discriminate against minor political parties in allocating seats for proportional representatives, and it leads to the nullification of votes cast for a political party which failed to obtain the minimum number of votes necessary for allocation of a seat. Therefore, a review for the violation of the principle of equal election is called for.

Whether the blockade clause is necessary or legally justified is a matter to be decided with due consideration to the present state of political affairs in a particular country. While it may not be readily concluded that the minimum requirement of votes for allocation of

seats for proportional representatives set by the current statutory provisions is excessive, the present blockade clause shares the problems arising from the current allocation of seats for proportional representatives in the National Assembly, because it is based on the total valid votes earned by a political party in the nationwide district elections.

A political system limiting parliamentary participation of a political party which obtained a number of votes less than the minimum required votes must be based on the premise that the election outcome accurately reflects people's support for particular political parties. The present election system, allocating seats for proportional representatives, while only allowing one vote per voter, is unable to accurately reflect people's support for a particular party, and in some cases, it even actively distorts the amount of support that each party receives. This is because votes cast for a party nominee in electoral districts are assumed to be votes for the party which nominated the candidate under the present election system, while such assumption may not hold true. A party which received more than 5/100 of total valid votes in nationwide electoral districts may not necessarily have support from the equivalent number of people. Thus, a party which may be actually supported by more than 5% of total electors may not be allocated a single seat for the proportional representative in the National Assembly under the current system, while a party with less than 5% of total electors support may be allocated more than one seat. Because the present election system employs an unreasonable yardstick to assess people's support for a particular political party, the blockade clause is in violation of the principle of equal election, no matter what the minimum required number of votes is.

(5) Miscellaneous

The current election system allowing one vote per elector and using the outcome of the district election for the allocation of seats for proportional representatives may be justified if a legitimate public interest of great importance is protected by doing so or if the adverse effect arising from allowing a separate vote for a political party of one's choice is too great to implement such election system.

The Court, however, cannot discover such exceptional conditions. As we have seen, the present election system does not have any merit, but only has many problems in terms of the constitutional function of the proportional representation system, namely, representation of social groups corresponding to their sizes, promotion of party politics, and prevention of political monopoly.

The amount of work or cost associated with election management

may be increased if a separate vote for a political party of one's choice is allowed, but this is not a legitimate reason to postpone the enforcement of the State's duty to guarantee people's right to participate in government. An argument may be made that it may be difficult for an average elector to properly understand the meaning of the one-person two-votes election system. But such an assertion may not hold as the educational level of ordinary Korean citizens is among the highest in the world, and the fixed slate system allowing two votes per voter is much simpler and clearer than the proportional representation system which adopts the free slate or changeable slate system, currently employed by many countries.

According to foreign legislative precedents, countries implementing both the majority representation system and the proportional representation system (i.e. Germany, Japan, New Zealand, Italy, and Russia) allocate seats for proportional representatives based on a separate vote for political parties.

There may be numerous ways of implementing the one-person two-votes election system. Legislators have comprehensive formative powers to solve such problems as division of electoral districts, matter of nominations, voting methods, and specific details about seat allocations.

(6) Sub-conclusion

(A) Article 189(1) of the Public Election Act is contrary to the principle of democracy, the principle of direct election, and the principle of equal election. Article 146(2) stating "one person shall be entitled to one vote" is constitutional if the proportional representation system is not adopted and only if the majority representation system is in place. However, the provision combined with Article 189(1) brings about many constitutional problems as seen above when the proportional representation system is adopted. Therefore, the statutory provision of Article 146(2) stating "one person shall be entitled to one vote" is unconstitutional as long as a separate vote for a political party is not allowed, while the election system implements both the majority representation system and the proportional representation system based on party nomination.

(B) Article 146(2) and Article 189(1) infringe on the right to vote. Firstly, as long as the proportional representation system is implemented, electors should have the right to select their proportional representatives. The present proportional representation system, however, does not guarantee the right to elect proportional representatives through a direct and free election by individual electors. Therefore, the provisions infringe on the right to vote and indirectly violate an

individual candidate's right to be elected.

Secondly, the provisions infringe on the elector's right of equality in election when voting for an independent candidate.

Finally, the provisions violate the right of equality of a political party which was excluded from allocation of seats for proportional representatives, because it failed to meet the unreasonable requirement of minimum amount of votes and the right of equality of electors who voted for the same party.

(7) Declaration of Unconstitutionality of Ancillary Provisions

Generally, when certain parts of an article is declared unconstitutional after constitutional review, the remaining provisions of the same act remain in force. However, if a certain provision is closely related to the parts declared unconstitutional and such provision by itself is unenforceable, the Court can declare such provision unconstitutional (1 KCCR 329, 342, 89Hun-Ka102, November 20, 1989; 3 KCCR 569, 581, 91Hun-Ka6, November 25, 1991; and 8-2 KCCR, 808, 829, 94Hun-Ba1, December 26, 1996).

Article 189(1) of the Public Election Act stipulates that seats of proportional representatives will be allocated to political parties according to the number of votes each party received in the nationwide district elections, and the provision is a central element in implementing the proportional representation system. Article 189(2) explains how to calculate the percentage of votes earned by a particular party, and Article 189(3) and 189(4) prescribe how to allocate seats of proportional representatives. Article 189(5) and Article 189(6) dictate how decision of election of proportional representatives will be made according to the seat allocation method provided by the above statutory provisions. Article 189(7) is a provision to allow allocation of seats for proportional representatives in case elections in all the local constituencies are not completed for any reasons. As such, if Article 189(1) is unconstitutional, the independent existence of ancillary provisions of 189(2), (3), (4), (5), (6) and (7) is meaningless. Although these provisions are not provisions on review, it would be proper to declare them unconstitutional to achieve legal clarity, and the Court hereby declares them unconstitutional.

4. Conclusion

Provisions regarding elections of district lawmakers in Article 56(1)[2] and Article 57(1)[1] of the Public Election Act, provision of Article 57(2) regarding the forfeiture of candidate deposit money when

votes earned are less than the number given by Article 57(1)[1], and provisions of Article 189(1) - (7) are unconstitutional. Article 146(2) stating "one person shall be entitled to one vote" is unconstitutional as long as a separate vote for a political party is not allowed, while the election system implements both the majority representation system and the proportional representation system based on party nomination. This decision is by a unanimous vote of all Justices, and Justice Kwon Seong wrote a concurring opinion.

5. Justice Kwon Seong's Concurring Opinion

I think that the present allocation of seats for proportional representatives in the National Assembly, and the election system allowing one vote per person is contrary to the principle of free election. The Constitutional Court expounded on the principle of free election in an earlier case as follows:

The principle of free election is not explicitly prescribed by the Constitution, but it is a principle embedded in the election system of a democratic nation. It is based on the principle of people's sovereignty, the principle of parliamentary democracy, and statutes concerning the rights to participate in government. The principle of free election implies the freedom to form political opinions and the freedom to put such opinions into practice. More specifically, the principle includes the freedom to vote, the freedom to run for election, and the freedom for election campaigns." (6-2 KCCR 15, 28, 93Hun-Ka4 and etc., July 29, 1994; 7-1 KCCR 499, 506, 92Hun-Ba29, April 20, 1995)

A free election is an election without any direct or indirect pressure or coercion that might encroach upon the elector's freedom of choice (K. Hesse, Grundzűge des Verfassungsrecht der Brd, 14th ed., paragraph 146), and the principle of free election is a principle protecting an elector from administrative measures or statute excessively limiting the freedom of decision (BVerfGE 40, 11, 41; 66, 369, 380). Under the current election system allowing one vote per person, if the candidate of one's choice is not from the political party that he or she supports, the voter is forced to forsake one's support for either the candidate or the party in the particular election. This is tantamount to forcing an individual elector to cast a ballot for a political party that he or she does not support or a candidate that he or she does not favor. In some instances, it would be difficult to choose whether to cast a ballot for the candidate of one's choice or for the party one supports, and the voter may choose not to vote at all. This restricts the freedom to form an opinion or the freedom of choice excessively. It encroaches on the right to exercise freedom

of choice in public election and violates the principle of free election. As we have seen, the one vote per person system distorts the voter's support, and this distortion of support is caused by forcing the voter to support the party of the candidate that he or she chose, or by forcing the voter to forbear participation in the election process altogether. Therefore, the present election system allowing one vote per person is contrary to the principle of free election.

The principle of free election also implies prohibition of compulsory election. Abstention from voting is not permissible in compulsory elections, and exercise of the right to vote becomes a duty. The instant statutory provision does not allow an elector the freedom not to vote for a proportional representative unless he or she does not cast a ballot in the district election, and it can be said that voting for a proportional representative is forced upon an elector. This may not be a typical form of a compulsory election, but it is against the principle of free election nonetheless.

Justices Yun Young-chul (Presiding Justice), Han Dae-hyun, Ha Kyung-chull, Kim Young-il, Kwon Seong, Kim Hyo-jong (Assigned Justice), Kim Kyoung-il, Song In-jun, and Choo Sun-hoe

Aftermath of the Case

The decision made a strong impact on society. Newspapers evaluated the decision as one of the most significant adjudications of the Constitutional Court to concretize people's sovereignty. Many academics pointed out that an overhaul of the entire election system is in order. Major parties responded differently to the decision. Smaller parties welcomed the decision because it lowered the existing obstacle blocking their advance to the central political arena. After the ruling, the political parties started negotiations on election reform measures and agreed to decrease the amount of candidacy deposit. However, they have yet to reach an agreement concerning the proportional representation system. On October 8, 2001, the National Assembly revised the Public Election Act. The deposit requirement was lowered from 20 million won to 15 million won, and the minimum votes to be obtained by a candidate to get the deposit back was reduced from 20/100 of total valid votes to 15/100. The constitutionality of the amended provisions is again being challenged through constitutional complaints (2001Hun-Ma687 · 691).

3. *National Assembly Election Redistricting Plan* Case

[13-2 KCCR 502, 2000Hun-Ma92, 2000Hun-Ma240 (consolidated), October 25, 2001]

Contents of the Decision

1. Limits to legislative discretion in redistricting electoral districts.
2. Permissible limit on population disparity in electoral districts.
3. A case where the redistricting discriminating electors in a particular district from those in other electoral districts was not regarded as gerrymandering.
4. Whether to declare the entire Election Redistricting Plan unconstitutional when parts of the Plan has unconstitutional elements.
5. Reasons for giving temporary effects to provisions declared nonconforming to the Constitution.

Summary of the Decision

1. A wide scope of legislative discretion is recognized in developing the National Assembly Election Redistricting Plan. However, the constitutional principle of equal election limits legislative discretion in the matter. First, the equality in the value of each vote is the most important and basic factor in constituency rezoning. Accordingly, unreasonable redrawing of electoral districts violating the constitutional mandate of equal weight of votes is arbitrary, and hence, is unconstitutional. Second, gerrymandering is not within the constitutional limits of legislative discretion, and is unconstitutional. Gerrymandering refers to intentional discrimination of electors in a particular region through the arbitrary division of electoral districts. It would be a case of gerrymandering if electors in a particular electoral district lose opportunities to participate in political affairs because of an arbitrary division of electoral districts, or if the constituency is redrawn to prevent the election of a candidate supported by electors from a particular region.

2. There are many suggestions for permissible limits on population disparity in electoral districts, and at this moment, the Court can consider adopting two of these options. One is to set the permissible maximum deviation of population in an electoral district from the average population of electoral districts at 33⅓% (equivalent to set-

ting the permissible maximum ratio between the most populous district and the least at 2:1). The other is to set the maximum deviation at 50% (in this case, the maximum ratio between the most populous district and the least populous district would be 3:1). Adoption of the 33⅓% criterion would create many problems because factors other than population, such as administrative district division and the total number of seats in the National Assembly, must be accounted for when readjusting the national electoral constituencies. It has only been 5 years since the Court first deliberated on the problem of population disparity in electoral districts, and idealistic approach disregarding practical limits would be imprudent. Therefore, the Court will review the instant case using the 50% criterion. However, the Court will have to employ the 33⅓% or a more exacting criterion after some time from now. In case of "Kyonggi Anyang Dongan-Ku" Electoral District, it has a population 57% more than the average population of electoral districts. Such division of electoral districts is beyond the limits of legislative discretion, and it violates the complainants' constitutional right to vote and the right to equality.

3. In case of "Incheon Seo-Ku and Kangwha-Kun B" Electoral District, it can be concluded that the legislature did not arbitrarily readjust the electoral district to discriminate electors in Seo-Ku Kumdan-Dong. Right before the 16th General Election for the National Assembly in 2000, Kangwha-Kun had a population less than the minimum required to constitute an independent electoral district. So the National Assembly members agreed to coalesce Kumdan-Dong, a part of Seo-Ku, to Kangwha-Kun to make a single electoral district because Kumdan-Dong was the most populous and was relatively close to Kangwha-Kun compared to all other Dongs in Seo-Ku.

4. In the instant case, the right to equality and the right to vote are violated by a part of the Election Redistricting Plan, namely, zoning of ""Kyonggi Anyang Dongan-Ku" Electoral District. However, there is a problem whether to declare the entire Election Redistricting Plan unconstitutional when only parts of the Plan has unconstitutional elements. This depends on whether the Redistricting Plan can be divided into separate entities. In the 95Hun-Ma224 decision, the Court decided that the Election Redistricting Plan formed an inseparable entity, and that the whole Plan had to be declared unconstitutional if parts of the Plan had unconstitutional elements. This is still reasonable for the defense of a constitutional order and the protection of citizens' basic rights, and the Court will maintain the position.

5. The Court could render a decision of simple unconstitutionality. However, the following facts have to be considered in doing so: that General Elections for the National Assembly have already been held based on the current Redistricting Plan; that there may arise a

vacuum in law if a special election or re-election for a particular district is to be held before the revision of the Plan, because the speedy revision of the Plan would be impossible due to its political nature; and that in order to maintain homogeneity in the composition to the National Assembly and to prevent confusion caused by changes in the electoral district, it is better that a special election or re-election is held under the present Redistricting Plan. Therefore, the Court finds the instant Redistricting Plan nonconforming to the Constitution, but orders it to remain effective temporarily until December 31, 2003, by which the legislature must revise the Plan.

Justice Kwon Seong's Concurring Opinion

Equality in the value of each vote is not the foremost concern in drawing up the National Assembly Election Redistricting Plan, but it is only one of many important factors to be considered. Another factor to be considered is proper representation of electors in a particular electoral district. The most clear example to substantiate the claim that a National Assembly member indeed represents the people is given when a National Assembly member is elected into the office by electors of an independent electoral district (such as an administrative district). Considering the historical development of the legislature, the principle of protection of minority and the principle of national solidarity, it is reasonable and justifiable to make each National Assembly member represent a certain electoral body. Since the present election system adopts the minor electorate system, or single-seat constituency system, ensuring a sense of connection between electors and a National Assembly member is as important as achieving equality in the value of each vote when finalizing the Election Redistricting Plan.

Separating a part of an administrative district and adding it to another administrative district to achieve mathematical equality in the value of each vote would weaken the link between electors and the elected. Such practice would also violate the right to vote of those electors who were separated from others in the old electoral district and were forced to vote in a newly formed electoral district, and hence, is unconstitutional. Under the current Act on the Election of Public Officials and the Prevention of Election Malpractices, three electoral districts, namely, "Pusan Puk-Ku and Kangso-Ku B" Electoral District, "Haeundae-Ku and Kijang-Kun B" Electoral District, and "Incheon Seo-Ku and Kangwha-Kun B" Electoral District, are formed by adding electors separated from their original administrative districts, and these parts of the Redistricting Plan violate the same electors' right to vote. Because of the inseparability of the Redis-

tricting Plan, the whole Plan is unconstitutional. The Court should also point out the unconstitutionality of Article 3 of the Addenda to the Act on the Election of Public Officials and the Prevention of Election Malpractices allowing formation of the above electoral districts.

Dissenting Opinions of Justices Han Dae-hyun and Ha Kyung-chull

According to the Court's decision in the 95Hun-Ma224 case on December 27, 1995, an electoral district with a population not exceeding the 60% maximum deviation limit from the average population of electoral districts is not unconstitutional. As of March 22, 2000, population in "Kyonggi Anyang Dongan-Ku" Electoral District is 328,383, about 57% more than the average population of electoral districts, namely, 208,917. Therefore, under the criterion set by the 95Hun-Ma224 decision, the present Redistricting Plan is not unconstitutional.

Considering deference to the legislative power, it would be imprudent for the Court to change its earlier holding in 1995. But we agree with the opinion of the Justices of the majority regarding the Election Redistricting Plan to be employed for the National Assembly Election in 2004. Instead of rendering a decision of nonconformity to the Constitution, the Court should reject the complaint, while suggesting that the new Redistricting Plan for the National Assembly Election in 2004 should set the permissible maximum deviation of population in an electoral district from the average population of electoral districts at 50% and that the new criterion will be used for constitutional review from then on.

Provisions on Review

Act on the Election of Public Officials and the Prevention of Election Malpractices (amended by Act No. 6265 on February 16, 2000)

Parts on "Kyonggi Anyang Dongan-Ku" Electoral District and "Incheon Seo-Ku and Kangwha-Kun B" Electoral District in the National Assembly Election Redistricting Plan, Table 1, Article 25(2): omitted

Related Provisions

The Constitution

Articles 11(1), 41(1), (2), (3)

Act on the Election of Public Officials and the Prevention of Election Malpractices (amended by Act No. 6265 on February 16, 2000)

Article 21 (Full Number of National Assembly Members)

(1) The full number of National Assembly members, for local constituency members and proportional representatives combined, shall be 273.

(2) The full number of National Assembly members to be elected in a single local constituency shall be one.

Article 25 (Demarcation of Local Election Districts for National Assembly)

(1) The local constituency for National Assembly (hereinafter referred to as the "election district for National Assembly") shall be demarcated in the area under jurisdiction of the City/Province, in consideration of the population, administrative districts, geographical features, traffic, and other conditions, but a Ku (including an autonomous Ku), Shi (meaning a Shi where a Ku is not established), or Kun (hereinafter referred to as a "Ku/Shi/Kun"[1]) shall not be partly divided and made to belong to another election district for National Assembly.

(2) [omitted]

Article 3 of Addenda (Special Cases concerning Demarcation of Local Election Districts for National Assembly Members)

Notwithstanding the provision of the latter part of Article 25(1), in the election of National Assembly members (including the special election, etc.), a divided part of the Haeundae Ku of the Pusan Metropolitan City may be made to belong to the local election district for the National Assembly member for Kijang Kun B, Haeundae Ku, and a divided part of the Puk Ku of Pusan Metropolitan City to the local election district for the National Assembly member for Kangso Ku B, Puk Ku, and a divided part of the Seo Ku of the Incheon Metropolitan City to the local election district for the National Assembly member for Kangwha Kun B, Seo Ku.

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1). A city is called shi. A city is made up of Districts called Ku. Within a Ku are neighborhoods called Dong. Some cities are not separated into districts. A district with not enough population to become a city is called Kun.

Related Precedents

7-2 KCCR 760, 95Hun-Ma224 et. al., December 27, 1995

10-2 KCCR 742, 96Hun-Ma54, November 26, 1998

10-2 KCCR 764, 96Hun-Ma74 et. al., November 26, 1998

Parties

Complainants

1. Jeong Jin-sup (2000Hun-Ma92)
   Counsel
   (1) Attorney Han Kyung-soo
   (2) Legal Corporation Hanjoong
   Attorney-in-charge: Lee Hee-suk
2. Yang Yong-suk and 11 others (2000Hun-Ma240)
   Counsel: Ryu Kwon-hong

Holding

1. Table 1, "the National Assembly Election Redistricting Plan," pursuant to Article 25(2) of the Act on the Election of Public Officials and the Prevention of Election Malpractices (amended by Act No. 6265 on February 16, 2000) is nonconforming to the Constitution.

2. The above National Assembly Election Redistricting Plan shall remain effective temporarily until December 31, 2003, by which the legislature must revise the Plan.

Reasoning

1. Overview of the Case and the Subject Matter of Review

A. Overview of the Case

(1) 2000Hun-Ma92

Complainant resides in "Kyonggi Anyang Dongan-Ku" Electoral District, and plans to vote in the 16th National Assembly election on April 13, 2000. As of December, 1999, the district has a population of 331,458, about 59% more than the average population of electoral

districts (total population 47,330,000 ÷ 227 electoral districts). The smallest electoral district in the National Assembly Election Redistricting Plan, "Kyongbuk Koryong-Kun and Seongju-Kun" Electoral District, has a population of 90,656. So, "Kyonggi Anyang Dongan-Ku" Electoral District has a population 3.65 times larger than that of "Kyongbuk Koryong-Kun and Seongju-Kun" Electoral District. On February 10, 2000, the complainant filed a constitutional complaint alleging that the present National Assembly Election Redistricting Plan was against the principle of equal election and that the Plan, under which the value of the complainant's vote is only 1/3.65 of a vote of an elector in "Kyongbuk Koryong-Kun and Seongju-Kun" Electoral District, infringed on the complainant's right to equality and the right to vote.

(2) 2000Hun-Ma240

Complainants reside in "Incheon Seo-Ku and Kangwha-Kun B" Electoral District, and plan to vote in the 16th National Assembly election on April 13, 2000. On April 7, 2000, the complainants filed a constitutional complaint alleging that the present National Assembly Election Redistricting Plan, forming a single electoral district by adding Kumdan-Dong to Kangwha-Kun, violated the constitutional right to vote and the right of equality because Kumdan-Dong and Kangwha-kun are geographically separated from each other and there is no sense of social or economic solidarity between residents of Kumdan-Dong and Kangwha-Kun.

B. Subject Matter of Review

The subject matter of review is the constitutionality of "Kyonggi Anyang Dongan-Ku" Electoral District and "Incheon Seo-Ku and Kangwha-Kun B" Electoral District in Table 1, "the National Assembly Election Redistricting Plan" (hereinafter called the "instant Election Redistricting Plan"), pursuant to Article 25(2) of the Act on the Election of Public Officials and the Prevention of Election Malpractices (amended by Act No.6265 on February 16, 2000, hereinafter called the "Public Election Act"). Contents of the instant Election Redistricting Plan are as shown in "Attachment 1".

2. Complainants' Arguments

A. 2000Hun-Ma92

(1) Population disparity in electoral districts cause inequality in

the weight of each vote, thereby violating the right to equality in elections. This is contrary to the Preamble and Article 11(1) of the Constitution stipulating protection of the right to equality. Violation of the right to equality in political spheres ultimately leads to the disintegration of the representative democratic system necessary for the realization of the democratic order which the Constitution holds as its fundamental objective.

(2) As of December 31, 1999, "Kyonggi Anyang Dongan-Ku" Electoral District where the complainant resides has a population of 331,458, about 59% more than the average population of electoral districts, or 208,502 (total population 47,330,000 ÷ 227 electoral districts). The district has a population about 3.65 times that of the smallest electoral district in the instant Election Redistricting Plan, "Kyongbuk Koryong-Kun and Seongju-Kun" Electoral District, which has a population of 90,656. Under the instant Election Redistricting Plan, the value of the complainant's vote is only 1/3.65 of a vote of an elector in "Kyongbuk Koryong-Kun and Seongju-Kun" Electoral District. Therefore, the Plan infringes on the complainant's constitutional right to equality and the right to vote.

(3) It might be impossible to achieve perfect equality in the value of each vote. According to the prevailing views of academics and precedents in courts around the world for the last thirty years, the permissible maximum ratio between the most populous and the least populous electoral districts is 3:1. However, under the instant Election Redistricting Plan, it is 3.88:1, and this is against the reasoning of the Court's earlier ruling five years ago. The instant Election Redistricting Plan completely ignores equality in the value of each vote, or more specifically, equality in the value of a vote contributing to the outcome of an election. It violates the right of equality in the National Assembly elections, and thereby infringes on the basic right of equality.

B. 2000Hun-Ma240

(1) The demarcation of electoral constituencies should be done by considering the social, geographical, historical, economical or administrative association between localities. Unless there are special inevitable circumstances, adjacent localities should form an electoral district. And the formation of a single electoral district out of two geographically separated localities without justifiable reasons, would be arbitrary, thus exceeding the limits of legislative discretion, and hence, is unconstitutional.

(2) In case of the "Incheon Seo-Ku and Kangwha-Kun B" Electoral District, Incheon Seo-Ku Kumdan-Dong and Incheon Kangwha-

Kun became parts of the Incheon Metropolitan City in March 1995, and they are located 20 km apart. Residents in Kumdan-Dong mostly work in factories, while those in Kangwha-Kun are mostly farmers. Therefore, there is no sense of solidarity between residents in the two localities. In case of Kumdan-Dong, problems in terms of traffic and environment have worsened since it became a part of Incheon Metropolitan City, and these issues require immediate attention. Despite these facts, Kumdan-Dong of Seo-Ku was isolated and added to Kangwha-Kun to form an electoral district for the National Assembly election. Such a realignment of electoral districts has made it very difficult for the complainants and other Kumdan-Dong residents to accurately convey their messages to the National Assembly, and this infringes on the right to pursue happiness, the right to equality, and the right to vote.

3. Review

A. Representative Democracy and the Principle of Equal Election

Article 1(2) of the Constitution explicitly states the principle of the people's sovereignty. However, under the representative democracy system adopted by most countries, the people holding the supreme power of the land delegate their power to the State agencies except in some rare cases. Success in a representative democratic system depends on how accurately and effectively people's opinions are reflected in the political decision making process. In this light, the electoral constituencies rezoning should be done in such a way to accurately represent electors' choice. Violation of equality in voting rights caused by arbitrary redistricting would distort people's opinions, and this would seriously undermine the basis of representative democracy. Article 11(1) of the Constitution declares the general "principle of equality," and Article 41(1) of the Constitution declares the "principle of equal election" in the National Assembly election through the provision that reads "the National Assembly shall be composed of members elected by universal, equal, direct, and secret ballot by the citizens." The principle of equal election is a manifestation of the principle of equality in the election process. It mandates the principle of equality in the number of votes, namely, one vote per person, and equality in their weight, that is, the extent that one vote contributes to the entire system of election (one vote, one value) (7-2 KCCR 760, 771, 95Hun-Ma224 and etc., December 27, 1995). Also it means the denial of gerrymandering, or discriminatory constituency rezoning, designed to prevent a certain group of people's

political opinions from being reflected in the political process (10-2 KCCR 742, 747, 96Hun-Ma54, November 26, 1998; 10-2 KCCR 764, 773, 96Hun-Ma74 and etc., November 26, 1998).

B. Legislative Discretion in Constituency Rezoning and Its Limits

Article 41(3) of the Constitution states that "the constituencies of members of the National Assembly, proportional representation, and other matters pertaining to National Assembly elections shall be determined by Statute," thereby delegating the decision making power concerning details of the election system and constituency rezoning to legislative discretion.

Therefore, a wide scope of legislative discretion is recognized in creating the National Assembly Election Redistricting Plan. The legislature can take into consideration not only the population disparity, but also administrative districts, geography of particular area, traffic, living sphere, sense of historical or traditional solidarity, or any other policy or technical factors when realigning the electoral districts. Article 25(1) of the Public Election Act embodies such understanding as it states that "the local constituency for National Assembly shall be demarcated in the area under jurisdiction of the City/Province, in consideration of the population, administrative districts, geographical features, traffic, and other conditions... ."

Article 41(2) of the Constitution states that "the number of members of the National Assembly shall be determined by Act, but the number shall not be less than 200," and Article 21 of the Public Election Act sets the full number of National Assembly seats, including all local constituency members and proportional representatives at 273. 227 members of the National Assembly are elected from local constituencies according to the relative majority representation system, and 46 proportional representatives are elected from one national constituency. The total number of National Assembly seats, or the size of the legislature, is also a factor to be considered in rezoning the electoral districts. In other words, the legislature has to consider the fact that while the number of National Assembly seats should be more than 200 as stipulated by the Constitution, an excessive number of Assembly members would be detrimental to effective parliamentary activities. This means that the formation of an efficient and adequate legislative body should also be considered in constituency rezoning.

But, a wide scope of legislative discretion in constituency rezoning does not mean that the redistricting of electoral districts is free

from constitutional control. In other words, the constitutional principle of equal election limits legislative discretion in such matters.

First, the equality in the value of each vote is the most important and basic factor in constituency rezoning. Accordingly, unreasonable redrawing of electoral districts, violating the constitutional mandate of equal weight of votes, is arbitrary, and hence, is unconstitutional. In this light, there is an inherent limit to legislative discretion in readjusting the electoral constituencies.

On this point, the Court earlier ruled that "while the National Assembly may consider factors other than population, it is unconstitutional if there exists grave inequality beyond any reasonable limits in the value of votes among electors" (7-2 KCCR 760, 773, 95Hun-Ma224 and etc., December 27, 1995).

Second, gerrymandering is not within the constitutional limits of legislative discretion, and is unconstitutional. Gerrymandering refers to an intentional discrimination of electors in a particular region through arbitrary division of electoral districts. It would be gerrymandering if electors in a particular electoral district lose opportunities to participate in political affairs, because of an arbitrary division of electoral districts, or if a district is redrawn to prevent the election of a candidate supported by electors from a particular region (10-2 KCCR 742, 748, 96Hun-Ma54, November 26, 1998; 10-2 KCCR 764, 775, 96Hun-Ma74 and etc., November 26, 1998).

The Court earlier ruled that "in redistricting the electoral constituencies, the legislature has to take into its consideration such factors as social, geographical, historical, economical and administrative association between localities, and an electoral district should be composed of a contiguous geographic area except for certain and inevitable circumstances." The Court further decided that unless there are inevitable circumstances, the redistricting of an electoral district by joining two completely separated localities without a common boundary, unless there are inevitable circumstances, was arbitrary and beyond the limits of legislative discretion, and hence unconstitutional (7-2 KCCR 760, 788-789, 95Hun-Ma224 and etc., December 27, 1995).

C. Unconstitutionality of "Kyonggi Anyang Dongan-Ku" Electoral District Part of the Election Redistricting Plan (Equality in the Value of Each Vote)

(1) Precedents on Population Disparity in Electoral Districts

In the first case about permissible limits on population disparity in electoral districts (95Hun-Ma224 and etc., December 27, 1995), the

Court found the then National Assembly Election Redistricting Plan nonconforming to the Constitution, and suggested the following criterion for the constitutionality of population disparity in the constituencies.

In the decision, five Justices, Justices Kim Yong-joon, Kim Chin-woo, Kim moon-hee, Hwang Do-yun, and Shin Chang-on, ruled that the permissible maximum deviation of population in the National Assembly Election should be 60% of the average population of electoral districts, or the quotient of the national population divided by the number of electoral districts[2], and that it would be unconstitutional to have a single electoral district which did not satisfy such population requirement.

Four Justices, Justices Lee Jae-hwa, Cho Seung-hyung, Chung Kyung-sik, and Koh Joong-suk, proposed to separate the electoral districts into the urban districts and the rural districts. The four Justices ruled that constituency redistricting which violates the 60% deviation of population limit and at the same time exceeds the 50% deviation limit in the same type of electoral district is beyond the limits of legislative discretion and hence, is unconstitutional.

Three Justices, Justices Kim Moon-hee, Hwang Do-yun, and Shin Chang-on, issued a concurring opinion to the majority opinion. In the opinion, three Justices pointed out that the legislature should take steps to remedy the existing population disparities among electoral districts within a reasonable period of time, and under the new Redistricting Plan, the largest electoral district should not have a population more than twice that of the smallest electoral district. Furthermore, the three Justices suggested that the Court should employ a new criterion which sets the permissible maximum ratio of population between the most populous district and the least at 2:1 after a reasonable period of time. Justice Kim Chin-woo wrote a concurring opinion also stating that the Court should employ the permissible maximum ratio of population between the most populous district and the least at 2:1 from the next case on.

(2) Population Disparity in Electoral Districts in the Instant Election Redistricting Plan

"Facts on the 16th National Assembly Election" published by the Central Commission on Election Management provides various statistical information regarding the election, including population of each electoral district as of March 22, 2000. A table analyzing population

2). This would be equivalent to setting the permissible maximum ratio between the most populous district and the least at 4:1. - Trans.

ratio of each National Assembly electoral district is attached to Appendix 2, and a table analyzing population disparity in the electoral districts is attached to Appendix 3.

The smallest electoral district in the instant Election Redistricting Plan, "Kyongbuk Koryong-Kun and Seongju-Kun" Electoral District, has a population of 90,190 (Strictly speaking, the number of qualified electors should be the basis of comparison, but since the number of electors is proportional to population in most cases, all figures hereinafter will be in terms of "population"). On the other hand, "Kyonggi Anyang Dongan-Ku" Electoral District where the complainant resides has a population of 328,383, and this is 3.64 times the population of "Kyongbuk Koryong-Kun and Seongju-Kun" Electoral District. The largest electoral district in the instant Election Redistricting Plan, "Kyonggi Uijongbu" Electoral District, has a population of 350,118, or a population 3.88 times that of the "Kyongbuk Koryong-Kun and Seongju-Kun" Electoral District. There are 154 electoral districts with a population more than twice the population of the smallest electoral district, and 45 of them have a population three times or more than the population of the smallest electoral district.

The average population of electoral districts is 208,917 (National population, 47,424,300 ÷ number of electoral districts, 227). "Kyonggi Anyang Dongan-Ku" Electoral District, where the complainant resides in, has a population 57% more than this figure, and the smallest electoral district, "Kyongbuk Koryong-Kun and Seongju-Kun" Electoral District, has a population 57% less than this figure. The largest electoral district, "Kyonggi Uijongbu" Electoral District, has a population 68% more than the average figure.

There are 81 electoral districts with a population exceeding the permissible maximum deviation of ±33⅓% (equivalent to setting the permissible maximum ratio between the most populous district and the least at 2:1) or more from the average population of electoral districts. 30 of these districts have a population exceeding the permissible maximum deviation of ±50% (equivalent to setting the permissible maximum ratio between the most populous district and the least at 3:1) or more.

It is noteworthy that there are 10 electoral districts with population disparities of ±60% (equivalent to setting the permissible maximum ratio between the most populous district and the least at 4:1) or more (all of the cases exceeded the upper limit). This is directly against the holding in the 95Hun-Ma224 case in which the Court ruled that a population disparity of ±60% would be the maximum population under the Constitution.

(3) Permissible Limit on Population Disparity

(A) In suggesting the permissible limit on population disparity, the Court could employ either the population of the smallest electoral district or the average population of electoral districts as a basis of comparison. In the 95Hun-Ma224 case, the Court chose to use the average population of electoral districts, following the provision of Federal Election Act of Germany, precedents of the German Constitutional Court, and the opinion of the Central Commission on Election Management, and this Court will maintain the decision.

(B) Next, the Court needs to decide whether to use different standards in reviewing the constitutionality of population disparities in urban electoral districts and rural electoral districts.

In the 95Hun-Ma224 case, some Justices proposed to use different permissible maximum deviation standards for rural electoral districts and urban electoral districts. However, because it is not easy to distinguish an urban electoral district from a rural electoral district, such classification would be either improper or unnecessary. Therefore, the Court will not distinguish between an urban electoral district from a rural electoral district when reviewing the instant case.

However, the existing difference between population in urban and rural areas resulting from the concentration of population to urban areas should be taken into consideration when formulating the permissible maximum deviation of population in an electoral district.

(C) Population disparity in electoral constituencies is not a problem limited only to Korea, and over the years, the standards used to review the constitutionality of population disparities have become more exacting in countries around the world. In the case of Germany, Article 3(1)[3] of the revised Federal Election Act (Bundeswahlgesetz) stipulates that the deviation of population in an electoral district, from the average population of electoral districts, should not exceed 15% and that rezoning constituency rezoning is required if the deviation exceeds 25%. In short, while setting the 15% deviation limit as a principle, and compelling the observance of 25% as a maximum deviation limit, the Act was flexibly legislated.

When compared to Article 3(1)[2] of the old Federal Election Act, which stated that the deviation of population in an electoral district from the average population of electoral districts should not exceed 25% and that rezoning of constituencies would be required if the deviation exceeded 33⅓%, it is clear that the standard in reviewing the constitutionality of constituency rezoning has become more strict in Germany.

In case of Japan, Article 3(1) of the Act to Institute the Con-

stituency Redistricting Commission for the Diet Election, enacted in February 4, 1994, stipulates that a revised redistricting plan should strive to achieve balanced population among electoral districts, that in the new redistricting plan, the number earned by dividing the population of the largest electoral district by that of the smallest should not exceed 2, and that consideration should be given to administrative districts, geography, traffic, and other special conditions.

(D) In the 95Hun-Ma224 case, the Court suggested some factors other than population to be taken into consideration when readjusting the national electoral constituencies. In the case, the Court first indicated that in Korea which adopts the unicameral system, a National Assembly member, while representing the Korean people as a whole, also represents the electors from a particular locality. The Court also cited population disparity between urban and rural electoral districts resulting from population concentration in metropolitan areas and existing inequality of development in all spheres as reasons to be lenient in suggesting the permissible limit on population disparity. On the other hand, the Court stated that many votes are wasted under the election system currently employed by Korea, namely, the minor constituency system combined with the majority representation system. The Court went on to point out that to permit excessive population disparities between electoral districts under such election system would significantly undermine the basis of the representative democratic system (7-2 KCCR 760, 775, 95Hun-Ma224 and etc., December 27, 1995). Such conditions have not changed much since then.

(E) Population remains the most important factor in redistricting constituencies, but secondary factors other than population have to be taken into consideration as well. To set limits on legislative discretion in constituency rezoning, or more specifically, to suggest constitutionally permissible limits on population disparity in electoral districts, is a problem of easing the strict application of the principle of equality in the value of each vote by considering factors other than population. Considering all the factors we have seen so far, among the suggestions regarding the permissible limits on population disparity, the one that says a population that is within the 33⅓% deviation limit (equivalent to setting the permissible maximum ratio between the most populous district and the least at 2:1) would be still unconstitutional if there is no reasonable justification for such a disparity. This standard is too rigorous, and it is too early to adopt this suggestion as the standard for constitutional review of the Election Redistricting Plan under the present political realities in Korea. To adopt the 60% criterion (equivalent to setting the permissible maximum ratio between the most populous district and the least at 4:1) five years after the Court adopted it in the 95Hun-Ma224 decision

would be improper in the light of the concurring opinion of the case, suggesting employment of a more strict criterion in the future dispute, or the fact that the standard adopted by the Court in the instant case would serve as guidelines in revising the Election Redistricting Plan for the National Assembly Election in 2004. It would be also against the worldwide trend of setting a more exacting standard to review the constitutionality of population disparities in electoral districts.

Then, the Court could choose between two other options at this time. One is to set the permissible maximum deviation of population in an electoral district from the average population of electoral districts at ±33⅓%. The other is to set the maximum deviation at ±50% (in this case, the maximum ratio between the most populous district and the least populous district would be 3:1).

Needless to say, the 33⅓% criterion is a superior option to achieve equality in voting rights. But adoption of this criterion would entail many problems, because it would make it very difficult to consider factors other than population, such as administrative district divisions and the total number of seats in the National Assembly in constituency rezoning.

The problem regarding division of administrative districts could be solved through revision of the current Public Election Act. While Article 25(1) of the Public Election Act stipulates that "... Ku/Shi/Kun shall not be partly divided and made to belong to another election district for the National Assembly member," this is not a constitutional requirement. Therefore, the provision would have to concede in order to achieve the constitutional requirement of equality in the voting rights, and revising the administrative districts itself could be considered.

Article 41(2) of the Constitution only stipulates that the total number of seats in the National Assembly should be more than 200, so this number could be adjusted to remedy population disparities.

However, in reality, formation of an electoral district by separating a part of an administrative district and adding it to another or increasing the total number of seats in the National Assembly would not be easy considering public opinion. Also, as we have seen earlier, there are 30 electoral districts with a population exceeding the permissible maximum deviation from the average population of electoral districts of ±50% (equivalent to setting the permissible maximum ratio between the most populous district and the least at 3:1), but there are 81 electoral districts with a population exceeding the permissible maximum deviation from the average population of electoral districts of ±33⅓% (equivalent to setting the permissible maxi-

mum ratio between the most populous district and the least at 2:1). Under such circumstance, it would not be difficult to predict that there would arise many problems if the Court adopted the 33⅓% criterion.

It has only been 5 years since the Court first deliberated on the problem of population disparity in electoral districts, and a too idealistic of an approach disregarding practical limits would be imprudent. Therefore, the Court will review the instant case using the 50% criterion.

However, the Court would like to make it clear once more, as did three Justices, Justices Kim Moon-hee, Hwang Do-yun, and Shin Chang-on, in their concurring opinion to the majority opinion in the 95Hun-Ma224 case, that, while the legislature could take into consideration factors other than population such as administrative districts, the total number of seats in the National Assembly, population disparities between urban and rural districts when realigning the electoral districts, the legislature should take steps to remedy the existing population disparities among electoral districts to ensure that the largest electoral district does not have a population more than twice that of the smallest electoral district to uphold the constitutional principle of equal election. The Court will employ the 33⅓% (equivalent to setting the permissible maximum ratio of population between the most populous district and the least at 2:1) or a more strict criterion after some time from now.

(4) Unconstitutionality of "Kyonggi Anyang Dongan-Ku" Electoral District Part of the Election Redistricting Plan

In case of "Kyonggi Anyang Dongan-Ku" Electoral District, it has a population 57% more than the average population of electoral districts. Such division of electoral districts is beyond the limits of legislative discretion, and violates the complainants' constitutional right to vote and the right to equality.

D. Constitutionality of "Incheon Seo-Ku and Kangwha-Kun B" Electoral District Part of the Election Redistricting Plan (regarding gerrymandering)

(1) Formation of the Instant Electoral District

Before the Act on the Election of Public Officials and the Prevention of Election Malpractices was amended on February 16, 2000, the electoral districts in Incheon Seo-Ku, Kyeyang-Ku and Kangwha-

Kun were divided to "Kyeyang-Ku and Kangwha-Kun A", "Kyeyang-Ku and Kangwha-Kun B", and "Incheon Seo-Ku" Electoral Districts. Under such division, Incheon Seo-Ku as a whole formed an independent electoral district, and "Kyeyang-Ku and Kangwha-Kun A" Electoral District was formed of all of Kyeyang-Ku except Kyeyang-Ku Kyeyang 1-Dong. Kyeyang-Ku Kyeyang 1-Dong and the district of Kangwha-Kun formed the "Kyeyang-Ku and Kangwha-Kun B" Electoral District.

A constitutional complaint challenging the constitutionality of forming "Kyeyang-Ku and Kangwha-Kun B" Electoral District by separating only Kyeyang-Ku Kyeyang 1-Dong from Kyeyang-Ku and adding it to Kangwha-Kun was filed. In the 96Hun-Ma54 case decided on November 26, 1998, the Court ruled that the particular Election Redistricting Plan had an unconstitutional element because the legislature departed from the scope of legislative discretion in forming such electoral district, but considering lack of time in preparing the Plan for the 15th National Assembly Election and the temporary nature of such constituency rezoning, the Plan was held constitutional.

In the above case, the Court suggested that since Incheon Kyeyang-Ku and Kangwha-Kun were separated from each other by Incheon Seo-Ku and Kyonggi Kimpo-Kun (currently Kimpo-Shi), it would be more reasonable to form an electoral district by combining Kangwha-Kun with Ongjin-Kun which was geographically very close to and administratively very similar to Kangwha-Kun, or to form an electoral district by combining Kangwha-Kun and some parts of Incheon Seo-Ku which were geographically closer to Kangwha-Kun instead of Kyeyang-Ku.

Following the holding of the Court, the legislature made Kyeyang-Ku a single electoral district, combined Kangwha-Kun and Incheon Seo-Ku, and formed two electoral districts, namely, "Incheon Seo-Ku and Kangwha-Kun A" Electoral District, composed of all parts of Incheon Seo-Ku except Kumdan-Dong, and "Incheon Seo-Ku and Kangwha-Kun B" Electoral District compossd of Kumdan-Dong and all parts of Kangwha-Kun, as it amended the Act on the Election of Public Officials and the Prevention of Election Malpractices through Act No.6265 on February 16, 2000.

(2) Constitutionality of the Instant Electoral District Part of the Election Redistricting Plan

According to the case records and "Facts on the 16th National Assembly Election" published by the Central Commission on Election Management, Firstly, Incheon Seo-Ku Kumdan-Dong and Kangwha-

Kun both were parts of Kyonggi-Do, but became parts of Incheon Metropolitan City on March 1, 1995. Incheon Seo-Ku Kumdan-Dong, located in the north part of Incheon, is partly urban and partly rural in composition. It is composed of eight smaller counties, and most residents of Kumdan-Dong work in factories (less than 10% of all households are farmers). Kangwha-Kun is located in the northwest part of Incheon, and is composed of 15 islands. More than 70% of all residents are farmers. Secondly, Incheon Seo-Ku Kumdan-Dong and Kangwha-Kun are approximately 20 km apart, and have Kyonggi Kimpo-shi in between them. Thirdly, as of March 22, 2000, population of Kangwha-Kun is 67,621, that of Ongjin-Kun, an administrative district composed of small islands close to Kangwha-kun, is 13,979, and that of Incheon Seo-Ku is 339,583. Incheon Seo-Ku is composed of 14 smaller administrative districts called Dongs, and of these, Kumdan-Dong has the largest population of 51,450 which is about 15% of the total population of Incheon Seo-Ku. Finally, after becoming a part of Incheon, population of Kumdan-Dong has rapidly increased, and about 1900 factories are located within its boundary. There is also the Metropolitan Area refuse disposal site in Kumdan-Dong, and Kumdan-Dong currently faces many problems in terms of traffic and environment.

When revising the Election Redistricting Plan for the 16th National Assembly Election, the legislature decided to set the minimum population of an electoral district at 90,000. Under such a guideline, Kangwha-Kun did not have enough population to form an independent electoral district, and it still would not meet the minimum population requirement if Kangwha-Kun was combined with Ongjin-Kun to form an electoral district[3]. Thus, the legislature decided to separate a part of Incheon Seo-Ku, which is closer to Kangwha-Kun than Incheon Kyeyang-Ku, and combine it with Kangwha-Kun to form an independent electoral district. The reason the legislature chose to separate Kumdan-Dong was because Kumdan-Dong, being located in the north part of Incheon Seo-Ku, was relatively close to Kangwha-Kun, and because it would be easier to meet the minimum population requirement to add Kumdan-Dong, the most populated of all administrative districts in Seo-Ku, to Kangwha-Kun.

Such constituency rezoning by the legislature is not against the Court's decision in the 96Hun-Ma54 case. Also, since population of Kumdan-Dong is about 43% of total population of "Incheon Seo-Ku and Kangwha-Kun B" Electoral District, it would be difficult to say Kumdan-Dong was incorporated into Kangwha-Kun. When all factors are considered, it cannot be concluded that the legislators arbitrarily realigned the electoral districts with an intention to discriminate

3). As suggested by the Court in the 96Hun-Ma54 case - Trans.

against the people of Kumdan-Dong.

Thus, the "Incheon Seo-Ku and Kangwha-Kun B" Electoral District part of the instant Election Redistricting Plan does not violate the complainants' right to vote or right to equality, and hence, is constitutional.

E. Inseparability of the Election Redistricting Plan and the Scope of Decision of Unconstitutionality

As seen above, the complainants' rights to equality and to vote are violated by only a part of the Election Redistricting Plan, namely, zoning of ""Kyonggi Anyang Dongan-Ku" Electoral District. However, there is a problem whether to declare the entire Election Redistricting Plan unconstitutional when only parts of the Plan has unconstitutional elements. This depends on whether the Redistricting Plan can be divided into separate entities.

In its earlier decision in the 95Hun-Ma224 case, the Court ruled on the inseparability of the Election Redistricting Plan as follows:

The electoral districts in the Election Redistricting Plan form an organic whole, and changes in one electoral district inevitably influence composition of other electoral districts in a chain reaction. Thus, if a part of the Election Redistricting Plan has unconstitutional elements, the whole Plan has unconstitutional elements. If the Court were to render a decision of unconstitutionality only for a part of the Election Redistricting Plan concerning the electoral district whose residents filed a constitutional complaint because of population disparity, there would be cases where other parts in the Plan with worse population disparities remain effective because there is a time limit for filing a constitutional complaint. This would be clearly unfair. Therefore, if rezoning of some constituencies violated the Constitution, the whole Election Redistricting Plan would have to be declared unconstitutional.

Such conclusion is still reasonable for defense of a constitutional order and protection of citizens' basic rights, and the Court will maintain the position.

F. Decision of Nonconformity to the Constitution

The Court should render a decision of unconstitutionality. However, the following facts have to be considered in doing so: that General Elections for the National Assembly have already been held based on the current Redistricting Plan; that there may arise a vacuum in law if a special election or reelection for a particular district

is to be held before the revision of the Plan, because speedy revision of the Plan would be impossible due to its political nature; and that in order to maintain homogeneity in the composition of the National Assembly and to prevent confusion caused by changes in the electoral district, it is better that a special election or reelection is held under the present Redistricting Plan. Therefore, the Court finds the instant Redistricting Plan nonconforming to the Constitution, but orders it to remain effective temporarily until the legislature revises the Plan by December 31, 2003.

4. Conclusion

"Kyonggi Anyang Dongan-Ku" Electoral District part is beyond the permissible limits of population disparities in electoral districts, and hence constitutes an arbitrary constituency rezoning. Thus, the Court should grant the complainants' constitutional complaint, and at the same time, the Court should declare the entire Election Redistricting Plan unconstitutional because of the inseparability of the Election Redistricting Plan. However, for reasons shown above, the Court finds the instant Redistricting Plan nonconforming to the Constitution but orders it to remain effective temporarily until the legislature revises the Plan by December 31, 2003. The constitutional complaint against "Incheon Seo-Ku and Kangwha-Kun B" Electoral District part of the instant Election Redistricting Plan should be rejected, but since the whole Plan is declared nonconforming to the Constitution due to the unconstitutionality of another part, the Court will not issue a separate adjudication rejecting that complaint.

This decision is pursuant to the consensus of all Justices except Kwon Seong who wrote a separate concurring opinion and Justices Han Dae-hyun and Ha Kyung-chull who wrote a dissenting opinion.

5. Justice Kwon-seong's Concurring Opinion

A. Limit to Equality in the Value of Each Vote

It is very difficult to achieve a mathematical equality in the value of each vote when a country has adopted the minor electorate system based on the administrative district divisions. The permissible maximum ratio between the most populous district and the least of 3:1 and that of 4:1 are not that different. To say the ratio of 3:1 is acceptable but not 4:1 is too artificial and unnatural.

Equality in the value of each vote is not the foremost concern in developing the National Assembly Election Redistricting Plan. It

is only one of many important factors to be considered.

B. Representatives' Ties with a Region or with Electors

Another of such factors would be proper representation of electors from a particular electoral district. In a country adopting the representative democratic system and allowing universal and direct election, there is no other option but to elect a member of the National Assembly from an electoral district composed of particular administrative districts. Such election system could be classified into the minor electorate system, the medium electorate system, or the major electorate system, depending on the size of the electoral districts. If all members of the National Assembly are elected from a single national electoral district, such representatives will have weak ties with electors. This is clear when one thinks of proportional representatives under the current election system. Each National Assembly member represents the entire people, but at the same time, he or she also represents the people who elected him or her into the office. To say that a member of the National Assembly represents all the people around the nation is to articulate the legal status and political responsibilities of a legislator. It means that a National Assembly member should not work only for the interests of his or her electors, but for the interests of the entire nation. However, it does not stipulate method of election of a legislator nor does it negate the ties between a legislator and his or her electors. The most clear way for a National Assembly member to properly represent the people is possible when a National Assembly member is elected into the office by electors of an independent electoral district (such as an administrative district).

C. Legitimacy of Representing Electors' Interests

To guarantee proper representation of electors from a particular electoral district is not just a matter of sentiment, but it is reasonable and legitimate because of the following reasons:

① In the light of the historical development of the parliamentary system, a legislator has always been elected by residents of a particular locality, and it was only natural to do so.

② In the light of the principle of protection of minority, a representative from a larger electoral district and a representative from a smaller electoral district have been and should be given equal status.

③ To achieve national solidarity, a representative from a populous, well-developed electoral district and a representative from a

smaller, less-developed electoral district have been and should be given equal status.

④ Self-respect, sense of honor, and sense of duty of a legislator are strengthened when he or she represents people of a particular locality.

Since the present election system adopts the minor electorate system, ensuring a sense of connection between electors and a National Assembly member is as important as ensuring equality in the value of each vote when finalizing the Election Redistricting Plan.

D. Unconstitutionality of Separating Residents of a Particular Locality

Separating a part of an administrative district and adding it to another administrative district to achieve mathematical equality in the value of each vote would weaken the link between electors and the elected. Such practice would also violate the right to vote of those electors who were separated from others in the old electoral district, and were forced to vote in a newly formed electoral district, and hence, is unconstitutional. There is a violation of the right to vote because of the following reasons: A legislature composed of representatives elected from certain administrative districts is a central component of the representative system which, in turn, is an integral element of the parliamentary system; Thus the right to elect a National Assembly member representing the administrative district where electors reside constitutes the essence of the electors' right to vote in the National Assembly election; If some residents of an administrative district were separated and were forced to belong to another administrative district for the National Assembly election, this is tantamount to losing the electors' right to elect a National Assembly member representing their locality. Combining independent administrative districts to form a single electoral district or separating a populous administrative district to form several electoral districts also restrict the electors' right to select a National Assembly member representing their locality to a certain degree, but this could be seen as the election of a common representative or several representatives, and it is not contrary to the essential element of the representative system.

Contrary to the majority opinion of Justices that Article 25(1) of the Public Election Act stipulating that "... Ku/Shi/Kun shall not be partly divided and made to belong to another election district for the National Assembly" is not a constitutional requirement, I think it is a constitutional requirement. As explained above, separating a part of

an administrative district and adding it to another administrative district to achieve the mathematical equality in the value of each vote would weaken the link between electors and the elected. Such a practice would also violate the right to vote of those electors who were separated from others in the old electoral district to vote in a newly formed electoral district, and hence, is unconstitutional. Therefore, Article 25(1) of the Public Election Act reflects a constitutional requirement, and the Election Redistricting Plan is contrary to Article 25(1), and is unconstitutional.

E. On the Instant Case

The following three electoral districts in the Election Redistricting Plan under the present Public Election Act hinder proper representation of electors:

1. "Pusan Puk-Ku and Kangso-Ku B" Electoral District: Puk-Ku Kumkok-Dong, Hwamyong-Dong, Dukchun-je2-Dong, and parts of Kangso-Ku

2. "Haeundae-Ku and Kijang-Kun B" Electoral District: Haeundae-Ku Joa-Dong, Songjung-Dong, and parts of Kijang-Kun

3. "Incheon Seo-Ku and Kangwha-Kun B" Electoral District: Seo-Ku Kumdan-Dong and parts of Kangwha-Kun

Formation of these three electoral districts violates the right to vote of those electors separated from their original administrative districts and forced to be a part of another electoral district. Because of the inseparability of the Redistricting Plan, the whole Plan is unconstitutional. The Court should also point out the unconstitutionality of Article 3 of Addenda to the Act on the Election of Public Officials and the Prevention of Election Malpractices, allowing the formation of the above electoral districts.

6. Dissenting Opinion of Justices Han Dae-hyun and Ha Kyung-chull

We agree with the majority opinion that the "Incheon Seo-Ku and Kangwha-Kun B" Electoral District part of the instant Election Redistricting Plan does not violate the complainants' right to vote or right to equality, and hence, is constitutional. However, for the following reasons, we disagree with the majority opinion which found the "Kyonggi Anyang Dongan-Ku" Electoral District part of the instant Election Redistricting Plan unconstitutional.

According to the Court's decision in the 95Hun-Ma224 case on

December 27, 1995 which rendered a decision of unconstitutionality on the National Assembly Election Redistricting Plan reviewed, an electoral district not exceeding the 60% maximum deviation limit from the average population of electoral districts is not unconstitutional.

As of March 22, 2000, the population in "Kyonggi Anyang Dongan-Ku" Electoral District is 328,383, about 57% more than the average population of electoral districts, namely, 208,917. Therefore, it is clear that the present Redistricting Plan is not unconstitutional under the criterion set forth by the 95Hun-Ma224 decision.

Considering deference to legislative power, it would be imprudent for the Court to change its earlier decision in 1995. But we agree with the opinions of the Justices of the majority that the permissible maximum deviation of population in an electoral district from the average population of electoral districts should be set at 50% for the Redistricting Plan to be employed for the National Assembly Election in 2004.

In conclusion, we think that the Court should reject the complaint, instead of rendering a decision of nonconformity to the Constitution, while suggesting that the new Redistricting Plan for the National Assembly Election in 2004 should set the permissible maximum deviation in an electoral district from the average population of electoral districts at 50%, and that the new criterion will be used for constitutional review from then on.

Justices Yun Young-chul (Presiding Justice), Han Dae-hyun, Ha Kyung-chull, Kim Young-il (Assigned Justice), Kwon Seong, Kim Hyo-jong, Kim Kyoung-il, Song In-jun, and Choo Sun-hoe

Appendix

Appendix 1 (revised on February 16, 2000)

The National Assembly Election Redistricting Plan: [omitted]

Appendix 2

Table of Population Ratio of Each National Assembly Electoral District

Classification / Region	Population (as of 03/22/00)	Number of Electoral Districts	No. of Electoral Districts with population ratio of 2:1 or less	No. of Electoral Districts with population ratio between 2:1 and 3:1	No. of Electoral Districts with population ratio between 3:1 and 4:1
Seoul	10,291,043	45	6	31	8
Pusan	3,812,489	17	2	10	5
Taegu	2,513,380	11	3	4	4
Incheon	2,514,144	11	2	6	3
Kwangju	1,360,943	6	1	4	1
Taejon	1,370,795	6	1	5	0
Ulsan	1,027,815	5	2	2	1
Kyonggi-Do	8,992,947	41	11	19	11
Kangwon-Do	1,554,437	9	4	5	0
Chungchongbuk-Do	1,492,293	7	2	4	1
Chungchongnam-Do	1,919,230	11	4	7	0
Chollabuk-Do	2,003,553	10	6	0	4
Chollanam-Do	2,146,768	13	10	2	1
Kyongsangbuk-Do	2,802,337	16	10	3	3
Kyongsangnam-Do	3,082,607	16	7	7	2
Cheju-Do	539,519	3	2	0	1
Total	47,424,300	227	73	109	45

population ratio: population ratio between the population of a particular electoral district and that of the least populous electoral district

1. Population of Smallest Electoral District ("Kyongbuk Koryong-Kun and Seongju-Kun" Electoral District): 90,190
2. Population of Largest Electoral District ("Kyonggi Uijongbu" Electoral District): 350,118 (3.88:1)
3. Population of Instant Electoral District ("Kyonggi Anyang Dongan-Ku" Electoral District): 328,383 (3.64:1)

Appendix 3

Table of Population Disparity in the National Assembly Electoral Districts

Classification / Region	Population (as of 03/22/00)	Number of Electoral Districts	No. of Electoral Districts with population disparity of ±33⅓ or less	No. of Electoral Districts with population disparity between ±33⅓ and ±50%	No. of Electoral Districts with population disparity between ±50 and ±60%	No. of Electoral Districts with population disparity of ±60 or more
Seoul	10,291,043	45	38	3	2	2
Pusan	3,812,489	17	12	5	0	0
Taegu	2,513,380	11	6	3	1	1
Incheon	2,514,144	11	7	3	1	0
Kwangju	1,360,943	6	5	1	0	0
Taejon	1,370,795	6	6	0	0	0
Ulsan	1,027,815	5	3	1	1	0
Kyonggi-Do	8,992,947	41	27	9	2	3
Kangwon-Do	1,554,437	9	5	2	2	0
Chungchong-buk-Do	1,492,293	7	5	1	0	1
Chungchong-nam-Do	1,919,230	11	7	2	2	0
Chollabuk-Do	2,003,553	10	3	4	2	1
Chollanam-Do	2,146,768	13	6	5	2	0
Kyongsang-buk-Do	2,802,337	16	6	7	2	1
Kyongsang-nam-Do	3,082,607	16	8	5	2	1
Cheju-Do	539,519	3	2	0	1	0
Total	47,424,300	227	146	51	20	10

population disparity: population deviation from the average population of electoral districts

1. Average Population of Electoral Districts: 208,917
2. Population of Smallest Electoral District ("Kyongbuk Koryong-Kun and Seongju-Kun" Electoral District): 90,190 (-57%)
3. Population of Largest Electoral District ("Kyonggi Uijongbu" Electoral District): 350,118 (+68%)
4. Population of Instant Electoral District ("Kyonggi Anyang Dongan-Ku" Electoral District): 328,383 (+57%)

Aftermath of the Case

The Constitutional Court rendered a decision of unconstitutionality on December 27, 1995, in the first Redistricting Plan case brought before the Court. At the time, the Court ruled that the permissible maximum deviation of population should be 60% of average population of electoral districts (equivalent to setting the permissible maximum ratio between the most populous district and the least at 4:1). Through the instant case, the Court changed its previous ruling and adopted the 50% deviation criterion (in this case, the maximum ratio between the most populous district and the least populous district would be 3:1), a stricter standard, to review the constitutionality of population disparities, thus moving a step closer to achieving equality in the value of votes.

The legislature is forced to overhaul the current Election Redistricting Plan following the Court's decision, and the National Assembly Election in 2004 will be held under the revised Redistricting Plan employing a more strict criterion on population disparities between electoral districts.

People from various social circles, including those from the legal profession and media, admitted that the Court's decision was inevitable to remedy the existing population disparities between electoral districts. Politicians from the ruling and opposition parties issued comments that while they respected the Court's decision, it would require much work to prepare a revision for the present Election Redistricting Plan because such factors as representation of rural and urban areas and the total number of seats in the National Assembly have to be factored in, and that this would call for a prudent approach, by gathering diverse opinions through debates and hearings.

4. *Act on the Immigration and Legal Status of Overseas Koreans* Case

(13-2 KCCR 714, 99Hun-Ma494, November 29, 2001)

Contents of the Decision

1. A case where subject matters of review were expanded to provisions in the Enforcement Decree inseparable from provisions of the Act on review.
2. Whether it is possible to file a constitutional complaint against provisions of an act before its promulgation.
3. Whether an Act bestowing benefits upon its legislation could infringe on the citizens' basic rights.
4. Whether a foreigner is entitled to basic rights.
5. Whether it violates the principle of equality not to apply the Act on the Immigration and Legal Status of Overseas Koreans to ethnic Koreans with foreign nationalities who emigrated prior to the establishment of the Republic of Korea, which make up most of the ethnic Koreans in China and the former Soviet Union.
6. Decision of nonconformity to the Constitution and ordering temporary application of provisions declared nonconforming to the Constitution.
7. A case where the decision of unconstitutionality of the definition provision was accounted by the decision of unconstitutionality on related provisions.

Summary of the Decision

1. Complainants only requested the constitutional review on Article 2[2] of the Act on the Immigration and Legal Status of Overseas Koreans. However, Article 3 of the Enforcement Decree of the Act, on the Immigration and Legal Status of Overseas Koreans, concretizes Article 2[2] of the Act, and they regulate the same legal matter as an inseparable entity. Moreover, provisions of an enforcement decree cannot exist without provisions of the parental Act. Thus, the Court should include the above provision of the Enforcement Decree in the subject matter of review, and Article 3[2] of the Enforcement Decree, the provision decisively excluding ethnic Koreans who emigrated prior to the establishment of the Republic of Korea, should be include as a matter of course. Also, since the complainants filed the instant

constitutional complaint for pseudo legislative omission of the Act which bestowed certain benefits to ethnic Koreans with foreign nationalities but denied the complainants the privileges set out in the Act, alleging that such legislation was against the principle of equality, Article 3[1] of the Enforcement Decree should also be included in the subject matter of review.

2. Unless the President vetoes a bill and ultimately abrogates it, a bill retains its identity and becomes an act after its promulgation. Therefore, a constitutional complaint against such an act.

3. In the case of an "act bestowing certain benefits," an individual who is excluded as a beneficiary under the act becomes a party and can claim that his or her right to equality has been violated by such legislation. If a decision of unconstitutionality or nonconformity to the Constitution could effectively recover the state of equality for such individuals discriminated by the Act in relation to individuals benefited by the Act, then an infringement on the basic rights is recognized.

4. A "foreigner" has a status similar to that of a "national," and therefore, a foreigner is entitled to the basic rights in principle.

5. The Act on the Immigration and Legal Status of Overseas Koreans provide a wide range of benefits to ethnic Koreans with foreign nationalities living abroad. The provisions on review in the instant case distinguish ethnic Koreans who emigrated before the establishment of the Republic of Korea from those who emigrated after the establishment of the Republic, and the Act provides various privileges to those belonging to the latter group, while denying those in the first group the same privileges. However, ethnic Koreans belonging to these two categories are identical in that they are ethnic Koreans with foreign nationalities. Whether an ethnic Korean emigrated before the establishment of the Republic of Korea or after is not a critical factor in the matter. However, the Act basically grants all the requests of those who emigrated to a foreign country after the establishment of the Korean Government (mostly Korean-Americans, especially first generation Korean-Americans with US citizenship), while ethnic Koreans who emigrated before the establishment of the Korean Government (mainly ethnic Koreans in China and the former Soviet Union) were not included in the scope of application of the Act, thereby being denied opportunities they desperately seek - opportunities to enter and exit and opportunities for employment in Korea. While the State cites socioeconomic and security reasons for this discriminatory legislation, such argument cannot be said to have gone through a thorough renew in the light of the fact that lawmakers originally planned to include ethnic Koreans who emigrated before the establishment of the Korean Government but excluded them in the latter process of legislation. The definition clause in the Act pro-

fesses adoption of a neutral standard based on the former nationality of ethnic Koreans. However, the provision in the Enforcement Decree requires those ethnic Koreans who emigrated before the establishment of the Korean Government, mostly ethnic Koreans living in China or the former Soviet Union who were forced to leave their motherland to join the independence movement, or to avoid military conscription or forced labor by the Japanese imperialist force, to prove that they were explicitly recognized as Korean nationals before becoming foreign citizens. Such requirement which effectively excludes these ethnic Koreans from receiving benefits under the Act does not have a legitimate basis. In sum, the statutory provisions in the instant case denying the complainants and other ethnic Koreans who emigrated before the establishment of the Republic of Korea the privileges under the Act, are arbitrary legislation without legitimate justifications, and they are against the principle of equality stated by Article 11 of the Constitution.

6. Legislators are free to choose a particular means among many options to restore the state of constitutionality when it is found that a statute is against the constitutional principle of equality. If the Court renders a decision of simple unconstitutionality, all ethnic Koreans with foreign nationalities will be deprived of privileges they enjoy under the Act from the time of the Court's decision. This would bring a vacuum in law and much confusion in society, inadmissible to a Government by the rule of law. Therefore, the Court finds the instant provisions nonconforming to the Constitution but orders them to remain effective temporarily until the legislature revises the Act. The legislature has to revise the Act by December 31, 2003 or the Act becomes invalid.

7. The statutory provisions on review in the instant case are definition clauses. The decision of unconstitutionality of a definition clause would accompany the recognition of unconstitutionality of other provisions in the Act dealing with ethnic Koreans with foreign nationalities, and it would be the same with lower rules, namely, the Enforcement Decree and the Enforcement Rule. Therefore, if legislators do not revise the Act in accordance with the Constitution by December 31, 2003, all related provisions in the Act, the Enforcement Decree, and the Enforcement Regulation would become null and void as of January 1, 2004.

Justice Kwon Seong's Concurring Opinion

The statutory provisions in the instant case use regional factors to decide the scope of application of the Act. In other words, under the present Act, ethnic Koreans who emigrated before the establish-

ment of the Korean Government are classified into different categories based on whether there is a Korean diplomatic establishment such as an embassy or a consulate in the country of their residence, after the establishment of the Korean Government. A strict standard should be used for the equality review of discrimination based on such a factor. Article 11(1) of the Constitution prohibits discrimination based on gender, religion or social status, and any actions constituting discrimination in these domains should be scrutinized under a strict standard. In addition, discrimination based on regional background or racial factors, being equally detrimental to social harmony, should also be reviewed using a strict standard. Under the standard of strict scrutiny, the instant statutory provisions discriminating against ethnic Koreans who were not explicitly recognized as Korean nationals before becoming foreign citizens violates the principle of proportionality, and hence, is against the principle of equality.

Dissenting Opinions of Justices Yun Young-chul, Han Dae-hyun and Ha Kyung-chull

In a constitutional case where the violation of the principle of equality becomes an issue, the Court should not make its decision based on whether a particular legislation is the "most reasonable and appropriate means" but on whether such legislation is "arbitrary or not." Under the arbitrariness renew, legislation bestowing benefits to citizens such as the instant Overseas Koreans Act is constitutional even if the means employed in the Act may not be enough to realize the legislative objective to the fullest extent. In other words, the legislature needs not simultaneously address all the problems associated with the legislative purpose. Instead, it may take one step at a time, and may choose to deal with an issue that seems most acute at the time of legislation. Ethnic Koreans living abroad face different political, diplomatic, economic, and social conditions depending on the countries of their residence. Upon legislation of the Act on the Immigration and Legal Status of Overseas Koreans, the National Assembly recommended "Three Items to Improve the Present Legal System Dealing with Overseas Ethnic Koreans," and accordingly, the Ministry of Justice has reviewed measures to provide ethnic Koreans in China with more opportunities to obtain Korean nationality and other means to relieve restrictions. Moreover, it is not unreasonable to take necessary measures to avoid potential diplomatic friction that may arise if dual citizenship is allowed, for it is the international custom not to allow dual citizenship as much as possible. Therefore, classification made by the instant provisions is not arbitrary.

Provisions on Review

Act on the Immigration and Legal Status of Overseas Koreans (revised by Act No. 6015 on September 2, 1999)

Article 2 (Definitions)

The term "overseas Korean" in this Act means a person who falls under any of the following subparagraphs:

1. [omitted]

2. A person prescribed by presidential decree, among those who once held the nationality of the Republic of Korea or their lineal descendants, but who now has the nationality of a foreign country (hereinafter referred to as an "Ethnic korean with foreign nationality").

Enforcement Decree of the Act on the Immigration and Legal Status of Overseas Koreans (revised by Presidential Decree No. 16602 on November 27, 1999)

Article 3 (Definition of Ethnic Korean with Foreign Nationality)

"A person prescribed by presidential decree among those who once held the nationality of the Republic of Korea or their lineal descendants, but who now obtain the nationality of a foreign country" as used in Article 2[2] of the Act means a person who falls under any of the following subparagraphs:

1. A person or lineal descendant of a person who emigrated after the establishment of the Korean Government and who lost the Korean nationality; and

2. A person or lineal descendant of a person who emigrated after the establishment of the Korean Government and who was explicitly recognized as a Korean national before obtaining the nationality of a foreign country.

Related Precedents

2. 12-2 KCCR 167, 97Hun-Ka12, August 31, 2000

4. 6-2 KCCR 477, 93Hun-Ma120, December 29, 1994

7. 95Nu11405, Supreme Court, April 9, 1996

Parties

Complainants

1. Cho and 2 others
   Counsel: Lee Seok-yeon

Holding

1. Article 2[2] of the Act on the Immigration and Legal Status of Overseas Koreans (revised by Act No.6015 on September 2, 1999) and Article 3 of the Enforcement Decree of the Act on the Immigration and Legal Status of Overseas Koreans (revised by Presidential Decree No. 16602 on November 27, 1999) are nonconforming to the Constitution.

2. The instant statutory provisions shall remain effective temporarily until the legislature revises the Act by December 31, 2003.

Reasoning

1. Overview of the Case and the Subject Matter of Review

A. Overview of the Case

The National Assembly legislated the Act on the Immigration and Legal Status of Overseas Koreans to facilitate overseas Koreans' entry into and departure from the Republic of Korea and to stabilize their legal status in Korea. On August 12, 1999, the National Assembly passed the bill, in an extraordinary session, and the bill was sent to the President on August 19, 1999. The President promulgated the Act (Act no. 6015) on September 2, 1999, and the Act entered into force on December 3, 1999.

Complainants are ethnic Koreans with Chinese nationality and currently reside in the Republic of China (hereinafter called "China"). On August 23, 1999, the complainants filed a constitutional complaint, arguing that Article 2[2] of the Act on the Immigration and Legal Status of Overseas Koreans excluding a person and linear descendents of a person who emigrated before the establishment of the Korean Government in 1948 from overseas Koreans as specified on th Act, thus denying the privileges bestowed by the Act, violated the human dignity and worth clause and the right to pursue happiness (Article 10 of the Constitution) as well as the right to equality (Article 11 of

the Constitution).

B. Subject Matter of Review

(1) Complainants' Request for Constitutional Review

Complainants filed a constitutional complaint only against Article 2[2] of the Act on the Immigration and Legal Status of Overseas Koreans (revised by Act No.6015 on September 2, 1999, hereinafter called the "Overseas Koreans Act"). Contents of Article 2 of the Overseas Korean Act and Article 3 of the Enforcement Decree of the Act (revised by Presidential Decree No.16602 on November 27, 1999) related to Article 2 of the Act are as follows:

Act on the Immigration and Legal Status of Overseas Koreans (revised by Act No. 6015 on September 2, 1999)

Article 2 (Definitions)

The term "overseas Korean" in this Act means a person who falls under any of the following subparagraphs:

1. A national of the Republic of Korea who has obtained the right of permanent residence in a foreign country or is residing in a foreign country with an intent to living permanently there (hereinafter referred to as a "Korean national residing abroad"); and

2. A person prescribed by presidential decree, among those who once held the nationality of the Republic of Korea or their lineal descendants, but who now has the nationality of a foreign country (hereinafter referred to as an " Ethnic korean with foreign nationality").

Enforcement Decree of the Act on the Immigration and Legal Status of Overseas Koreans (revised by Presidential Decree No. 16602 on November 27, 1999)

Article 3 (Definition of Ethnic Korean with Foreign Nationality)

"A person prescribed by presidential decree among those who once held the nationality of the Republic of Korea or their lineal descendants, but who now obtain the nationality of a foreign country" as used in Article 2[2] of the Act means a person who falls under any of the following subparagraphs:

1. A person or lineal descendant of a person who emigrated after the establishment of the Korean Government and who lost the Korean nationality; and

2. A person or lineal descendant of a person who emigrated

after the establishment of the Korean Government and who was explicitly recognized as a Korean national before obtaining the nationality of a foreign country.

(2) Expansion of Subject Matter of Review

Persons to whom the Overseas Koreans Act is applied to "a Korean national residing abroad", or a national of the Republic of Korea who has obtained the right of permanent residence in a foreign country or is residing in a foreign country with the intention to permanently live in a foreign country (Article 2[1] of the Overseas Koreans Act), and "a Korean with foreign nationality", or a person or lineal descendants of a person who was a Korean national but obtained the nationality of a foreign country and who was designated by a presidential decree to be subject to the Act (Article 2[2] of the Overseas Koreans Act). However, Koreans with foreign nationalities are classified into two groups: one group consists of persons or lineal descendents of person who emigrated after the establishment of the Korean Government and who lost their Korean nationality (Article 3[1] of the Enforcement Decree of the Act); the other consists of persons or lineal descendants of a person who emigrated after the establishment of the Korean Government and who were explicitly recognized as Korean nationals before obtaining the nationality of a foreign country (Article 3[2] of the Enforcement Decree of the Act). As a consequence, the Overseas Koreans Act deny the application of the Act to ethnic Koreans with foreign nationalities who are "persons or lineal descendants of persons who emigrated before the establishment of the Korean Government and who were not explicitly recognized as Korean nationals before obtaining the nationality of a foreign country" (hereinafter called "ethnic Koreans who emigrated before the establishment of the Korean Government"). As seen above, Article 3 of the Enforcement Decree of the Overseas Koreans Act concretizes Article 2[2] of the Act, and they regulate the same legal matter as an inseparable entity. Moreover, provisions of an enforcement decree cannot exist without provisions of the parental Act. Thus, the Court should include the above provision of the Enforcement Decree in the subject matter of review, and Article 3[2] of the Enforcement Decree, the decisive provision excluding ethnic Koreans who emigrated before the establishment of the Republic of Korea, should be included as a matter of fact. Also, since the complainants filed the instant constitutional complaint for pseudo legislative omission of the Act which was legislated to bestow certain benefits to ethnic Koreans with foreign nationalities but denied the complainants the privileges set out in the Act, alleging that such legislation was against the principle of equality, Article 3[1] of the Enforcement Decree should also be

included in the subject matter of review. Therefore, the Court will review the constitutionality of both Article 2[2] of the Overseas Koreans Act and Article 3 of the Enforcement Decree of the Act (hereinafter called the "statutory provisions of the instant case").

2. Complainants' Arguments and Opinions of Related Agencies

A. Complainants' Arguments

(1) The Nationality Act adopts Jus Sanguinis (Article 2(1)[1], 2(1)[2] of the Nationality Act), and Article 2(2) of the Constitution makes it a duty of the State to protect citizens residing abroad. Ethnic Koreans with foreign nationalities are included in the category of citizens living abroad in the broad sense. It would violate the human dignity and worth clause and the right to pursue happiness protected by Article 10 of the Constitution to exclude complainants and other ethnic Koreans who emigrated before the establishment of the Korean Government when legislating to protect other citizens residing abroad.

(2) Ethnic Koreans who emigrated before the establishment of the Korean Government and persons or lineal descendants of persons who emigrated after the establishment of the Korean Government and who lost their Korean nationality (hereinafter called "ethnic Koreans who emigrated after the establishment of the Korean Government") are identical in that they are ethnic Koreans with foreign nationalities. The Overseas Koreans Act which provides diverse privileges only to ethnic Koreans who emigrated after the establishment of the Korean Government upon the arbitrary standard of whether a person had the Korean nationality in the past, is discrimination without a reasonable basis, and violates the essential aspect of the right of equality stated in Article 11(1) of the Constitution.

(3) The statutory provisions in the instant case effectively limit the scope of ethnic Koreans with Foreign nationality to those who emigrated after the establishment of the Korean Government. This is tantamount to negating the legitimacy of the Provisional Republic of Korea Government, and it is against the Preamble of the Constitution, stating that the Republic of Korea upholds the cause of the Provisional Republic of Korea Government born of the March First Independence Movement of 1919.

B. Opinion of the Minister of Justice

(1) Legal Prerequisites

(A) A constitutional complaint filed against legislative omissions can be approved on limited conditions such as a legislative failure to perform a duty to enact a particular legislation that the Constitution expressly delegated to the legislature to protect certain basic rights. The instant case does not meet the required conditions, and the constitutional complaint against the instant legislative omission is inappropriate. Moreover, if an Act is to be subject to a constitutional review, it has to be at least promulgated, but the complainants filed this constitutional complaint against the Overseas Koreans Act on August 23, 1999, before the Act was promulgated. The instant complaint is also improper on these ground.

(B) A constitutional complaint based on Article 68(1) of the Constitutional Court Act can be filed only by an individual whose basic rights has been violated. The Overseas Koreans Act does not give rise to and bestow specific rights to certain individuals, and what some ethnic Koreans living abroad receive upon implementation of the Act are only incidental benefits. Therefore, even if the complainants were denied such benefits, the instant complaint does not satisfy legal prerequisites of a constitutional complaint.

(C) The complainants are "foreigners" with Chinese nationality. A natural person with foreign nationality can only file a constitutional complaint against the violation of natural basic rights. The Overseas Koreans Act is not a legislation about natural human rights, and the right of equality is generally not a basic right guaranteed to foreigners. Therefore, a foreigner cannot be a bearer of a basic right with regard to the Overseas Koreans Act, and the complaint filed by the complainants who are foreigners is not legally sufficient.

(D) There is no evidence that the complainants are ethnic Koreans who emigrated to a foreign country or their lineal descendents (The only evidence regarding qualification of the complainants is a copy of passports proving that the complainants are Chinese nationals). Therefore, the complaint does not meet the prerequisite of self-relatedness, or the requirement that the restriction on basic rights by the instant provisions must be related to the complainants themselves, and hence, is inadequate.

(2) Review on the Merits

(A) There is a reason why the Overseas Koreans Act adopted the

"Past Nationality Principle" when defining ethnic Koreans with foreign nationalities. Legislation adopting "Jus Sanguinis", or the principle that a person's citizenship is determined by the citizenship of the parents, would be against the general principle of the public international law and is contrary to international customs. Moreover, it could bring about diplomatic friction with other countries. The definition is also too vague so that it may be applied without limit. Also it may result in violating the international public law prohibiting discrimination of individuals based on race or nationality. Therefore, current international customs have adopted the "Past Nationality Principle". Ethnic Koreans in China and the former Soviet Union are excluded and denied the privileges under the Act as a consequence of adopting the "Past Nationality Principle", which explicitly stipulates the aforementioned process of confirming ethnic Koreans with foreign nationalities. There was no legislative intention to unreasonably discriminate against these individuals.

(B) Provisions in the Overseas Koreans Act aim to ease restrictions imposed on economic activities of ethnic Koreans with foreign nationalities based on their preemptive rights in Korea. Therefore, the necessity to apply these provisions to ethnic Koreans who emigrated before the establishment of the Korean Government is weak because they do not have any preemptive rights in Korea. Simplification of regulations on entry and exit of ethnic Koreans who emigrated before the establishment of the Korean Government could lead to an influx of ethnic Koreans with Chinese nationality, relatively low-waged workers, into the nation's labor market and cause a significant number of social problems. Under the ongoing South-North confrontation, there is also the risk of it being used by North Koreans as a route for infiltration, thereby causing immediate security threats. It is also very likely that the State will face diplomatic frictions with China who is extremely sensitive to nationalism among racial minorities within its border if the Act were to include ethnic Koreans who emigrated before the establishment of the Korean Government as potential beneficiaries of the Act. In this light, it can be concluded that the legislators stayed within the boundary of their legislative discretion when determining the scope of overseas Koreans to receive lightened regulation in such areas as exit from and entry in to the country with due consideration to such factors as socio-economical stability and preventing unexpected danger.

(C) If the Court renders a decision of unconstitutionality against the statutory provisions in the instant case, the instant provisions of the Overseas Korean Act will become null and void. Thus about 13,000 individuals from 60 countries including the United States of America, Germany, Argentina, and New Zealand, currently receiving

benefits under the Act, may be forced to leave the country immediately, or suffer restriction in real estate dealings or financial transactions. Such unexpected change in law will cause much demage to innocent individuals.

3. Review on Legal Prerequisites

The Minister of Justice challenged the legal sufficiency of the case on the following grounds: whether it is legitimate to file a constitutional complaint against legislative omission in the instant case; whether there actually exists infringement on basic rights; whether a foreigner is entitled to basic rights; and whether the complainants meet the prerequisite of self-relatedness. Therefore, the Court will first examine these issues.

A. Legitimacy of the Constitutional Complaint

(1) Constitutional Complaint against a Legislative Omission

There are two types of legislative omissions: genuine legislative omissions and pseudo legislative omission. A constitutional complaint challenging a pseudo legislative omission must have a certain provision as a subject, and affirmatively state the specific constitutional violations such as the violation of the principle of equality caused by the provisions of defective legislation (8-2 KCCR 480, 489, 94Hun-Ma108, October 4, 1996; 12-1 KCCR 556, 565, 99Hun-Ma76, April 27, 2000). The statutory provisions on review in the instant case provide certain benefits to some ethnic Koreans with foreign nationalities but deny the complainants and other ethnic Koreans who emigrated before the establishment of the Korean Government such benefits because of the limited scope of the application of the Act. In other words, the problem in the case is not that the legislature did not have a legislation on overseas Koreans, especially ethnic Koreans with foreign nationalities, but that the legislation was imperfect or insufficient. Therefore, it is a case of a pseudo legislative omission, and the complaint challenging the constitutionality of the statutory provisions in the light of the principle of equality is legitimate.

(2) Constitutional Complaint against an Act before Its Promulgation

Unless the President vetoes a bill, the President has to promulgate it within fifteen days after receiving the bill from the legislature. If the President does not promulgate the bill within the lim-

ited period of fifteen days, the bill becomes law (Article 53(5) of the Constitution). Therefore, unless the President vetoes the bill and ultimately abrogates it, a bill retains its identity and becomes an act after its promulgation. In its earlier decision, the Court included a transitional clause of the new law which was not in existence at the time of the request for constitutional review in the subject matter for review (12-2 KCCR 167, 172, 97Hun-Ka12, August 31, 2000). In the light of this precedent, as long as the Act was promulgated and entered into force after the request for constitutional review, and complaints argue that basic rights, such as equality rights, have been infringed by the law, a constitutional complaint against provisions of the Act cannot be dismissed just because it was not promulgated at the time of the request for constitutional adjudication.

B. Infringement on the Basic Rights

In case of an "act infringing on people's rights", an individual whose basic rights have been violated by regulation or restriction imposed by the act becomes a party claiming an infringement on his or her rights. On the other hand, in case of a "statute bestowing certain benefits", an individual who is excluded from receiving benefits under the act becomes a party claiming that his or her right to equality has been violated by such legislation. In such case, the Court could decide that there is an infringement on the basic rights if a decision of unconstitutionality or nonconformity to the Constitution could effectively put an end to discrimination against such individual from the beneficiaries of the act. In the instant case, the complainants claim that there is a violation of the right of equality because the provisions of the instant Act deny the complainants the privileges accorded by the Act, and the Court can review the case based on its merits to put an end to such discrimination.

C. Foreigner's Entitlement to Basic Rights

A constitutional complaint under Article 68(1) of the Constitutional Court Act can only be filed by individuals whose basic rights have been violated. Qualification for an individual to be a complainant whose basic rights has been violated means that only a person who is a bearer of basic rights can file a constitutional complaint. In its earlier decision, the Court ruled that a "national" or a "foreigner" who has a status similar to that of a national can be the bearer of basic rights (6-2 KCCR 477, 480, 93Hun-ma120, December 29, 1994). Thus a foreigner is entitled to basic rights in principle. The complainants argue that their human dignity and worth and right to pur-

sue happiness have been violated by the instant provisions. These are "human rights", and a foreigner can be the bearer of these rights. The right to equality is also a human right, and a foreigner's right to equality can only be limited subject to the nature of the right concerned, such as the right to political participation, or the principle of reciprocity. In the instant case, the complainants do not assert their rights of equality in comparison to Korean nationals. They allege that their right of equality has been violated because of discrimination between ethnic Koreans with foreign nationalities. In this case, the complainants are entitled to the right of equality without any restriction imposed by the nature of the right concerned or the principle of reciprocity. Therefore, the complainants can be recognized as bearers of basic rights.

D. Self-relatedness

Self-relatedness in a constitutional complaint is whether the statutory provisions on review could "possibly infringe on" the complainant's basic rights (47 KCCG 604, 409, 99Hun-Ma289, June 29, 2000). Since a constitutional complaint has the dual purpose, namely, the "subjective" function of providing legal relief to particular individuals and the "objective" function of protecting the constitutional order, the Court could recognize self-relatedness if the complainant successfully persuades the Court that he or she is the bearer of the basic rights at issue (6-2 KCCR, 395, 407, 89Hun-Ma2, December 29, 1994). Complainant Cho is an individual who emigrated to Manchuria from Soonchon Chollanam-Do in 1944 to escape forced labor upon receiving a conscription notice by the Japanese colonialists, and Complainants Moon and Chun are second-generation ethnic Koreans whose parents emigrated to Manchuria to avoid Japanese exploitation. The complainants argue that they are being discriminated against, through the Overseas Koreans Act, and based on their argument, the Court can recognize that the complainants are indeed the bearers of the basic rights at issue. Therefore, self-relatedness in this case cannot be denied.

4. Review on Merits

A. Legislative Purpose and Contents of the Overseas Koreans Act

(1) The legislative purposes of Overseas Koreans Act regarding ethnic Koreans with foreign nationalities are as follows (Gazette of the Korean Government 8-9, September 2, 1999). The Act has been

legislated to promote globalization of the Korean society by encouraging more active participation of ethnic Koreans living abroad in all spheres of the Korean society. The Act aims to encourage investment in Korea by simplifying regulations with regards to entry and exit, acquisition of real estate, financial transaction, and foreign exchange dealings of ethnic Koreans. Also, the Act focuses on dissolving the discontents overseas Koreans have for their motherland, by selectively accepting their demands exemplified in their call for dual citizenship, while removing the side-effects on granting dual citizenship, such as problems regarding military service, taxes, and diplomatic relations, as well as the obstruction of national unity.

(2) The basic contents of the Overseas Koreans Act include the following. First, the Act subdivides ethnic Koreans living abroad into two groups, namely, Korean nationals residing abroad and ethnic Koreans with foreign nationalities (Article 2). The Act applies with respect to the entry into and departure from the Republic of Korea and the legal status therein of Korean nationals residing abroad and ethnic Koreans with foreign nationalities who have the status of sojourner (Article 3). Ethnic Koreans with foreign nationalities can stay in Korea with the status of sojourner for two years, apply for extension of the length of their sojourn, and enter or depart from Korea without reentry permission from the State during such period (Article 10(1) - (3)). The Act guarantees ethnic Koreans with foreign nationalities who have obtained the status of sojourner the freedom of employment and other economic activities within the scope that they do not impair social order or economic stability (Article 10(5)). They are entitled to equal rights with a Korean national in terms of the acquisition, possession, utilization, and disposal of real estate in the Republic of Korea except lands within military installations protection zone (Article 11(1)), and they will be made exempt from forced performance charges or fines as long as they register real estate originally registered in the name of a title transferee under actual titleholder's name or dispose of the real estate through sale within one year after the Overseas Koreans Act enters into force (Article 11(2)). Ethnic Koreans with foreign nationalities also have equal rights to Korean nationals in the use of domestic financial institutions, except in the case prescribed by Article 18 of the Foreign Exchange Transactions Act (Article 12), and those who stay longer than ninety days are entitled to medical insurance coverage pursuant to acts and subordinate statutes related to medical insurance (Article 14).

(3) The legislature made a preliminary announcement on legislation of the bill on September 29, 1998. In the original bill, "persons with Korean ancestor with foreign nationality" was defined as "an ethnic Korean who obtained the nationality of a foreign country and

who was prescribed by the presidential decree to be subject to the Act" (Gazette of the Korean Government 15-16, September 29, 1998). The original provision was amended as some pointed out that such legislation could invite diplomatic friction with neighboring countries, because it concerned on the sensitive issue involving national policies toward minorities (i.e. ethnic Koreans in China).

B. Basic Rights in Violation

The complainants argue that the statutory provisions on review violates the human dignity and worth clause and the right to pursue happiness prescribed by Article 10 of the Constitution as well as the right to equality stipulated by Article 11 of the Constitution, and that they are against the Preamble of the Constitution which states that the Republic of Korea upholds the cause of the Provisional Republic of Korea Government born of the March First Independence Movement of 1919. But, the problem at issue is that the complainants are denied privileges under the Overseas Koreans Act because of the instant provisions. The statutory provisions do not violate the human dignity and worth clause and the right to pursue happiness, hitherto enjoyed by the complainants. Therefore, the Court only needs to review whether the instant provisions violate the right of equality of the complainants in comparison to other ethnic Koreans with foreign nationalities who are granted special benefits under the Overseas Koreans Act.

C. Unconstitutionality of the Instant Statutory Provisions

(1) Meaning of the Principle of Equality

Article 11(1) of the Constitution states that "all citizens shall be equal before the law, and there shall be no discrimination in political, economic, social or cultural life on account of gender, religion, or social status." The principle of equality prescribed by Article 11(1) is the supreme principle in the field of protection of basic rights. It provides a standard which the state must abide by in interpreting or executing laws, and it is a mandate by the State not to discriminate without a reasonable basis. Everyone is entitled to the right to claim equal treatment, and the right to equality is the most basic of all basic rights (1 KCCR 1, 2, 88Hun-Ka7, January 25, 1989). The constitutional principle of equality, however, does not require absolute equality negating any form of differential treatment whatsoever. Rather, it means relative equality forbidding discrimination in legis-

lating and executing laws without reasonable basis. Therefore, differentiation or inequality with reasonable basis is not against the principle of equality. Whether a discrimination is grounded on a reasonable basis or not depends on whether such discrimination is a necessary and adequate means to achieve a legitimate legislative purpose, while upholding the constitutional principle for respect for human dignity (6-1 KCCR, 72, 75, 92Hun-Ba43, February 24, 1994; 10-2 KCCR 461, 476, 98Hun-Ka7 and etc., September 30, 1998).

(2) Standard and Effect of Discrimination

(A) The Act classifies a group of Koreans with foreign nationalities (Article 2[2] of the Overseas Koreans Act) into two categories: one group consists of persons or lineal descendents of persons who emigrated after the establishment of the Korean Government and who lost Korean nationality (Article 3[1] of the Enforcement Decree of the Act); the other consists of persons or lineal descendants of persons who emigrated after the establishment of the Korean Government and who were explicitly recognized as Korean nationals before obtaining the nationality of a foreign country (Article 3[2] of the Enforcement Decree of the Act). As a consequence, the Overseas Koreans Act deny the privileges under the Act to ethnic Koreans with foreign nationalities who are "persons or lineal descendants of persons who emigrated before the establishment of the Korean Government and who were not explicitly recognized as Korean nationals before obtaining the nationality of a foreign country". This is because of the following reasons: According to Article 2(1) of the Enforcement Regulation of the Act on the Immigration and Legal Status of Overseas Koreans, "a person who was explicitly recognized as a Korean national" is an individual who registered oneself at one of the Korean diplomatic establishments or at other authorized agencies or organizations in the country of his or her residence, pursuant to the provisions of the Registration of Korean Nationals Residing Abroad Act (enacted on November 24, 1949 as Act No.70; wholly amended on December 28, 1999 by Act No. 6057); Because Korea and China agreed to establish diplomatic relations with each other on August 24, 1992 and because the Korean embassy in China opened on August 28, 1992 (The Beijing Office of the Korea Trade-Investment Promotion Agency, or KOTRA, opened on January 30, 1991), it was physically impossible for ethnic Koreans in China to fulfill the registration requirement; The situation is not much different for Koreans living in the former Soviet Union ("Investigation Report" on the Bill on the Immigration and Legal Status of Overseas Koreans by the Legislation and Judiciary Committee of the National Assembly, p. 8, August 1999).

(B) The statutory provisions on review are definition clauses on ethnic Koreans with foreign nationalities, and an individual classified as an ethnic Korean with a foreign nationality under the Act receives a wide variety of benefits and privileges as seen above. In principle, ethnic Koreans with foreign nationalities are "foreigners", and, therefore, they cannot become public officials of the Republic of Korea (Article 35 of the State Public Officials Act; Article 33 of the Local Public Officials Act; Article 9 of the Diplomatic Public Officials Act). They also cannot enjoy the freedom of residence and the right to move at will (Article 14 of the Constitution; Article 7 and 17 of the Immigration Control Act), freedom of occupation (Article 15 of the Constitution; Article 5 of the Fisheries Act; Article 6 of the Pilotage Act), right to property (Article 23 of the Constitution; Article 3 of the Foreigner's Land Acquisition Act; Article 25 of the Patent Act; Article 6 of the Aviation Act), right to vote and right to hold public office (Article 24 and 25 of the Constitution; Article 15 and 16 of the Act on the Election of Public Officials and the Prevention of Election Malpractices), right to claim compensation (Article 29(2) of the Constitution; Article 7 of the State Compensation Act), right to receive aid for injury from criminal acts (Article 30 of the Constitution; Article 10 of the Crime Victims Aid Act), right to vote on Referendum (Article 72 and 130(2) of the Constitution; Article 7 of the National Referendum Act) and other social rights, or can only enjoy them in a limited fashion (12-2 KCCR 167, 183, 97Hun-Ka12, August 31, 2000). The Overseas Koreans Act lifts some of these restrictions for a limited group of ethnic Koreans with foreign nationalities, and the standard employed to distinguish qualified beneficiaries under the Act discriminates against the complainants and other ethnic Koreans who emigrated before the establishment of the Republic of Korea in their exercise of basic or legal rights.

(3) Violation of the Right to Equality

(A) The principle of equality prohibits the legislature from treating essentially equal things arbitrarily unequally, or treating unequal things arbitrarily equally. The legislature violates the principle of equality when it enacts laws discriminating facts that are essentially equal without reasonable justification for the discrimination. When things being compared are identical not in every aspect, but only in certain aspects, whether to see them as identical in legal terms or not depends on the standard employed to determine such identity. In general, such standard draws upon the intent and meaning of the statute in question (8-2 KCCR 680, 701, 96Hun-Ka18, December 26, 1996). As we have seen previously, the provisions on review distinguish ethnic Koreans who emigrated after the establishment of the

Republic of Korea, mostly Korean-Americans in the US or ethnic Koreans in European countries, from those who emigrated before the establishment of the Republic of Korea, mainly ethnic Koreans in China and the former Soviet Union. The Overseas Koreans Act provides various privileges to those belonging to the first group while denying those in the latter group the same privileges. However, ethnic Koreans belonging to these two categories are identical in that they are ethnic Koreans with foreign nationalities. The only difference between them is the time of their emigration. This difference is not so essential as to affect equal treatment of individuals belonging to the two groups. In other words, whether ethnic Koreans emigrated before or after the establishment of the Republic of Korea cannot be a decisive factor warranting discrimination between the two groups.

(B) Legislation discriminating a group of people from others naturally has a specific legislative objective. In order for such discrimination with regard to basic rights to be a reasonable one, the objective should be legitimate and in accordance with the Constitution. In addition, the standard for such discrimination should be substantially related to the legislative purpose, and resulting discrimination should not be excessive (8-2 KCCR 46, 56, 93Hun-Ba57, August 29, 1996).

The Overseas Koreans Act provides a wide scope of benefits and privileges to an ethnic Korean who emigrated to a foreign country after the establishment of the Korean Government, and virtually grants him or her a status as that of a dual citizenship. However, the statutory provisions on review deny such privileges to an ethnic Korean who emigrated before the establishment of the Korean Government, thereby treating him or her merely as another foreigner. As such, the Overseas Koreans Act grants basically all the requests of those who emigrated to a foreign country after the establishment of the Korean Government (mostly Korean-Americans, especially first generation Korean-Americans with US citizenship), while ethnic Koreans who emigrated before the establishment of the Korean Government (mainly ethnic Koreans in China and the former Soviet Union) were not included in the scope of application of the Act, thereby being denied opportunities they desperately seek - opportunities to enter and exit Korea and opportunities for employment in Korea. Supplementary measures to meet the needs of the ethnic Koreans in the latter group proposed by the Ministry of Justice are not giving sufficient help to ethnic Koreans with foreign nationalities. The fact that the Act was legislated based on the requests of ethnic Koreans who emigrated after the establishment of the Korean Government cannot be a decisive factor justifying such great discrimination. Needs of ethnic Koreans who emigrated before the establishment of the Korean

Government are equal to, if not greater than, those of ethnic Koreans who emigrated after the establishment of the Korean Government. While the State cites socio-economic and security reasons for this discriminatory legislation, such argument cannot be said to have gone through a thorough review in the light of the fact that lawmakers originally planned to include ethnic Koreans who emigrated before the establishment of the Korean Government but excluded them in the latter process of legislation. It does not seem that the State conducted a thorough research and analysis of possible results of legislation which includes ethnic Koreans who emigrated before the establishment of the Korean Government within the scope of the Act.

The State argues that ethnic Koreans who emigrated before the establishment of the Korean Government are excluded and denied the privileges under the Act as a consequence of the adoption of the "Past Nationality Principle" when defining ethnic Koreans with foreign nationalities in the Act, according to international customs. The State emphasizes that legislation adopting "Jus Sanguinis", or the principle that a person's citizenship is determined by the citizenship of the parents, would be against the general principle of public international law and contrary to international customs; that it could bring about diplomatic friction with other countries; and that the notion is too vague so that the application of the Act may be extended without limit. The State cited Ireland, Greece and Poland as countries adopting the "Past Nationality Principle" and allowing special treatment in entry and departure of expatriates who obtained the nationality of another country ("Investigation Report" on the Bill on the Immigration and Legal Status of Overseas Koreans by the Legislation and Judiciary Committee of the National Assembly, p. 8, August 1999). However, the extent of past nationality recognized in these countries is drastically different from that in the instant case. Although there may be an apprehension of diplomatic friction, the instant provisions defining ethnic Koreans with foreign nationalities cannot be seen as a necessary and adequate legislation resulting from a through review of policy alternatives. Instead of enacting a singular special act to address the existing difficulties that ethnic Koreans with foreign nationalities face in Korea, the State should first have reviewed if it would be possible to achieve the same objective by individually relieving restrictions, considering all circumstances. If legislation adopting "Jus Sanguinis" has problems, instead of approaching the matter by guaranteeing a certain legal status to ethnic Koreans with foreign nationalities, it would be better if the State started by improving the status of foreigners in Korea in general while focusing on supporting the activities aiming to instill a sense of national identity and strengthen cultural solidarity in the countries of their residence in the case of overseas Koreans.

(C) As we have seen previously (Section 4(A)(3)), ethnic Koreans who emigrated before the establishment of the Korean Government are excluded and denied the privileges under the Act not because the State adopted the "Past Nationality Principle" from the beginning. The State adopted the "Past Nationality Principle", a somewhat neutral term, in the Overseas Korean Act in defining ethnic Koreans with foreign nationalities, while through the Enforcement Decree, requiring those ethnic Koreans who emigrated before the establishment of the Korean Government, mostly ethnic Koreans living in China or the former Soviet Union who were forced to leave their motherland to join the independence movement, or to avoid military conscription or forced labor by the Japanese imperialist force, to prove that they were explicitly recognized as Korean nationals before obtaining foreign citizenship, thereby making it virtually impossible for these ethnic Koreans to receive benefits bestowed under the Act. Legislation of an act discriminating ethnic Koreans who were involuntarily displaced due to historical turmoil sweeping over the Korean peninsula cannot be justified from a humanitarian perspective, let alone from a national perspective, in the sense that no country on earth has legislated an act to discriminate against such compatriots, when it seems only appropriate to assist them. The public interest to be achieved by this legislation is too minor compared to the injury inflicted on individuals being discriminated by the Act.

Article 2 of the Overseas Korea Foundation Act (enacted on March 27, 1997, by Act No. 5313) which was legislated before the Overseas Koreans Act defines overseas Koreans as persons with the nationality of the Republic of Korea who have stayed overseas for a long time or who have obtained the permanent resident status in a foreign country (Article 2[1]) or persons with Korean lineage who reside and make a living in a foreign country regardless of their nationality (Article 2[2]). The first definition corresponds to "Korean nationals residing abroad" under the Overseas Koreans Act, and the second corresponds to "Koreans with foreign nationalities". The two Acts may differ in their respective legislative purposes, but it would lead to confusion in the application of the Acts if different definitions are to be used for the same term ("overseas Koreans") in the two Acts.

(4) Sub-conclusion

In sum, discrimination based on the statutory provisions in the instant case that deny the complainants and other ethnic Koreans who emigrated before the establishment of the Republic of Korea the privileges under the Act is arbitrary and is without legitimate reasons.

Since the standard used for such discrimination is not substantially related to achieving the legislative purpose and the extent of discrimination cannot possibly be seen as reasonable, these provisions are against the principle of equality stated in Article 11 of the Constitution, and thereby violate the complainants' right to equality.

D. Decision of Nonconformity to the Constitution and Order for Temporary Application

(1) When a statutory provision violates the Constitution, the Court must in principle issue a decision of unconstitutionality and thereby protect the normative power of the Constitution. However, when the elimination of statutory provision from the codes may cause a vacuum or confusion in law, the Court can issue a decision of nonconformity to the Constitution and leave the statutory provision temporarily effective. In other words, if an unconstitutional state of leaving the unconstitutional statutory provision temporarily effective is constitutionally far more desirable than a constitutional state of vacuum in law brought on by a decision of unconstitutionality, the Constitutional Court may need to prevent vacuum in law and the resulting disorder. The vacuum in law and the resulting disorder are unacceptable to the government by rule of law. So the most feasible decision is to leave 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 383, 417, 97Hun-Ba26, October 21, 1999).

In a case where a statute is against the principle of equality, it is up to the legislature to choose the means to restore the constitutionality in the legal order when the Constitution does not specify employment of a particular means and when there are many ways to remove the unconstitutional state at hand. The Court could render a decision of unconstitutionality to restore the state of constitutionality infringed by a violation of the principle of equality. However, this would form a legal state unprovided by the Constitution and without the consideration of the legislature, and it would ultimately infringe on the formative power of the legislature. Because of these reasons, the Court avoids the decision of simple unconstitutionality and renders a decision of nonconformity to the Constitution.

(2) The Overseas Korean Act entered into force on December 3, 1999, and according to the report submitted by the Ministry of Justice, as of August 30, 2001, 23,664 individuals reported their Korean residences under Article 6 of the Act. Of these, 10,532 are Korean nationals residing abroad, and 13,132 are ethnic Koreans with foreign nationalities. These individuals currently enjoy the privileges granted

by the Overseas Koreans Act. If the Court were to render a decision of unconstitutionality against the statutory provisions in the instant case, the aforementioned ethnic Koreans with foreign nationalities will be instantly deprived of the status they enjoy under the Act from the time of the Court's decision. Accordingly, they will be forced to leave the country immediately. They will also be forced to stop all their economic activities in Korea including real estate acquisitions and use of domestic financial institutions, and medical insurance coverage for these individuals will no longer be available. This would bring a vacuum in law and much confusion in society, inadmissible to a Government by the rule of law. To prevent such vacuum in law, the Court needs to leave the unconstitutional statutory provision temporarily effective until the legislature improves it in the manner consistent with the Constitution. Considering the unconstitutional aspects of the instant statutory provisions, the legislature should enact a revision to the Act as soon as possible, by December 31, 2003 at the latest, to remove the unconstitutional aspects of the Act.

(3) The statutory provisions on review are definition clauses. A decision of unconstitutionality of a definition clause would accompany the recognition of the unconstitutionality of related provisions. In other words, if Article 2 of the Act defining ethnic Koreans with foreign nationalities is found unconstitutional, then Article 5, 10, 11, and 16 (revised by Act No.6307 on December 29, 2000) of the Overseas Koreans Act which exclusively apply to ethnic Koreans with foreign nationalities, as well as parts of Article 6, 7, 8, 12, 14, and 17 of the Act dealing with ethnic Koreans with foreign nationalities are unconstitutional. The same applies to the provisions in the Enforcement Decree and Enforcement Regulation. This is because of the following reasons: When a provision of an act delegates the particulars of a certain matter to lower rules, such as a presidential decree, and if the Court renders a decision of unconstitutionality against the provision of the act, not only does the provision of the act but also the lower rules such as the presidential decree delegated by the instant provision lose effect; The provisions in the lower rules lose effect because there no longer exists a legal basis for formulation of these provisions when the provision in the act loses its effect upon the decision of unconstitutionality. (95Nu11405, Supreme Court, April 9, 1996). Therefore, if the legislators do not revise the Act in accordance with the Constitution by December 31, 2003, all related provisions in the Act, the Enforcement Decree, and the Enforcement Regulations will become null and void as of January 1, 2004. Accordingly, the ordinary courts, other state agencies, and local governments will not be able to apply these provisions.

5. Conclusion

Thus, the Court finds the instant statutory provisions nonconforming to the Constitution but orders them to remain effective temporarily until the legislature revises the Act. This decision is pursuant to the consensus of all Justices except Kwon Sung who wrote a separate concurring opinion and Justices Yoon Young-chul, Han Dae-hyun and Ha Kyung-chull who wrote a dissenting opinion.

6. Justice Kwon-seong's Concurring Opinion

I think it is necessary and possible to analyze the unconstitutionality of the instant statutory provisions using the standard of strict scrutiny employed for review of the violation on the principle of equality.

A. As the majority opinion indicates, persons to whom the Overseas Koreans Act applies include "a Korean national residing abroad", or a national of the Republic of Korea who obtained the right of permanent residence in a foreign country or is residing in a foreign country with the intention of permanently living in a foreign country (Article 2[1] of the Overseas Koreans Act), and "a Korean with foreign nationality", or a person or lineal descendants of a person who was a Korean national, but obtained the nationality of a foreign country and who was designated by a presidential decree to be subject to special privileges under the Act (Article 2[2] of the Overseas Koreans Act). However, Koreans with foreign nationalities are subdivided into two groups: one group consists of persons or lineal descendents of persons who emigrated after the establishment of the Korean Government and who lost the Korean nationality (Article 3[1] of the Enforcement Decree of the Act); the other consists of persons or lineal descendants of persons who emigrated after the establishment of the Korean Government and who were explicitly recognized as Korean nationals before obtaining the nationality of a foreign country (Article 3[2] of the Enforcement Decree of the Act). As a consequence, the Overseas Koreans Act deny the privileges under the Act to ethnic Koreans with foreign nationalities who are "persons or lineal descendants of persons who emigrated before the establishment of the Korean Government and who were not explicitly recognized as Korean nationals before obtaining the nationality of a foreign country" (hereinafter called "ethnic Koreans without explicit recognition of their nationality").

In sum, among the ethnic Koreans who emigrated before the establishment of the Korean Government[1] and who obtained the nationality of foreign countries[2] are individuals who obtained foreign na-

tionality after being explicitly recognized as Korean nationals and individuals who obtained foreign nationality without being explicitly recognized as Korean nationals. The Overseas Koreans Act deny the benefits and privileges under the Act to those individuals in the latter group.

B. To be "explicitly recognized as a Korean national" means to register oneself at one of the Korean diplomatic establishments or at other authorized agencies or organizations able to process such registration in the country of his or her residence[3] pursuant to the Nationality Act[4], the Registration of Korean Nationals Residing Abroad Act[5], and the Act on the Establishment of Overseas Diplomatic and Consular Missions of the Republic of Korea[6]. Since there could have been no Korean diplomatic establishment before August 15, 1948, it was originally impossible for an ethnic Korean who obtained the nationality of a foreign country prior to that time to be explicitly recognized as a Korean national. It was also impossible for an ethnic Korean who emigrated after the establishment of the Korea Government on August 15, 1948 and obtained the nationality of a foreign country to be explicitly recognized as a Korean national if there was no Korean diplomatic establishment in the country of their residence at the time he or she obtained the nationality of a foreign country.

C. The present Overseas Koreans Act employs two standards to divide ethnic Koreans who emigrated prior to the establishment of the Korean Government.

The first of such standards is whether an ethnic Korean obtained foreign nationality before or after the establishment of the Korean Government. In the case an ethnic Korean who obtained foreign nationality before the establishment of the Korean Government, the Overseas Koreans Act cannot be applied to that individual (since it was impossible for the ethnic Korean to get recognized as a Korean national before the foundation of the Republic of Korea). On the

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Ed. Note: The footnotes in this decision were translated from those included in the original text.

1). Article 31 of the Enforcement Decree of the Veterans' Pension Act states that "before the establishment of the Korean Government" means before August 14, 1948.

2). They could have obtained the foreign nationality before the establishment of the Korean Government or after the establishment of the Korean Government.

3). Article 2(1) of the Enforcement Regulation of the Act on the Immigration and Legal Status of Overseas Koreans (enacted by the order of Minister of Justice on December 2, 1999)

4). promulgated and entered in to force on December 20, 1948.

5). promulgated and entered in to force on November 24, 1949.

6). promulgated and entered in to force on March 9, 1950.

other hand, if an ethnic Korean obtained the foreign nationality after the establishment of the Korean Government, application of the Overseas Koreans Act to that individual depends on whether there was a diplomatic establishment in the individual's country of residence.

The second standard employed is whether there was a Korean diplomatic establishment in the country of residence of the ethnic Korean at the time when he or she obtained foreign nationality. If there was no Korean diplomatic establishment in the country of residence, the Overseas Koreans Act cannot be applied to that individual (since it was impossible for the ethnic Korean to be recognized as a Korean national because of an absence of an authorized agency in the country of his or her residence). On the other hand, if there was a Korean establishment in the country of residence, the Overseas Koreans Act can be applied to that individual.

D. The first standard employed by the Overseas Koreans Act, a time factor, discriminates against ethnic Koreans who obtained their foreign nationality before the establishment of the Korean Government by excluding them from the Act altogether. Since it is unavoidable to designate a critical date to enforce the Overseas Koreans Act and it is up to the legislature to decide on what such date should be, the Court should refrain from reviewing the constitutionality of discrimination based on the first standard. However, the Court should review the constitutionality of discrimination based on the second standard.

The second standard employed is whether there was a Korean diplomatic establishment in the country of residence of the ethnic Korean (in case of lineal descendents of such individual, their birthplace) at the time when he or she obtained foreign nationality. This is employment of a regional factor as a basis for discrimination under the Overseas Koreans Act.

Whether to establish a diplomatic mission in a particular foreign nation is a problem of choice in the area of absolute policy issues. However, this cannot be used as a standard to decide whether to bestow a particular ethnic Korean with foreign nationality with privileges similar to those of a Korean national. In other words, a standard used to decide whether to establish a diplomatic mission in a particular country and a standard used to decide the status of a particular ethnic Korean with foreign nationality are two separate matters. In this light, I think a strict standard should be used for equality review of the constitutionality of discrimination against ethnic Koreans without explicit recognition of their nationality based on whether there was a Korean diplomatic establishment in the particular country of their residence, a regional factor. The reasons are as follows.

Article 11(1) of the Constitution prohibits discrimination based on gender, religion or social status, and any discrimination by these three factors should be scrutinized under a strict standard. (11-2 KCCR 732, 98Hun-Ba33, December 23, 1999; 11-2 KCCR 770, 98Hun-Ma363, December 23, 1999).

Discrimination based on these three factors represented the social vices existing at the time of the enactment of the Constitution. Such discrimination had to be overcome as it was inhumane, against democratic ideals, and detrimental to cultural development, and the founders felt the need to ban any form of inequality based on these factors through the Constitution. However, there may also be discrimination based on factors other than the three stipulated by the Constitution which may be as cruel, if rare, as discrimination based on gender, religion or social status. Such discrimination may not have been proscribed by the Constitution because the founders felt that inequality resulting from such discrimination had been overcome ideologically and nearly overcome in reality at the time of enactment of the Constitution. But if such discrimination were to reappear, a strict standard must be used to review its constitutionality even though it does not fall under Article 11(1) of the Constitution. Discrimination based on regional factors such as the birthplace or place of residence of an individual, or discrimination based on race is not prohibited by Article 11(1) of the Constitution, but such discrimination needs to be reviewed for its constitutionality using a strict standard.

Discrimination based on regional factors is as inhumane as discrimination based on race. Such discrimination should be banned because it obstructs social integration and hinders the exercise of the freedom and creative initiative of individuals[7].

As seen above, the instant statutory provisions discriminate against ethnic Koreans with foreign nationalities who reside in a country where there is no Korean diplomatic establishment from ethnic Koreans with foreign nationalities who reside in a country where there is a Korean diplomatic establishment. This is discrimination based on a regional factor, and its constitutionality naturally needs to be scrutinized using a strict standard.

E. Since the majority of Justices declared the statutory provisions unconstitutional using a relaxed standard and expounded their reasoning process, it would not be necessary to explain the unconstitutionality of the instant provisions when scrutinized under a strict standard, but I will summarize the conclusion of the constitutional

7). The Preamble of the Constitution requires the State "to afford equal opportunities to every person and provide for the fullest development of individual capabilities."

review using a strict standard. The Overseas Koreans Act discriminates against ethnic Koreans without an explicit recognition of their nationality for economic reasons and for convenience in administrative regulation, and this places the legitimacy of the Act in doubt. It is not impossible to come up with alternative measures to avoid difficulties that may arise when all ethnic Koreans with foreign nationalities are treated equally, while minimizing discrimination against ethnic Koreans without explicit recognition of their nationality. There is no fixed formula for the installation and closure of overseas diplomatic establishments. Diplomatic establishment may be in operation when an ethnic Korea moves to a particular country but may no longer be in existence when the individual is about to obtain the foreign nationality. Discrimination based on such a variable factor in itself is not appropriate. Therefore, discrimination at issue does not pass the appropriateness of means test and does not meet the rule of least restrictive means. Moreover, the public interest achieved by such discrimination is not greater than the private interest of ethnic Koreans without explicit recognition of their nationality. In conclusion, the instant statutory provisions which discriminate ethnic Koreans without explicit recognition of their nationality violates the principle of proportionality, and hence, is against the principle of equality.

7. Dissenting Opinion of Justices Yun Young-chul, Han Dae-hyun and Ha Kyung-chull

We do not think the instant statutory provisions are unconstitutional because of the following reasons.

A. The Constitutional Court and the legislature are both bound by the Constitution, but the nature of the duty is not the same. To affirmative policy-making institutions such as the legislature, the Constitution acts as guidance and as a limit on actions, or as the norm for behavior. However, to the Constitutional Court, the Constitution acts as the standard against which to evaluate the constitutionality of the actions of other government institutions, or as the norm for control. Thus, as the norm for behavior, the principle of equality requires the legislature to treat people equally in the substantive sense of "treating equals as equals and treating unequals as unequals." On the other hand, as the norm for control, the principle only requires the Court to develop a standard to prohibit arbitrariness in the exercise of legislative power, and the Court may recognize the violation of this principle only when there is no reasonable justification for discrimination in legislative policy. In other words, the legislative body's duty to realize the principle of equality is reduced to the rule against arbitrariness for the Constitutional Court. In a

constitutional case where the violation of the principle of equality becomes an issue, the Court should not make its decision based on whether a particular legislation is the "most reasonable and appropriate means", but on whether such legislation is "within the constitutional limits" or whether such legislation is "arbitrary or not". The legislature's policy-making power and the functional separation of powers in a democratic country can best be secured this way (9-1 KCCR 91, 115, 90Hun-Ma110 and etc., January 16, 1997; 10-2 KCCR 504, 98Hun-Ka7 and etc., September 30, 1998).

B. According to the arbitrariness review, legislation bestowing benefits to citizens such as the instant Overseas Koreans Act is constitutional even if the means employed in the Act may not be enough to realize the legislative objective to the fullest extent. In other words, the legislature needs not simultaneously address all the problems associated with the legislative purpose. Instead, it may take one step at a time, and may choose to deal with an issue that seems most acute at the time of legislation. In such case, the legislator can exercise its discretion to enact the statute which it deems is appropriate after giving due consideration to such factors as the legislative purpose, current conditions of potential beneficiaries, and federal budget or ability for compensation. Through its precedents, the Court has ruled likewise as follows:

Even under the constitutional principle of equality, the State is very much free to choose when, where, and for whom it would start taking measures to improve upon the present conditions or the present system regarding basic rights. In other words, the State should have an option to take a gradual approach to improve the present system to embody high ideals under a reasonable standard, using its present capabilities. If this is not allowed, the State cannot make improvement on any existing system except in the very few cases where it is possible to improve upon all aspects of the system for everyone concerned simultaneously, because doing otherwise would violate the principle of equality. Such conclusion is clearly unreasonable, and is against the intent of the principle of equality (2 KCCR 178, 197, 89Hun-Ma107, June 25, 1990; 3 KCCR 11, 25, 90Hun-Ka27, February 11, 1991; 5-2 KCCR 622, 640, 89Hun-Ma189, December 23, 1993; 10-2 KCCR 819, 834, 98Hun-Ka1, December 24, 1998).

C. Ethnic Koreans living abroad face different political, diplomatic, economic, and social conditions depending on the countries of their residence. It should not be ignored that the differences exist among ethnic Koreans with foreign nationalities as well as between Korean nationals residing abroad and ethnic Koreans with foreign nationalities. Upon legislation of the Act on the Immigration and Legal Status of Overseas Koreans, the National Assembly recommended

"Three Items to Improve the Present Legal System Dealing with Overseas Ethnic Koreans" to the Ministry of Justice and the Ministry of Foreign Affairs and Trade. The recommendation included simplified naturalization procedures for alienated ethnic Koreans such as ethnic Koreans in China; system reform and government support to secure the livelihood of ethnic Koreans with illegal alien status and their return to the countries of their residence; and adoption of policy to designate Korean-Chinese in Korea as a special group of people requiring governmental protection. Accordingly, the Ministry of Justice revised and enforced the "Guide for Affairs Dealing with Status of Ethnic Koreans in China" to give more opportunities for ethnic Koreans in China to attain Korean nationality. The Ministry also formulated and enforced "Measures to Supplement the Enforcement Decree of the Overseas Koreans Act (Management of Entry and Stay of ethnic Koreans in China)" to enforce multiple measures designed to simplify restrictions imposed on these individuals. As a result, much of the existing discriminatory treatment has been relieved. Moreover, it is not unreasonable to take necessary measures to avoid potential diplomatic friction with other countries that may arise if dual citizenship is allowed, as there still exists a principle in international law avoid dual citizenship.

In this light, classification made by the instant provisions has its reasons, and is not unreasonable nor arbitrary.

D. While it may be necessary to accord ethnic Koreans in China with additional support from national and humanitarian perspectives, it is a matter to be settled by the legislature through its legislation later on, and it is a matter of legislative policy. Decision of unconstitutionality based on "all or nothing" approach is not in accordance with the arbitrariness test based on the principle of separation of powers.

Justices Yun Young-chul (Presiding Justice), Han Dae-hyun (Assigned Justice), Ha Kyung-chull, Kim Young-il, Kwon Seong, Kim Hyo-jong, Kim Kyoung-il, Song In-jun, and Choo Sun-hoe

Aftermath of the Case

After the decision of the Court, the State is pondering over two alternatives to achieve equality: one is to revise the Act to take away all benefits from all ethnic Koreans living abroad; the other is to revise the Act to expand the scope of beneficiaries under the Act. China refused to issue entry visas to Korean lawmakers who wished to visit China and investigate living conditions of ethnic Koreans living in China as a part of their efforts to introduce a revision of

the Act conforming to the Constitution, and reflecting reality, and this led to a diplomatic dispute between Korea and China.

5. *School Operational Committees in Private Schools* Case

(13-2 KCCR 762, 2000Hun-Ma278, November 29, 2001)

Contents of the Decision

1. Scope of legislative discretion concerning the establishment of the school operational committees
2. Whether Article 31 and other Articles of the Elementary and Secondary Education Act ordering the mandatory establishment of the school operational committees in private schools infringe on the property rights of the founder or the incorporated foundation of private schools.
3. Whether Article 31 and other Articles of the Elementary and Secondary Education Act violate the constitutionally guaranteed independence and professionalism of education.

Summary of the Decision

1. A school operational committee is a system which enables teachers, parents, and leaders of the community to deliberate on important matters in school management. The system is a means to guarantee the parents' right to participate in their children's education. It also helps enhance school autonomy and enable a diverse and creative educational system reflecting the special conditions and characteristics of the local community.

Because parents should naturally be allowed to participate in their children's education, legislation recognizing the parents' right to collectively participate in their children's educational process is constitutionally permitted. Also, a teacher's right to educate (right to teach class) should be guaranteed by law. Allowing the participation of community members in the school operational committee is related to the democratic principle of local autonomy, and its merits would be that it enables a school to reflect the needs and characteristics of the community in its management.

Thus, whether to require the mandatory establishment of school operational committees in private schools, as is the case in national or public schools, is a policy matter for the legislature, and it cannot be deemed as unconstitutional unless the legislature clearly departs from the scope of legislative discretion.

2. Article 23(1) of the Constitution states that "the right to property of all citizens shall be guaranteed. The contents and limitations thereof shall be determined by Act." Statutory provisions requiring the establishment of school operational committees may restrict the right of the foundation of private schools, to freely dispose of or use their property, but such restrictions are consequences of the legislature determining certain limits to the property rights of private school foundations.

The school operational committee is usually an advisory organization, and among the advisory matters, the drafting of budgets and settlement of accounts of schools are deliberated on only when the particular private school requests consultation. In this light, statutory provisions requiring the establishment of the school operational committee does not violate the essential aspect of the property right of private schools. Even if the instant statutory provisions can be seen as legislation restricting property rights, not legislation forming the contents of property rights, the restriction is for a legitimate purpose, and is not excessive.

3. In order to ensure stable and continuous development of a nation, education needs to be led and managed by educators or educational experts, so that education is not influenced by unjustified interference from external power. Thus, independence, professionalism, and political impartiality of education is required, as is stipulated in Article 31 of the Constitution. The instant statutory provisions may impose restrictions on independence and professionalism of education in private schools. However, considering the legislative purpose and the composition and nature of the school operational committee, it cannot be held that the system of school operational committee in private schools is clearly arbitrary or puts an unreasonable emphasis on the public nature of education in private schools while negating autonomy of private schools.

Provisions on Review

Elementary and Secondary Education Act (revised by Act No. 6007 on August 31, 1999)

Article 31 (Establishment of School Operational Committees)

(1) National, public and private elementary schools, middle schools, high schools and special schools shall organize and operate school operational committees to enhance the autonomy of operating schools and to conduct education to meet the actual circumstances and characteristics of a region.

(2) [omitted]

(3) The fixed number of members of any school operational committee established in a national, public or private school shall be prescribed by the Presidential Decree with the size, etc. of the school concerned taken into account, within the scope of not less than 5 but not more than 15.

Article 32 (Functions)

(1) [omitted]

(2) Any private school principal shall consult with the school operational committee with respect to the matters of each subparagraph (excluding the matters of subparagraph 6) of paragraph (1): Provided, That for matters as referred to in subparagraphs 1 and 2 of the same paragraph, it shall be subject to a request by an incorporated school foundation.

(3) Any school operational committee established in a national, public or private school shall deliberate and vote on matters relating to the raising, administration and use of the school development fund.

Article 34 (Organization and Operation of School Operational Committees)

(1) [omitted]

(2) Matters relating to the composition of any school operational committee established in any private school shall be prescribed by the Presidential Decree and other matters necessary for the operation of such committee shall be prescribed by the articles of association.

Article 63 (Order for Correction or Modification)

(1) Where any school violates education-related Acts and regulations, or orders or school regulations thereon, with respect to facilities, equipment, classes, school affairs and other matters, the competent authorities may order the founder and operator or the head of a school to correct or modify them within a fixed period.

(2) Where any person who has been issued an order for correction or modification referred to in paragraph (1) fails to satisfy them within the designated period without a justifiable cause, the competent authorities may annul or suspend the actions in violation of the order, or take measures such as reducing the number of students, reducing or closing classes and department or suspending the enrollment of students in the schools concerned, as prescribed by the presidential decree.

Enforcement Decree of the Elementary and Secondary Education Act (revised by Presidential Decree No. 16729 on February 28, 2000)

Article 63 (Private School Operational Committee)

(1) School operational committees to be established at private elementary schools, middle schools, high schools, and special schools (hereafter in this Article referred to as "private schools") pursuant to Article 31 of the Act (hereinafter referred to as "private school operational committees") shall be composed of teacher members, parent members, and community members of the respective schools.

(2) The provisions of Articles 58, 59, and 60(2) and (3) shall apply mutatis mutandis to the fixed number and election, etc. of the members of a private school governing committee, but members for teachers except ex officio members shall be commissioned by the principal of a school from among those recommended at a plenary session of school personnel in accordance with the procedures as determined by the articles of incorporation. In this case, the term "national and public schools" shall be read as "private schools", and the term "deliberation" as "consultation".

(3) The principal of a school shall respect the result of consultation with the governing committee to the best of his ability.

(4) Where the principal of any private school fails to go through a deliberation and resolution by the operational committee or acts different from the result of such deliberation and resolution or fails to implement the result of such deliberation and resolution, without any justifiable cause, or implements the result without consultation, without any cause under Article 60, with respect to the creation, operation, and use of the school development fund under Article 32(3) of the Act, the competent authorities may give an order for correction referred to in Article 63 of the Act.

(5) The matters not prescribed by this Decree concerning the composition of a private school governing committee shall be determined by the articles of incorporation.

Local Education Autonomy Act (revised by Act No. 6216 on January 28, 2000)

Article 62 (Composition of an Electoral Body)

(1) The members of the electoral body of the Board of Education or the Superintendent of the Office of Education shall be composed of all individuals who are members of school operational committees (hereinafter called the "school operational committee electorate) under Article 31 of the Elementary and Secondary Education Act as of the date the election day is announced.

(2) [omitted]

Elementary and Secondary Education Act (revised by Act No. 6007 on August 31, 1999)

Article 31 (Establishment of School Operational Committees)

(1) National, public and private elementary schools, middle schools, high schools and special schools shall organize and operate school operational committees to enhance the autonomy of operating schools and to conduct education to meet the actual circumstances and characteristics of a region.

(2) Any school operational committee established in any national or public school shall consist of teacher representatives of the school concerned, parent representatives and leaders of communities.

(3) The fixed number of members of any school operational committee established in a national, public or private school shall be prescribed by the Presidential Decree with the size, etc. of the school concerned taken into account, within the scope of not less than 5 but not more than 15.

Related Provisions

The Constitution

Articles 10, 23(1), 31(4), 36(1), 37(1)

Elementary and Secondary Education Act (revised by Act No. 6007 on August 31, 1999)

Article 32 (Functions)

(1) Any school operational committee established in a national or a public school shall deliberate matters falling under any of the following subparagraphs:

1. Matters relating to the formulation and amendment of school charter and regulations;

2. Matters relating to drafting budget and the settlement of accounts of school;

3. Matters relating to the method of operating the school curriculum;

4. Matters relating to the selection of textbooks and educational materials;

5. Matters relating to educational and training activities after regular school hours or during vacation periods;

6. Matters relating to the recommendation of persons as

visiting teachers under the provisions of Article 31(2) of the Public Officials for Education Act;

7. Matters relating to the creation, operation and use of the school operation support fund;

8. Matters relating to school food programs;

9. Matters relating to recommendations made by principal with respect to college entrance examinations;

10. Matters relating to the composition and operation of a school sports team;

11. Matters relating to proposals and recommendations with respect to school operation; and

12. Other matters prescribed by the Presidential Decree and the Municipal Ordinance of the Special Metropolitan City, Metropolitan City, or Province (hereinafter referred to as the "City/Province").

(2) - (3) [omitted]

Enforcement Decree of the Elementary and Secondary Education Act (revised by Presidential Decree No. 16729 on February 20, 2000)

Article 58, 59, 60, 61 : see Appendix 2

Related Precedents

1. 11-1 KCCR 233, 97Hun-Ma130, March 25, 1999
   12-1 KCCR 427, 98Hun-Ka16 and etc., April 27, 2000
   4 KCCR 739, 89Hun-Ma88, November 12, 1992
2. 5-2 KCCR 36, 92Hun-Ba20, July 29, 1993
3. 8-1 KCCR 433, 94Hun-Ma119, April 25, 1996

Parties

Complainants

1. School Corporation Wooam Education Foundation and 15 others
   Counsel: Legal Corporation Hwabaek
   Attorney-in-charge: Roh Kyong-rae and 3 others

Holding

The complaint against Article 62(1) of the Local Education Autonomy Act (revised by Act No. 6216 on January 28, 2000) is dismissed. The complaint against Article 31(1), (3), 32(2), (3), 34(2), and parts of Article 63 concerning private schools of the Elementary and Secondary Education Act (revised by Act No. 6007 on August 31, 1999) and Article 63 of the Enforcement Decree of the Elementary and Secondary Education Act (revised by Presidential Decree No. 16729 on February 20, 2000) is rejected.

Reasoning

1. Overview of the Case and the Subject Matter of Review

A. Overview of the Case

Complainants are members of the Coalition of Private Middle and High School Foundations in Korea. On April 26, 2000, the complainants filed a constitutional complaint against provisions of the Elementary and Secondary Education Act revised on August 31, 1999, and provisions of the Enforcement Decree of the Elementary and Secondary Education Act requiring the mandatory establishment of the school operational committees in private schools. The complainants allege that these provisions violate the complainants' property right and are against Article 31 of the Constitution stipulating independence and professionalism of education. Simultaneously, the complainants filed a constitutional complaint against a provision of the Act on Autonomy of Local Education stipulating that the electoral body for members of the Board of Education or the Superintendent of the Office of Education should be composed of individuals who are members of the school operational committees, alleging that it is against Article 11(1), 24, and 117(1) of the Constitution because it deprived local residents of the right to vote.

B. Subject Matter of Review

The complainants challenge the constitutionality of Article 31, 32, 34, and 63 of the Elementary and Secondary Education Act and Article 63 of the Enforcement Decree of the Elementary and Secondary Education Act. Since the complainants filed the instant complaint to contest the constitutionality of the establishment and management of school operational committees in private schools, Article 31(2), 32(1),

and 34(1) of the Elementary and Secondary Education Act which only deal with national or public schools are irrelevant to the instant case, therefore not subject for review. The constitutional review of the remaining provisions should also be limited to aspects dealing with private schools.

Thus, the subject matter to review in the instant case will be Article 31(1), (3), 32(2), (3), 34(2), and parts of 63 concerning private schools of the Elementary and Secondary Education Act (revised by Act No. 6007 on August 31, 1999), hereinafter referred to as Act, Article 63 of the Enforcement Decree of the Elementary and Secondary Education Act (revised by Presidential Decree No. 16729 on February 28, 2000), hereinafter referred to as the instant provision, and Article 62(1) of the Act on Autonomy of Local Education (revised by Act No. 6216 on January 28, 2000).

The provisions on review and related provisions in the instant case are in the attached Appendix 2.

2. Complainants' Arguments and Opinions of Related Agencies

A. Complainants' Arguments

The school foundation is the principal agents managing private schools, and to require agents other than the school foundation such as students' parents, teachers, and members of communities to participate in the school management violates the independence and essential aspects of private schools. The school operational committee is stipulated to deliberate or advise on "matters related to school charter", "matters related to drafting budgets and the settlement of accounts of school", "matters related to the method of operating the school curriculum", and "matters related to the recommendation of visiting teachers" (Article 32 of the Act), and this infringes on the authority of the board of directors of the school foundation. The school foundation could be penalized if it does not go through the deliberation and resolution of the school operational committee, merely an advisory organ, on matters related to the creation, operation and use of the school development fund. It is also problematic to hold the school foundation, not the school operational committee, responsible for legal consequences of the decision of the school operational committee.

If private schools are required to organize school operational committees, parents of students and members of local communities who know little of or are unfit for school management will participate in

school management, and this would infringe on the teachers' authorities in education. As for teacher members of the school operational committee, teachers with strong political motivations would participate and this would impede stability in education.

The instant statutory provisions are against Article 31 of the Constitution stipulating independence and professionalism of education, and are contrary to Article 23(1) of the Constitution since the provisions infringe on the property right of private school foundations.

The provision of the Act on Autonomy of Local Education bestowing the right to elect leaders of local education to individual members of school operational committees deprives local residents of the right to vote and it is against the local representation principle. Hence, it is against Article 11(1), 24, and 117(1) of the Constitution.

B. Opinions of the Minister of Education & Resources Development (previously, Minister of Education): see Appendix 3

3. Review of the Complaint Concerning Article 62(1) of the Act on Autonomy of Local Education

A constitutional complaint should be filed by an individual whose constitutionally guaranteed basic right has been violated by an exercise or non-exercise of governmental power. In other words, only a person satisfying the self-relatedness requirement can file a constitutional complaint. A private school foundation is not entitled to the right to vote as guaranteed by the Constitution. Aside from whether Article 62(1) of the Local Education Autonomy Act granting individual members of school operational committees the right to elect leaders of local education, deprives local residents of the right to vote or is against the local representation, it is evident that the instant statutory provision does not infringe on the basic right of the complainants, who are not entitled to the right to vote. Therefore, the complaint against the provision is not legally sufficient because it does not meet the self-relatedness requirement.

4. Review on the Subject Matter

A. Scope of Legislative Discretion Concerning School Operational Committee

(1) In order to provide diverse educational opportunities, the free-

dom to establish private schools and the freedom to manage education in private schools generally has to be guaranteed. While the public education system is dominant in modern society, private schools are approved because they offer diversity that public schools cannot. Today, emphasis is on the public beneficial characteristics of education, and the public nature of education in private schools similar to that in national or public schools is required of private schools[1]. In its earlier decision, the Court also recognized the public nature of education in private schools while emphasizing autonomy in private schools.

The content of this decision is as follows:

The public nature of education has been increasingly emphasized in the modern countries, and the national and public school system has continued to expand. However, the distinctive feature of a free democratic society is that creative and voluntary efforts of people with diverse perspectives and capabilities meet to maintain balance and harmony. In this regard, the independence, diversity, and creativity of education is a very important objective. Generally, national or public schools have a duty to conduct standardized education in accordance with the universal philosophy of education and the principle of equal opportunities in education. Therefore, there are inherent limits for these schools to develop and cultivate unique qualities of their own. On the contrary, private schools are allowed to strive to achieve their specific founding principle, and they are free to exercise originality in education following their unique educational principles. Furthermore, private schools voluntarily supplement the limits of the State's financial investment on matters concerned with education.

Ed. Note: The footnotes in this decision were translated from those included in the original text.

1). A certain degree of independence is recognized for private school management. Unique founding principle or tradition of a particular private school is still well realizable in the public educational system. Private school foundations have autonomy on certain matters concerning school management such as management of contributed properties (Article 28, Private School Act), operating a profit-making enterprise (Article 6, Private School Act), and budget and settlement of accounts (Article 29-33, Private School Act). Private school foundations also have extensive freedom in personnel matters such as appointing and dismissing the head of the school, teachers, or other personnel of the school (Article 53, 53-2, 53-3, Private School Act).

Education in private schools has a certain degree of public nature. Private schools are not much different from national or public schools in the fact that they are also responsible for rendering education services to the people, thereby protecting the people's constitutional right to receive education. Because of the public nature of private schools, certain facets of school management in private schools are subject to state regulations. Provisions of the Elementary and Secondary Education Act concerned with curricula, classes, textbooks used, and teacher's qualification are also applied to private schools, and Article 4 of the Private School Act stipulates that the private schools receive the supervision and guidance of the State.

In this light, it is appropriate and desirable to ensure a certain amount of autonomy in private schools when managing its material and personnel resources. However, as there is no essential difference between national or public schools and private schools in that private schools are also responsible for rendering public education, the State which has a duty to maintain the public school system, legitimately has an authority and responsibility to a certain extent to supervise and control operation and management of private schools.

The degree of supervision or control of private schools by the State, while recognizing the autonomy in operating private schools, cannot remain constant at all time. It depends on social conditions and/or special circumstances at the time and on the types of schools becoming subject to such supervision. As long as such supervision does not violate the essential principles of education, such regulation ultimately belongs to the formative power of the legislature. (3 KCCR 387, 408-410, 89Hun-Ka106, July 22, 1991; 11-1 KCCR 233, 243, 97Hun-Ma130, March 25, 1999)

According to some statistics[2], private schools make up 40% of secondary schools, 96% of junior colleges, and 77% of universities. Up until now, private schools in Korea have not been granted autonomy in the right to select students and the right to decide tuition levels because of the emphasis on the public nature of education. The State has exercised control over these matters. It is noteworthy that 98% of private middle and high schools depend on tuition and federal subsidies to meet expenses, and money from the school foundations covers only 6% of total college or university expenditure.

While autonomy of private schools should be respected, it is more imperative to realize the peoples' right to receive education. Several measures have been considered to guarantee the public nature of education in private schools, the school operational committee being one of them. A school operational committee is a system which enables teachers, parents, and leaders of the community to deliberate on important matters in school management. The system is a means to guarantee the parents' right to participate in their children's education. It also helps enhance school autonomy and enable a diverse and creative educational system reflecting the special conditions and characteristics of the local community. (11-1 KCCR, 233, 241, 97Hun-Ma130, March 25, 1999).

(2) Parents' right to educate children is not explicitly stated in the Constitution. However, it is an intransferable, inviolable human right that all people enjoy regardless of their nationality. Article

2). Refer to a proposal for revision of the Private School Act proposed by assemblypersons Lee Hae-chan and Kim Duk-kyu.

36(1) of the Constitution protecting marriage and family life, Article 10 stating the right to pursue happiness, and Article 37(1) providing that "people's liberties and rights shall not be disrespected for not being enumerated in the Constitution" form the foundation for this right (12-1 KCCR 427, 446-448[3], 98Hun-Ka16 and etc., April 27, 2000).

Parents' right to participate in school management may not be directly derived from the parents' right to educate children. Nevertheless, parents should be allowed to participate in their children's educational process.[4] Therefore, legislation allowing parents' collective participation in their children's education by statute can be clearly constitutionally upheld.

Whether to regard the teacher's right to teach as a constitutionally protected basic right is a matter of dispute,[5] but it is clearly a right that should be legally protected. The educational system in many countries today are increasing teachers' participation in school management and educational decision making process.

Allowing participation of community members in the school operational committee is related to the democratic principle of local autonomy, and its merits would be that it enables a school to reflect the needs and characteristics of the community in its management.

In summary, whether to require the mandatory establishment of school operational committees in private schools is the case in national or public schools or to let a voluntary organization such as the existing school supporting committee to play a similar role and make the establishment of the school operational committee optional, while

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3). "Parent's right to educate children means the right to decide freely how they will discharge their duty to educate children. Therefore, it means the right to decide on the objective and method 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 character, merits, and mental and physical level of growth. Giving parents the primary right to decide on these matters is based on the thought that they, better than any other person, can best protect the children's interests."

4). 11-1 KCCR 233, 242, 97Hun-Ma130, March 25, 1999. "The objective of education is to develop individual potentials, to accomplish personality, and to promote individual abilities to support oneself, thereby enabling each individual to enjoy life worthy of human beings (3 KCCR 387, 404, 89Hun-Ka106, July 22, 1991). Education of a minor has the objective of developing personal integrity. This is a responsibility shared by parents and schools, and effective cooperation is called for to achieve the objective of education. Parents' right to educate their children and the responsibility of the State in establishing the proper educational system need to be coordinated and remain in harmony. There can be various views on the education of a minor, so providing the best possible educational process through debate and discussion is an important condition in achieving this objective. This is why we believe that parents need to participate, in any way possible, in an educational system led by the State."

5). 4 KCCR 739, 756-758, 89Hun-Ma88, November 12, 1992

inducing the organization of such a committee, is a policy matter for the legislature, and it cannot be deemed as unconstitutional unless the legislature clearly departs from the scope of legislative discretion. (11-1 KCCR 233, 243, 97Hun-Ma130, March 25, 1999)

B. Reviews on Individual Merits

(1) Violation of Property Right

(A) It is difficult to hold that the instant statutory provisions requiring the establishment of the school operational committee restrict the property rights of the foundation of private schools. Article 23(1) of the Constitution states that "the right to property of all citizens shall be guaranteed. The contents and limitations thereof shall be determined by Act." Statutory provisions requiring the establishment of school operational committees may restrict the right of the foundation of private schools, to freely dispose of or use their property, but such restrictions are consequences of the legislature determining certain limits to the property rights of private school foundations.

Specific details of property rights are formed through legislation stipulating contents and limitations of property rights. In such case, the statute does not restrict property rights, but forms property rights (5-2 KCCR 36, 44, 92Hun-Ba20, July 29, 1993). This is such case, and the foundation of private schools is allowed to freely use, profit from, or dispose of the school properties under the limitations imposed by the instant statutory provisions.

However, legislation forming contents of the property right should not violate the essential aspect of the right to freely use, profit from, or dispose of property nor negate the private ownership system altogether (5-2 KCCR 36, 44-45, 92Hun-Ba20, July 29, 1993).

The school operational committee is an advisory organization (but a deliberation and resolution organization on matters related to the creation, operation and use of the school development fund[6]), and it deliberates on matters related to drafting budgets and the settlement of accounts of school only when the particular private school requests for advice. In this light, statutory provisions requiring the

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6). This is inevitable since the school operational committee is responsible for raising a school development fund (Article 33 of the Elementary and Secondary Education Act).

Article 33 (School Development Fund)

(1) Any school operational committee referred to in Article 31 may create a school development fund.

(2) The matters necessary for the creation and method of operation of the school development fund referred to in paragraph (1) shall be determined by the Presidential Decree.

establishment of the school operational committee do not infringe on the essential aspect of the property right of private schools to use, dispose of, or profit from property, nor negates the private ownership system altogether.

(B) Even if the instant statutory provisions can be seen as legislation restricting the property right, they do not constitute excessive restriction. A school operational committee is a system which enables teachers, parents, and leaders of the community to deliberate on important matters in school management. The system is a means to guarantee the parents' right to participate in their children's education. It also helps enhance school autonomy and enable a diverse and creative educational system reflecting the special conditions and characteristics of the local community. Therefore, legislation requiring the establishment of the school operational committee is designed to achieve public welfare stipulated by Article 37(2) of the Constitution, and has a legitimate legislative purpose. Furthermore, the school operational committee can only advise on matters related to the draft budget and the settlement of accounts of school when there is the request of the school foundation (Article 32(2) of the Elementary and Secondary Education Act), and it remains an advisory organization for the rest of the matters listed in Article 32(1) of the Elementary and Secondary Education Act related to the property of the school foundation. In this light, the instant statutory provisions do not excessively restrict the property right.

Generally, a "consultation" is not legally binding, with regard to the execution of the agreed matters. Article 63(3) of the Enforcement Decree of the Elementary and Secondary Education Act states that "the principal of a school shall respect the result of consultation with the governing committee to the best of his ability," and Article 63 permits the competent authorities to order correction or modification in case of a violation of education-related Acts. But actions contrary to Article 63(3) of the Enforcement Decree does not immediately constitute a violation of the Act, and the statutory provisions do not excessively restrict the complainants' property right. Also, generally when the private school doesn't go through a consultation with the school operational committee, it may be subject to a correction order pursuant to Article 63, but as the contents of the correction orders are mostly those ordering the schools to actually go through the consultation, Article 63 (the part concerning the school operational committee) does not excessively restrict the complainants' property rights.

Article 63(4) of the Enforcement Decree of the Act stipulates that a deliberation and resolution by the school operational committee is required for the creation, operation, and use of a school development fund and that the competent authorities may issue an order for cor-

rection when the principal of the private school violates the provision. But as we have seen, this is not unreasonable because the school operational committee is the organ responsible for raising a school development fund. Also, this statutory provision does not form a restriction on the property right of the private school foundations regarding existing assets. Even if it does restrict the property right, it does not constitute an excessive restriction. In conclusion, the instant statutory provision does not violate the complainants' property right.

(2) Violation of Principle of Independence and Professionalism of Education

Article 31(4) of the Constitution states that "independence, professionalism and political impartiality of education and the autonomy of institutions of higher learning shall be guaranteed under the conditions as prescribed by Statute." Generally, independence of education implies that educators have the authority to decide contents and means of education and that the administrative agency should not have control over these matters. It also means that the teachers' independence from supervisors and founders of educational facilities, and the exclusion of administrative agencies in deciding the contents of education, and the public election of the members of the board of education or similar education management organizations. Professionalism of education requires that professional educators take charge of preparation and execution of education policy, or at least, that they participate in the process[7].

In order to ensure stable and continuous development of a nation, education needs to be led and managed by educators or educational experts, so that education is not influenced by unjustified interference from external power. Thus, independence, professionalism, and political impartiality of education is required, as is stipulated in Article 31 of the Constitution. (8-1 KCCR, 433, 447, 94Hun-Ma119, April 25, 1996).

The school operational committee is designed to ensure democracy and transparency in the school policy making process by encouraging participation of various members of the school community, and it is an autonomous organization established to enable a diverse and creative educational system reflecting the special conditions and characteristics of the local community. In this light, the school operational committee in itself does not violate autonomy of education

7). Opinion of the Minister of Education and Human Resources (previously, Minister of Education). See Appendix 3.

guaranteed by the Constitution. Since the school operational committee is merely an advisory organ designed to assist the head of a private school to make reasonable and appropriate decisions on important matters in school management by gathering the opinions of various members of the committee, it is not contrary to the professionalism of education.

The instant statutory provisions may impose restrictions on independence and professionalism of education in private schools. However, if such restriction is imposed by legislation and if such legislation is within the scope of discretion coordinating independence, professionalism, and autonomy of private schools with the public nature of education, it would not be against the Constitution. Considering the legislative purpose and the scope of legislative discretion in allowing the system, and also considering the aforementioned contents on property rights, it cannot be concluded that the instant statutory provisions requiring the establishment of the school operational committee in private schools are clearly arbitrary or put an unreasonable emphasis on the public nature of education in private schools while negating autonomy of private schools.

The statutory provisions also provide measures to keep restrictions on autonomy of private schools to a minimal extent as follows: First, the school operational committees in private schools, unlike those in national or public schools, are merely advisory organs (Article 32(2) of the Elementary and Secondary Education Act); Second, the school operational committee can advise on matters related to formulation and amendment of school charter and regulations and matters related to the draft budget and the settlement of accounts of school only when there is a request by the school foundation (proviso of Article 32(2) of the Act); Third, faculty members except ex officio members (i.e. principal) of the school operational committee in a private school, unlike those in national or public schools, are commissioned by the principal of a school from among those recommended at a plenary session of school personnel (Article 63(2) of the Enforcement Decree of the Elementary and Secondary Education Act); and lastly, other matters necessary for the operation of the school operational committee is to be prescribed by the articles of association (Article 34(2) of the Act).

In conclusion, even if the instant statutory provisions put restrictions on independence and professionalism of education, such restrictions are within the constitutionally permitted boundary of legislative discretion.

5. Conclusion

Therefore, the complaint against Article 62(1) of the Act on Autonomy of Local Education (revised by Act No. 6216 on January 28, 2000) is dismissed as it is not legally sufficient. The complaint against Article 31(1), (3), 32(2), (3), 34(2), and parts of 63 concerning private schools of the Elementary and Secondary Education Act (revised by Act No. 6007 on August 31, 1999) and Article 63 of the Enforcement Decree of the Elementary and Secondary Education Act (revised by Presidential Decree No. 16729 on February 28, 2000) is without basis, and thus is rejected. So held by a unanimous decision of all Justices.

Justices Yun Young-chul (Presiding Justice), Han Dae-hyun, Ha Kyung-chull, Kim Young-il, Kwon Seong (Assigned Justice), Kim Hyo-jong, Kim Kyoung-il, Song In-jun, and Choo Sun-hoe

Appendix

Appendix 1 : List of complainants - [omitted]

Appendix 2 : Provisions on Review and Related provisions

Elementary and Secondary Education Act (revised by Act No. 6007 on August 31, 1999)

Article 31 (Establishment of School Operational Committees)

(1) National, public and private elementary schools, middle schools, high schools and special schools shall organize and operate school operational committees to enhance the autonomy of operating schools and to conduct education to meet the actual circumstances and characteristics of a region.

(2) Any school operational committee established in any national or public school shall consist of representatives of teachers of the school concerned, representatives of student parents and leaders of communities.

(3) The fixed number of members of any school operational committee established in a national, public or private school shall be prescribed by the Presidential Decree with the size, etc. of the school concerned taken into account, within the scope of not less than 5 but not more than 15.

Article 32 (Functions)

(1) Any school operational committee established in a national

or a public school shall deliberate matters falling under any of the following subparagraphs:

1. Matters relating to the formulation and amendment of school charter and regulations;

2. Matters relating to the draft budget and the settlement of accounts of school;

3. Matters relating to the method of operating the school curriculum;

4. Matters relating to the selection of textbooks and educational materials;

5. Matters relating to educational and training activities after regular study hours or during a vacation period;

6. Matters relating to the recommendation of persons as invited teachers under the provisions of Article 31(2) of the Public Officials for Education Act;

7. Matters relating to the raising, operation and use of the school operation support fund;

8. Matters relating to school feeding;

9. Matters relating to recommendations made by principal with respect to college entrance examinations;

10. Matters relating to the composition and operation of a school sports team;

11. Matters relating to proposals and recommendations with respect to school operation; and

12. Other matters prescribed by the Presidential Decree and the Municipal Ordinance of the Special Metropolitan City, Metropolitan City, or Province (hereinafter referred to as the "City/Province").

(2) Any private school principal shall consult with the school operational committee with respect to the matters of each subparagraph (excluding the matters of subparagraph 6) of paragraph (1): Provided, That for matters as referred to in subparagraphs 1 and 2 of the same paragraph, it shall be subject to a request by an incorporated school foundation.

(3) Any school operational committee established in a national, public or private school shall deliberate and vote on matters relating to the raising, administration and use of the school development fund.

Article 34 (Organization and Operation of School Operational Committees)

(1) The matters necessary for the organization and operation of

school operational committees established at national schools under Article 31 shall be determined by the Presidential Decree, and the matters necessary for the organization and operation of school operational committees established at public schools shall be determined by the Municipal Ordinance of the City/Do within the scope as determined by the Presidential Decree.

(2) Matters relating to the composition of any school operational committee established in any private school shall be prescribed by the Presidential Decree and other matters necessary for the operation of such committee shall be prescribed by the articles of association.

Article 63 (Order for Correction or Modification)

(1) Where any school violates education-related Acts and regulations, or orders or school regulations thereon, with respect to facilities, equipment, classes, school affairs and other matters, the competent authorities may order the founder and operator or the head of a school to correct or modify them within a fixed period.

(2) Where any person who has been issued an order for correction or modification referred to in paragraph (1) fails to satisfy them within the designated period without a justifiable cause, the competent authorities may annul or suspend the actions in violation of the order, or take measures such as reducing the number of students, reducing or closing classes and department or suspending the enrollment of students in the schools concerned, as prescribed by the presidential decree.

Enforcement Decree of the Elementary and Secondary Education Act (revised by Presidential Decree No. 16729 on February 28, 2000)

Article 58 (Composition of National and Public School Governing Committees)

(1) The fixed number of members of a school governing committee to be established at national and public elementary schools, middle schools, high schools, and special schools (hereinafter through Article 62 referred to as "national and public schools") referred to in Article 31 of the Act (hereinafter referred to as "operational committees") shall be determined by the school governing committee regulations of the school concerned (hereinafter referred to as "committee regulations") with the size, etc., of the school concerned taken into account, within the limits as set forth in the following subparagraphs:

1. A school of which the number of the students is less than 200: Not less than 5 but not more than 8 members;

2. A school of which the number of the students is not less than 200 but less than 1000: Not less than 9 but not more than

12 members; and

3. A school of which the number of the students is not less than 1000: Not less than 13 but not more than 15 members.

(2) The component ratio of members of a governing committee to be established at national and public schools shall be determined by the committee regulations within the following limits:

1. Members for parents of students (meaning those who represent parents of students at the school: hereafter in this Section the same shall apply): 40/100 to 50/100;

2. Members for teachers (meaning those who represent teachers at the school: hereafter in this Section the same shall apply): 30/100 to 40/100; and

3. Community members (public educational officials living in the area where the school is located who conduct the affairs on educational administration, businesspeople who conduct business in the area where the school is located, those who graduated from the school, or others who wish to contribute to operating the school: hereafter in this Section the same shall apply): 10/100 to 30/100.

(3) Notwithstanding the provisions of paragraph (2), the component ratio of a governing committee at national and public vocational schools referred to in Article 80 may be determined by the school governing committee regulations within the following limits. In this case, not less than a half of community members shall be elected from enterprisers referred to in paragraph (2)[3]:

1. Members for parents of students: 30/100 to 40/100;

2. Members for teachers: 20/100 to 30/100; and

3. Community members: 30/100 to 50/100.

(4) Deleted. <by Presidential Decree No. 16729, Feb. 28, 2000>

Article 59 (Election of Members)

(1) The principals of national and public schools shall be ex officio members for teachers.

(2) Parent members shall be directly elected among the parent, through democratic representative procedures at a plenary session of parents: Provided, That where it is difficult to elect them at a plenary session in the light of the size, facilities, etc. of a school, as prescribed by the regulations of the committee concerned, the members may be elected at a meeting which is composed of representatives of parents of students by each class under the conditions as prescribed by the regulations of the committee concerned. <Amended by Presidential Decree No. 16729, Feb. 28, 2000>

(3) Members for teachers except ex officio members shall be elected from teachers by a secret ballot at a plenary session of school personnel. <Amended by Presidential Decree No. 16729, Feb. 28, 2000>

(4) Community members shall be, upon the recommendation of any parent members or teacher members, elected by a secret ballot of the latter.

(5) A governing committee shall have a chairman and a vice-chairman, and they shall be elected from members other than members for teachers by a secret ballot.

Article 60 (Deliberation of Governing Committee)

(1) The principal of any national or public school shall respect the results of a deliberation by the governing committee to the best of his ability, and where he intends to act differently from the result of the deliberation, he shall make a report in writing to the governing committee and the competent authorities.

(2) Where it threatens to severely impede the conduct of educational activities and operating the school in the course of a deliberation by the governing committee, or there is no time to convene the governing committee due to any national disaster or other force majeure, the principal of any national or public school may implement the matters listed in Article 32 without deliberation by the governing committee.

(3) Where the principal of any national or public school implements the matters without deliberation by the committee pursuant to paragraph (2), he shall make a report in writing without delay on related matters and the causes therefor to the governing committee and the competent authorities.

Article 61 (Order for Correction)

Where the principal of any national or public school acts differently from the result of a deliberation and resolution by the governing committee under Article 32(1) and (3) of the Act or fails to implement a result of such deliberation and resolution without any justifiable cause, or he implements without deliberation a matter subject to deliberation without any cause referred to in Article 60(2), the competent authorities may give an order for correction referred to in Article 63 of the Act. <Amended by Presidential Decree No. 16729, Feb. 28, 2000>

Article 63 (Governing Committees of Private Schools)

(1) Governing committees to be established at private elementary schools, middle schools, high schools, and special schools (hereafter in this Article referred to as "private schools") pursuant to Article 31 of the Act (hereinafter referred to as "private school governing committees") shall be composed of members for teachers, members for

parents of students, and community members of the respective schools.

(2) The provisions of Articles 58, 59, and 60(2) and (3) shall apply mutatis mutandis to the fixed number and election, etc. of the members of a private school governing committee, but members for teachers except ex officio members shall be commissioned by the principal of a school from among those recommended at a plenary session of school personnel in accordance with the procedures as determined by the articles of incorporation. In this case, the term "national and public schools" shall be read as "private schools", and the term "deliberation" as "consultation".

(3) The principal of a school shall respect the result of consultation with the governing committee to the best of his ability.

(4) Where the principal of any private school fails to go through a deliberation and resolution by the governing committee concerned or acts differently from the result of such deliberation and resolution or fails to implement the result of such deliberation and resolution, without any justifiable cause, or implements the result without going through consultation without any cause under Article 60(2), with respect to the creation, operation, and use of a school development fund under Article 32(3) of the Act, the competent authorities may give an order for correction referred to in Article 63 of the Act.

(5) The matters not prescribed by this Decree concerning the composition of a private school governing committee shall be determined by the articles of incorporation.

Local Education Autonomy Act (revised by Act No. 6216 on January 28, 2000)

Article 62 (Composition of Electoral Body)

(1) An electoral body for members of the Board of Education or the Superintendent of the Office of Education shall be composed of all individuals who are members of school operational committees (hereinafter called the "school operational committee electorate) under Article 31 of the Elementary and Secondary Education Act as of the date when the election day is announced.

Appendix 3 : Opinion of the Minister of Education and Human Resources (previously, Minister of Education)

(1) Numerous nations around the world including the United Kingdom have launched diverse education reform programs to prepare people for the 21st century. The school operational committee program has been adopted with the understanding that education at

individual schools need to be changed if education is to successfully perform its duty in this rapidly changing globalization era. It is designed to do away with school management based on regulation and control, and to reform a formerly undemocratic decision making process, or a closed school management. It has been adopted to maximize autonomy and creativity of each school, thereby enabling diverse and creative education in accordance with the local conditions and school characteristics.

(2) Independence of education implies that educators have the authority to decide contents and means of education and that the administrative agency should not have control over these matters. It also means that the teachers' independence from supervisors and founders of educational facilities, and the exclusion of administrative agencies in deciding the contents of education, and the public election of the members of the board of education or similar education management organizations. The school operational committee is designed to ensure democracy and transparency in the school policy making process by encouraging participation of various members of the school community, and it is an autonomous organization established to conduct diverse and creative education appropriate to the local conditions and regional characteristics. In this light, the school operational committee in itself does not violate autonomy of education guaranteed by the Constitution.

Professionalism of education requires that professional educators should take charge of preparation and execution of education policy, or at least, they should participate in the process. Since the school operational committee is merely an advisory organ of diverse members of the school community which deliberate on matters of great significance for the school management upon the principal's request, it is not contrary to professionalism of education.

The school operational committees in private schools, unlike those in national or public schools, are advisory organs, not compulsory organs. While the principal has to consult with the committee on the matters that require such consultation by the law, the result of consultation is not legally binding. Provisions requiring establishment of the school operational committees in private schools also do not infringe on the authority of the board of directors of the school foundation.

Article 32(2) of the Elementary and Secondary Education Act exempt "matters related to the recommendation of persons as invited teachers" from consultation by the school operational committee. The school operational committee deliberates and decides on matters related to the raising, administration and use of the school development fund. But a "school development fund" is money endowed by persons other

than the school foundation or that collected from parents, and since the school operational committee is the organ responsible for raising a school development fund under Article 33(1) of the Act, this is inevitable. Article 63 (Correction and Modification Order) of the Act is legislated to achieve the legislative objective of the Act by providing means to compel private schools to abide by the regulations when private schools violate education-related Acts or subsequent orders of competent authorities. Thus, whether to require the mandatory establishment of school operational committees in private schools, as is the case in national or public schools, is a policy matter for the legislature, and it cannot be deemed as unconstitutional unless the legislature clearly departs from the scope of legislative discretion.

(3) The school operational committee is an advisory organ designed to ensure democracy and transparency in the school policy making process by encouraging participation of various members of the school community, and it is an autonomous organization established to conduct diverse and creative education appropriate to the local conditions and regional characteristics. The school operational committee does not restrict the right of a private school foundation to freely use, profit from, or dispose of the school properties, so it does not infringe on the property rights of the private schools.

(4) The complainants argue that to grant all members of the school operational committees the right to vote for members of the Board of Education or the Superintendent of the Office of Education violates the local residents' right to vote and that it is against Article 117 and 118 of the Constitution. However, the right to elect members of the Board of Education or the Superintendent of the Office of Education is given to the members of the school operational committee in accordance with Article 62(1) of the Act on Autonomy of Local Education stipulating that "an electoral body for members of the Board of Education or the Superintendent of the Office of Education shall be composed of all individuals who are members of school operational committees (hereinafter called the "school operational committee electorate) under Article 31 of the Elementary and Secondary Education Act as of the date when the election day is announced."

II. Summaries of Opinions

1. *Constitutional Complaint against Article 34(1) of the Act on the Honorable Treatment and Support of Pensions, etc. of Distinguished Services to the State* Case
(13-1 KCCR 386, 2000Hun-Ma25, February 22, 2001)

In this case, the Constitutional Court upheld the provisions granting extra points to individuals who rendered distinguished service for the State and their families in all employment examinations for the civil service.

A. Background of the Case

Article 34(1) of the Act on the Honorable Treatment and Support of Pensions, etc. of Distinguished Services to the State (hereinafter called the "Act") grants an extra 10% of the full score in each subject tested in all employment examinations for the civil service to individuals who rendered distinguished service for the State and their families (hereinafter called "individuals with distinguished service recognition"). The complainant who was preparing for the national public employee employment examination filed a constitutional complaint against the statutory provision alleging that it infringes on the right of equality, the freedom to choose one's occupation, and the right to hold public office of the complainant who is not classified as an individual with distinguished service recognition.

In 1999, the Constitutional Court ruled that the statutory provisions in the Support for Discharged Soldiers Act, granting veterans an extra 5% of the full points as extra in each subject tested in all hiring examinations for civil service, were unconstitutional because they discriminated against women and men who were not classified as veterans, in violation of the principle of proportionality.

B. Summary of the Decision

The Constitutional Court unanimously upheld Article 34(1) of the Act, and ruled as follows:

(1) Review on violation of the equality principle can be conducted using either of the two standards, namely, the principle against arbi-

trariness or the principle of proportionality. In most equality reviews, the principle against arbitrariness is employed, but in those cases where the Constitution specially demands equality or where differential treatment causes a significant burden on the related basic rights of other individuals, the constitutional review shall be conducted using a strict standard of the principle of proportionality.

The extra point system for individuals with distinguished service recognition puts a great burden on the basic rights, namely, the right to hold public office and the freedom to choose one's occupation. Therefore, in the instant case the Court should employ the principle of proportionality as the standard of review. However, because Article 32(6) of the Constitution orders preferential treatment of individuals who have given distinguished service to the State in the field of opportunity to work, the Court should employ a more relaxed standard of review than the usual strict standard of the principle of proportionality.

The legislative purpose of the extra point system for individuals with distinguished service recognition is designed to help them achieve a stabilization of livelihood and to provide them with another chance to serve the State and society by providing preference in job opportunities as stipulated in Article 32(6). The extra point system is also appropriate as the policy to achieve such legislative objective.

And also, since Article 32(6) of the Constitution demands priority in providing job opportunities for individuals with distinguished service recognition, preferential treatment of these individuals is necessary.

In most civil servant examinations, individuals protected by the governmental employment protection program make up about 10% of total successful candidates. In the light of this fact, we can conclude that there is a balance between the legislative purpose and the extent of discrimination. In some cases, only individuals under the state employment protection program may qualify for the openings in a particular civil service sector due to the limit in the number of final candidates or the difficulty of the examination. However, such exceptional cases do not make the extra point system unconstitutional altogether. The veterans' extra point system was declared unconstitutional by the Court because it discriminated against women in violation of the constitutional provisions. However, the extra point system for individuals with distinguished service recognition, based on Article 32(6) of the Constitution stipulating preferential treatment for individuals who have given distinguished service to the State, meets the balance of interest test despite some problems it poses.

Therefore, the instant extra point system does not give preferential treatment to individuals with distinguished service recognition in violation of the principle of proportionality, and it does not infringe on the complainant's right to equality.

(2) The right to hold public office protected by Article 25 of the Constitution means that all citizens will have equal opportunities to serve as public officials according to their abilities and aptitudes. Thus, discrimination by factors unrelated to the required job qualifications such as gender, religion, social position, or region is prohibited by the Constitution, in principle.

However, exceptions to the principle of meritism in selecting public official candidates can be made if they are based on a constitutional principle, or a particular statute of the Constitution, and if they are within reasonable limits.

Restriction on the right to hold public office imposed by the instant extra point system is an exception to the merit system in selecting public official candidates based on Article 32(6) of the Constitution, and as we have seen, does not violate the principle of proportionality or the rule against excessive restriction in the review on violation of the principle of equality. Therefore, the extra point system does not violate the complainant's right to hold public office.

C. Aftermath of the Case

The Constitutional Court employed the principle of proportionality, first employed in the veteran's extra point system, for the constitutional review of the instant case. In actual application of the principle of proportionality to the instant case, the Court used a more relaxed standard because the Constitution called for preferential treatment of individuals with distinguished service recognition, and the Court declared the instant extra point system constitutional, unlike its previous ruling on the veterans' extra point system.

2. *New Agreement on Fisheries between the Republic of Korea and Japan* Case
[13-1 KCCR 676, 99Hun-Ma139, 99Hun-Ma142, 99Hun-Ma156, 99Hun-Ma160 (consolidated), March 21, 2001]

In this case, the Constitutional Court upheld the provisions in the new Agreement on Fisheries between the Republic of Korea and Japan

for the reason that it does not violate the right of the complainants.

A. Background of the Case

In 1994, the 200-nautical-mile Exclusive Economic Zone (EEZ) regime began with the effectuation of the United Nations Convention on the Law of the Sea. On January 23, 1998, Japan unilaterally declared abrogation of the Agreement on Fisheries between the Republic of Korea and Japan (hereinafter called the "Fisheries Agreement") signed in December 1965. Then, on November 28, 1998, Korea and Japan agreed on a new Fisheries Agreement. The new Fisheries Agreement recognizes each country's claim on the 200-nautical-mile exclusive economic zone, but it establishes a neutral zone where exclusive economic zones of the two nations overlap. The new Fisheries Agreement grants the coastal nation the rights to decide fishing conditions such as fishing quotas of the other nation, or to allow or regulate the other country's fishing activities within its exclusive economic zone. According to the Agreement, neither of the two countries (Korea and Japan) can regulate fishing activities of the other country inside the neutral zone in the overlapping exclusive economic zones, and the flag state has authority over its ships within the same region. Under the new Fisheries Agreement, the neutral zone in the overlapping exclusive economic zones included Tokdo, the eastern-most islets of Korea. Complainants who have fished in the waters around Tokdo under the old Fisheries Agreement filed a constitutional complaint, alleging that the new Fisheries Agreement infringed on the complainant's right to territory by forcing Korea to give up its territorial claims to Tokdo, and its right to fish around the islets of Tokdo.

B. Summary of the Decision

Justices could not agree whether the instant case met the conditions required for a legitimate constitutional complaint. Two Justices decided that the complaint did not meet the self-relatedness requirement, because the right to territory was not a basic right, and denied standing. On the other hand, seven Justices decided that a constitutional complaint could be filed based on the right to territory. Through its review on merits, the Court upheld the new Fisheries Agreement between Korea and Japan on a majority vote.

(1) Majority Opinion

(A) Article 3 of the Constitution states that "the territory of the

Republic of Korea shall consist of the Korean peninsula and its adjacent islands," thereby declaring the extent of territorial sovereignty of Korea. However, not many academics, if any, interpret the territorial clause in the Constitution as a basis for a constitutional right protected by the State. This is because while a basic right is a subjective constitutional right of individual citizens the territorial clause is a provision stipulating one of the fundamental physical components of a state. Protection of peoples' basic right is the objective of all governments, and it gives legitimacy to the state authorities. A constitutional complaint, one of the most representative means to protect peoples' basic rights through constitutional adjudication, does not only function as a subjective means of providing relief to individuals whose rights are violated but also serves as an objective means to uphold the constitutional order. There may be cases where substantial protection of the individual's basic rights would be impossible if an objective constitutional order in the matter is not guaranteed. One such example arises out of Article 3 of the Constitution. Article 3 declares the territorial basis of our nation. Changes in our territorial frontiers inevitably bring about changes in the extent of sovereignty of our nation, thereby causing many changes in the social and legal orders. Changes in the national territory will eventually lead to important changes in the scope of peoples' basic rights. In this respect, while it may not be possible to file a constitutional complaint based on the territorial clause alone, the right to territory could be regarded to constitute one of the basic rights upon which the Court could review the constitutionality of the instant provisions. This would help achieve a more substantial protection of peoples' basic rights.

(B) The Agreement in this case is a fisheries agreement, and is not directly related to the territorial rights within the exclusive economic zones. Although the Agreement distinguishes an exclusive economic zone from a neutral zone, the neutral zone is formed between the two countries by yielding a proportion of EEZ to their coastal lines from a median line that would have to be drawn in case a mutual argument on the EEZ is not made. In this light, it can be concluded that interests of both countries have been duly reflected in the instant Fisheries Agreement. An exclusive economic zone is an independent entity from the territorial waters, and this is the same for a neutral zone. Therefore, although Tokdo may be inside the neutral zone under the Agreement, the Agreement is not directly related to the territorial claims to Tokdo. Thus, complainants' argument that their right to territorial waters of Tokdo and the exclusive economic zone have been violated by the instant Agreement lacks a basis

(2) Dissenting Opinion

The instant Fisheries Agreement is an agreement on fishing by nationals and ships of Korea and Japan in the exclusive economic zones of the two countries (refer to the preamble of the Agreement). Article 15 of the instant Agreement, stating that the Agreement shall not be deemed to harm either parties' position on international legal issues other than the fisheries matter, makes it clear that the Agreement is not related to the territorial issues of both nations. Also, the territory, along with people and sovereignty, is a basic condition to form a state, and the entity entitled with the territorial right is the state, not individual citizens of the state.

Individual citizens could assert that a certain land part constitutes territory of the State or demand the State to guard its territory, and territory is the basis for its citizens' livelihood or their basic rights. However, the right to territory is not a basic right that an individual can demand the State to protect, and the instant citizen's constitutional complaint does not have standing in the Court, because there is no violation of a constitutional right.

3. *Injunction on Security Surveillance and National Defense Surveillance Act* Case [13-1 KCCR 799, 98Hun-Ba79, 98Hun-Ba86, 99Hun-Ba36 (consolidated), April 26, 2001]

In this case, the Constitutional Court invalidated a provision of the Security Surveillance Act not allowing an injunction on a security surveillance when a person made subject to security surveillance makes an appeal to an appellate court through administrative proceedings, because the provision was against the principle of due process.

A. Background of the Case

According to the Security Surveillance Act, when a person files a judicial review of administrative actions objecting to security surveillance, an injunction order can not be issued during the proceedings unlike other administrative cases.

A security surveillance disposition is issued against persons who committed such crimes as espionage or who violated certain statutes of the National Security Act. A person subject to security surveillance is required to report one's principal activities for a three-month

period, contents of meeting or communications with other persons, also subject to security surveillance, and matters relating to trips, and if the individual fails to report the aforementioned matters or does not follow the limitations imposed by the authority, he or she would be subject to criminal prosecution.

Complainants are individuals who had been made subject to security surveillance or whose security surveillance disposition period had been renewed. The complainants filed a constitutional complaint arguing that the instant statutory provision entirely prohibiting an injunction order is against the principle of due process.

B. Summary of the Decision

The Court invalidated Article 24 of the Security Surveillance Act in a unanimous decision as follows:

According to Article 24 of the Security Surveillance Act, it is impossible to order an injunction against security surveillance disposition when a person files a judical review of administrative actions objecting to security surveillance. Under the provision, an individual who received an unjustified security surveillance disposition cannot help but be made subject to the enforcement of the disposition until the ordinary court decides the disposition null and void. Furthermore, under the provision, even if the disposition is invalidated by the judgment of the ordinary court, the person will be prosecuted on criminal charges if the said person runs away to avoid security surveillance, does not report required matters without valid justification, or attends a gathering contrary to the public prosecutor's disposition before the prohibitive measures is declared null and void. The statutory provision also stipulates that a case would be dismissed if the disposition period of 2 years elapses during administrative proceedings.

The legislative purpose of the instant provision is to prevent an injunction order from being issued without sufficient review of the case. However, such objective can be achieved through means other than placing an absolute ban on injunction. For example, substantive regulations or procedural regulations could be enacted to qualify the conditions of an injunction, and the ordinary court may make the decision based on their judgment, thereby achieving the desired legislative objective.

An absolute ban on injunction was adopted not because it was inevitable, but rather because priority had been given to administrative convenience and efficiency in legislating the Act. Under the provision, an individual made subject to security surveillance has only

limited opportunities to receive a judicial review of the legitimacy of the security surveillance disposition restricting his or her privacy rights and freedom of expression, and sometimes, an individual made subject to security surveillance is even deprived of such opportunities altogether. In this light, there does not exist a balance between the public interest achieved by the Act and the private interest restricted by the Act.

Due process of law stipulated in Article 12(1) of the Constitution requires that restrictions on peoples' freedom be made through procedures stipulated in a form of an act legislated by the parliament and that the contents of such Act be reasonable and legitimate. However, the instant provision unreasonably restricts the basic right of a person made subject to security surveillance in the legal process of arguing the legitimacy of the security surveillance disposition. Therefore, it is contrary to the principle of due process.

C. Aftermath of the Case

In this case, the Constitutional Court once again ruled that it is against the principle of proportionality if the legislators enacted a law that did not leave any room for discretion for the administration or the ordinary courts when it could achieve the same legislative objective through provisions granting discretion to the institutions applying the law.

4. *Act on the Registration of Real Estate under Actual Titleholder's Name* Case

[13-1 KCCR 1017, 99Hun-Ka18, 99Hun-Ba71, 99Hun-Ba111, 2000Hun-Ba51, 2000Hun-Ba64, 2000Hun-Ba65, 2000Hun-Ba85, 2001Hun-Ba2 (consolidated), May 31, 2001]

In this case, the Constitutional Court found nonconforming to the Constitution the provisions of the Act on the Registration of Real Estate under Actual Titleholder's Name, because penalty imposed to persons violating the statutes of the Act was too excessive and indiscriminate.

A. Background of the Case

According to the Civil Act, one can exercise a real right over

real estate against a third party only after registration of the right. However, the Supreme Court, through its precedents dating back decades, has allowed registration of real estate under the title of a person who does not have actual rights of the estate, and the so-called "title trust agreement" has been widely used by the general public. Under a title trust agreement, a real right is registered under the title trustee's name, and externally, or in matters concerning people other than title trustor and title trustee, the title trustee is the person who can make legal claims based on the registered right. Between the title trustee and the title trustor, however, the title trustor retains the actual rights to the real estate. The title trust agreements, however, have widely been used for speculation, evasion of taxes and other means of circumventing the laws, and the National Assembly enacted the Act on the Registration of Real Estate under Actual Titleholder's Name in 1995 to regulate such abuse of the title trust agreements. According to the Act, registration of real right to real estate under the name of the title trustee under the title trust agreement is prohibited (this is called "obligation to register in name of person having actual right"), and when a creditor has a real right to any real estate transferred to secure a performance of an obligation (hereinafter called "security right by means of transfer"), the creditor is required to submit an application for registration to a public official in charge of the registration along with a document specifying the obligor, amount of credit, and the fact that it is a security for the performance of an obligation. Also, the Act provides that a penalty equivalent to 30/100 of the value of the real estate can be imposed upon ① a person who violated the real name registration requirement after the Act came into force or who, being classified as an existing title trustor, failed to make an actual name registration during the grace period of one year from the enforcement date of the Act; ② a person who acquired a real right of real estate but did not apply for an actual name registration within three years from certain days that the Act prescribes; and ③ a creditor who has a real right to real estate transferred to secure the performance of an obligation, but failed to submit documents specified under the Act within the grace period of one year from the enforcement date of the Act.

Petitioners who were penalized under the provisions of the Act filed for a judicial review of administrative actions objecting to imposition of the penalties. The ordinary court *sua sponte* requested the constitutional review of the provisions of the Act regarding penalties.

B. Summary of the Decision

(1) Majority Opinion

The Constitutional Court issued a decision of nonconformity, prohibiting the provisions from being applied in any manner by courts, other state agencies, and local governments and ordering the legislature to revise the Act by June 30, 2002, after which the provisions would become void as of July 1, 2002, on a majority vote of eight Justices, as follows:

(A) Penalty Provision against Title Trustor

The instant provision uniformly imposes a penalty equivalent to 30/100 of the value of the real estate upon a person who became a title trustor after the Act entered into force or a person who became a title trustor before enforcement of the Act but failed to make an actual name registration within the grace period provided by the Act. The magnitude of the penalty was decided with due consideration to rates of the transfer profits tax and gift tax to render such regulation effective. While the penalty rate is at a level similar to the transfer profits tax and gift tax, the actual penalty amount levied by the Act is much larger than that collected through these taxes because the transfer tax is levied on capital gains from property transfer and the gift tax is levied on a tax basis after the deduction of certain expenses. Moreover, additional charges for compliances can be imposed upon the individual when he or she is penalized under the Act but continues to delay the registration of the real right to the real estate concerned under his or her name. Based on such facts, it can be concluded that the penalty rate in the instant case, namely 30/100 of the value of the concerned real estate, is too excessive even when we consider the legislative purposes.

The instant provisions of the Act impose a uniform amount of penalty without an exception, and this may result in excessive punishment in certain cases. The provisions provide no room for consideration of the underlying intent of the title trust agreement, and differentiations in penalty amounts for different types of violation are not possible. And also, the provisions take no heed or provide no consideration for special circumstances necessitating the use of the title trust agreement. Because the Supreme Court had declared the title trust agreement legitimate through its many precedents, many people must have used the title trust agreement for mere convenience before it was made illegal through legislation of the Act. In this light, it is very likely that the provisions of the Act are against the principle of proportionality and the right to equality, if they do not allow the administrative authorities to impose different penalty

amounts for different cases after considering such factors as the underlying purpose of the use of the title trust agreement, the amount of profits from transactions, if any, and the period of delay before applying for an actual name registration.

(B) Penalty Provision against Title Trustor Making No Registration for a Long Period of Time

A person who has signed a title trust agreement to actively hide his or her real rights to real estate is very likely to have illegitimate or antisocial intent in doing so. However, a person who has not applied for the registration of the real right to the real estate concerned under his or her name for a long period is more likely to have delayed the registration for other reasons: he or she may be ignorant of the new legislation; he or she may find it too troublesome to change the registration; or he or she may not have enough resources to pay for the expense of registration.

Delay in the registration is fundamentally inaction, and failure to make a registration for transfer of the real right to real estate is a violation of a duty imposed for administrative reasons. In this light, to impose a uniform penalty amount equivalent to 30/100 of the value of the real estate upon individuals without such antisocial intent as tax evasion or circumvention of legal regulations would fail the balance of interests test, and therefore is against the rule against excessive restriction. Furthermore, to punish such individual with a penalty equivalent to that imposed on people who actively violated the Act by signing a title trust agreement is against the principle of equality.

(C) Penalty Provision against Holder of Security Right by means of Transfer

A security right by means of transfer, a legal act, is granted to ensure the performance of an obligation, and granting security right does not have any antisocial nature in itself. A special act has been legislated to regulate the practice of granting security rights by means of transfer, and a relatively light administrative penalty is imposed upon an individual violating the provisions under other laws regarding the duty to report. Considering these facts, imposing a penalty amount equivalent to 30/100 of the value of real estate upon an for failure to submit required documents, even in the case when it is clear that the individual is a legitimate creditor entitled to a security right by means of transfer, is excessive and violates the principle of proportionality. Also, to punish such individual with a penalty equivalent to that imposed on people who knowingly violated the Act on the Registration of Real Estate under Actual Titleholder's Name after it entered into force is against the principle of equality.

(2) Dissenting Opinion

The statutory provision declaring all title trust agreements null and void is unconstitutional because it fails the balance of interests test. It excessively restricts the exercise of the property right and violates the principle of private autonomy. All statutory provisions of the Act regulating title trust agreement based on the premise that all title trust agreements are null and void are also unconstitutional.

C. Aftermath of the Case

The National Assembly revised the Act on March 30, 2002 following the decision of the Court. According to the revised Act, a penalty up to the amount equivalent to 30/100 of the value of the real estate can be imposed for violation of the Act, but the specific criteria for actual penalties will be prescribed in the presidential decree of the Act with due consideration to the value of real estate, the period of violation, and the existence of any antisocial intent such as tax evasion or circumvention of legal regulations. Under the revised Act, the State is now able to impose different amount of penalties for different cases in violation of the Act.

5. *Limit on Detention Period* Case
(13-1 KCCR 1188, 99Hun-Ka14, June 28, 2001)

In this case, the Constitutional Court upheld the provision of the Criminal Procedure Act limiting the detention period of a defendant because it serves the legislative purpose of protecting the bodily freedom of the accused.

A. Background of the Case

Article 92(1) of the Criminal Procedure Act states that "a period of detention shall not exceed two months. In cases where the continuance of the detention is necessary, the period of detention may be renewed twice in each instance only by a court's ruling." In some cases, such limit on the detention period has made judges rush into sentencing defendants accused of serious charges without sufficient hearings, because the judges feel that they need to finish the trial before they are forced to set free such serious criminals upon the elapse of detention period.

The requesting court was about to try an appeal case for a

defendant sentenced to 15-year imprisonment on a murder charge by the court of first instance. A substantial period was spent for preparation of the appellate court hearings, and the Court discovered that the defendant could be detained for only one more month at the time of the first hearing. The requesting court *sua sponte* requested the constitutional review of the instant statutory provision limiting detention period of the accused, stating that the provision violated the defendant's right to a fair trial, and the right to pursue happiness, and that it was contrary to human dignity and worth.

B. Summary of the Decision

(1) Majority Opinion

The Constitutional Court upheld the instant statutory provision, on a majority vote of seven Justices, as follows:

"Detention period" as used in the instant provision means "a period allowed for an ordinary court to hold its hearings while physically detaining the defendant," and it does not mean "a period allowed for an ordinary court to hold its hearings on a case where the defendant is physically detained." In other words, the instant statutory provision limits the detention period in order to protect the defendant's bodily freedom by preventing prolonged detention of the defendant in prejudgment confinement, and it is not designed to limit the period of actual hearings or adjudication of the ordinary court for the purpose of a speedy trial. Therefore, when a competent court reviewing a case against a detained defendant feels that further hearings are required, it can set the detained defendant free and continue the legal proceedings against the defendant. Although the instant statutory provision strictly limits the detention period of a defendant by the court, it does not impose a limit on the period of trial or violate the defendant's right to a fair trial by restricting the exercise of defendant's right to defend oneself.

It could be argued that such limit on the detention period may in actuality violate a defendant's right to a fair trial because of the common practice of the ordinary courts to finish trials against detained defendants before the detention period elapses. However, violation of a basic right in such case is because of the wrongful application of the instant provision, contrary to the legislative purpose. The instant provision only serves to protect the defendant's bodily freedom, and does not violate the defendant's right to a fair trial in itself. Hence, it is constitutional.

(2) Dissenting Opinion

A defendant may not be given sufficient opportunities to prove his or her arguments against the charge and to dispute the accusation made by the public prosecutors because of the customary practice of the ordinary courts to rush sentencing a detained defendant lest the defendant flee and not show up for trial after being set free. This happens because the instant statutory provision strictly and uniformly limits the detention period of a defendant. Therefore, the instant provision violates the defendant's basic rights, and hence, is unconstitutional.

6. *Closure of Competence Dispute Proceeding* Case
(13-1 KCCR 1218, 2000Hun-Ra1, June 28, 2001)

In this case, the Constitutional Court declared the competence dispute case closed upon the plaintiff's withdrawal after completion of the hearings but before the Court's pronouncement of its final decision, by applying *mutatis mutandis*, the Civil Procedure Act on withdrawal of a case.

A. Background of the Case

Mr. A, who is a member of the ruling party and an executive secretary of the House Steering Committee in the National Assembly, declared the opening of an *ad hoc* meeting of the Steering Committee, placed a proposal for revision of the National Assembly Act on the agenda, and declared that the proposal was adopted on behalf of the Chairman of the Steering Committee. Plaintiffs, who are members of the National Assembly from the opposition party, requested an adjudication on competence dispute alleging that their rights to review and vote on the proposed revision of the Act had been violated, and requested the Court to pronounce the declaration of the adoption of the proposed revision by Mr. A null and void. Plaintiffs' arguments were based on the following grounds: that the Chairman of the Steering committee did not bestow proper authorities to Mr. A to declare the opening of a committee meeting; that the proposal for revision of the National Assembly Act was not properly adopted as the agenda of the meeting; and that the voting process to adopt the agenda was not in accordance with the required procedures prescribed in the National Assembly Act.

The Court held two hearings on the case, completed deliberation of Justices after conclusion of the oral arguments, reached a verdict, and designated a date for pronouncement of its final decision. In the meanwhile, the legislature did not take further steps to revise the National Assembly Act: It did not refer the proposal for the revision of the Act to the Legislation and Judiciary Committee or to the plenary session of the National Assembly. Furthermore, the ruling party and the opposition party agreed to refer the proposal for revision back to the House Steering Committee for deliberation and to withdraw the request for a competence dispute adjudication. Following such agreement, plaintiffs withdrew their request for a competence dispute adjudication two days before the date designated for pronouncement of the Court's final decision on the matter.

B. Summary of the Decision

(1) Majority Opinion

The Constitutional Court declared the competence dispute case closed, on a majority vote of seven Justices, as follows:

Article 40(1) of the Constitutional Court Act provides that "except as otherwise provided in this Act, the provisions of the laws and regulations relating to the civil litigation shall apply *mutatis mutandis* to the procedure for adjudication of the Constitutional Court." Because there is no provision in the Constitutional Court Act regulating withdrawal of requests for adjudication on a competence dispute or requiring agreement of the defendant, Article 239 of the Civil Procedure Act on withdrawal of a lawsuit applies *mutatis mutandis* to the procedure for adjudication on a competence dispute.

Competence dispute does not serve a subjective function of providing relief to individuals whose rights are infringed, but it serves an objective function of upholding the constitutional order. The instant case where plaintiffs allege that their rights to review and vote on proposals for legislation are violated, deals with a very public issue concerned with the protection of the legislative authorities of lawmakers. However, individual lawmakers can decide whether to exercise the right to review and vote on legislation proposals, and individual lawmakers whose right to review and vote on legislation proposals had been violated can decide whether to file a request for the adjudication of a competence dispute. In other words, the legislators are entitled to the freedom to file a competence dispute adjudication. Based on these facts, it can be concluded that a National Assembly member should also be guaranteed the freedom to withdraw the request for a competence dispute adjudication on his own

will and that the National Assembly member should not be deprived of such freedom because of the public nature of the competence dispute adjudication. In the instant case, the competence dispute is closed by the plaintiffs' withdrawal of the request for adjudication.

(2) Dissenting Opinion

In the instant competence dispute case, plaintiffs withdrew their request for constitutional adjudication after completion of a review of the facts, and further hearing was not needed. According to the case records, the decision of the Court in the instant case clarifies criteria and limits on details of proceedings that the National Assembly, especially the Standing Committees, has to abide by, and this has important bearing in defending and maintaining the constitutional order. Therefore, Article 239 of the Civil Procedure Act concerning the closure of a judicial review should not be applied *mutatis mutandis* in this case, even if plaintiffs withdrew their request for a competence dispute adjudication. Accordingly, the case is not closed, and the Court should pronounce its final decision on the case.

C. Aftermath of the Case

This is the first competence dispute case where details of the proceedings in the House Steering Committee, one of the Standing Committees in the National Assembly, became a subject of constitutional debate. According to the dissenting opinion, the Court reached a conclusion that the adoption of the proposed revision to the National Assembly Act violated the plaintiffs' rights to review and vote on legislation proposals and that the declaration of adoption of the proposed revision was null and void because it violated the majority rule guaranteed by the Constitution. It is likely that political disputes in the National Assembly will be argued in the Constitutional Court more often in the future because of the unannounced decision of the Court in the case.

The opposition party, following the reasoning of the dissenting opinion, is working on a proposal to revise the Constitutional Court Act to limit withdrawal of the request for constitutional adjudication in competence dispute or constitutional complaint procedures.

7. *Agent Orange Victims* Case
(13-1 KCCR 1393, 99Hun-Ma516, June 28, 2001)

In this case, the Constitutional Court found nonconforming to the Constitution the provision of the Act to Support Veterans Suffering from Exposure to Defoliants which denies the eligibility of benefits for bereaved families of veterans who died without applying for benefits under the Act, on the grounds that the provision violates the principle of equality.

A. Background of the Case

During the Vietnam War, defoliants such as Agent Orange were widely used by the armed forces in military operation areas. Long after the War, scientists have epidemiologically proved that these defoliants could cause serious illness such as lung cancer. On March 10, 1993, the National Assembly legislated the Act to Support Veterans Suffering from Exposure to Defoliants (hereinafter called the "Act") to help Korean Vietnam War veterans suffering as a result of exposure to defoliants or bereaved families of veterans who died of aftereffects from exposure to defoliants.

However, the Act limited the families qualifying as beneficiaries under the Act to ① family members of a veteran who is confirmed to have died of illness resulting from exposure to defoliants before the enforcement of the Act, and ② family members of a veteran who, having applied to the Minister of the Office of Patriots and Veterans Affairs for benefits under the Act, died before being classified as a qualified beneficiary under the Act, but was posthumously recognized as a defoliant victim. Therefore, family members of a veteran who died before applying for benefits after enforcement of the Act, such as the complainants, do not qualify for benefits under the Act even if it is later proven that the cause of death of the deceased veteran was illness directly linked to exposure to defoliants. Complainants filed a constitutional complaint alleging that the instant statutory provision violated the right of equality and the right to property.

B. Summary of the Decision

(1) Majority Opinion

The Constitutional Court issued a decision of nonconformity, on a majority vote of six Justices, as follows:

(A) Violation of Property Right

Article 32(6) of the Constitution states that "the opportunity to work shall be accorded preferentially, under the conditions as prescribed by Statute, to those who have given distinguished service to the State, wounded veterans and policemen, and members of bereaved families of military servicemen and policemen killed in action." To provide "the opportunity to work" refers to only one of many possible means to reward people who rendered distinguished service to the State. The statutory provision as a whole proclaims that the State has a comprehensive duty to compensate for the sacrifice and distinguished service of these individuals. Details of compensation are problems of the legislative policy, and the legislature should prepare necessary measures with due consideration to the economic status of the State, financial means available, and public sentiment. Individuals with distinguished service recognition can make claims for compensation only after legislators enact laws with detailed provisions awarding compensation to these individuals, and such is the case here.

The right to receive compensation has the same attributes as the right to property. However, because it is recognized as a right upon legislation in a particular statute, the right to receive compensation is not a property right protected by the Constitution until a particular individual meets qualification requirement stipulated by the law. Therefore, the complainants who have not yet met the legal requirements prescribed by the Act have not yet acquired the right to receive compensation, and the provision on review does not violate the complainants' property rights.

(B) Violation of the Principle of Equality

Whether death of a veteran suffering from illness related to exposure to defoliants occurs before or after the enforcement date of the Act depends on very fortuitous factors such as the type of illness, time of contracting the disease and its seriousness, and the rate of progress of the disease. In either case, there is no difference in the fact that a veteran has suffered from aftereffects of exposure to defoliants. Therefore, it is unreasonable to discriminate against bereaved family members of veterans based on whether a veteran died before or after the Act entered into force.

Among the veterans who died after filing for benefits but before being recognized as a defoliant victim, there may be cases where the State was accountable for the delay in recognizing him as a defoliant victim, whereas in the case of veterans who died without applying at all, the State cannot be held accountable for a delay in the determining process. This may be the reason for distinguishing

the two cases. However, the State does not need to take steps to compensate individuals for administrative delays if a veteran nearing his demise because of illness linked to exposure to defoliants filed for benefits but died immediately after applying for benefits. But, in cases of veterans who died before applying for benefits, it would be unreasonable to uniformly penalize veterans who neglected to institute proceedings because there would be many different reasons as to why veterans who died before applying for benefits under the Act did not apply: some veterans may not have known that they suffered from aftereffects of exposure to defoliants because of misdiagnosis; some veterans may have died before applying for benefits because of rapid development of disease; and some may not have known that the State enacted new laws to provide benefits to defoliant victims or that defoliant victims need to follow special procedural requirement to qualify for benefits.

However, what is more important is that compensation for veterans suffering from defoliant exposure and for family members of such veterans is not merely a gratuitous favor of the State. It is just compensation by the State for the honorable sacrifice that these veterans made for the State during the Vietnam War. Therefore, the State should continuously afford compensation for all veterans recognized as defoliant victims and their families to the maximum possible extent, which would be in accordance with the spirit of Article 32(6) of the Constitution. The central issue for compensation, then, is whether the cause of the veteran's death is illness resulting from exposure to defoliants during his tour of duty in Vietnam, not whether the deceased applied for benefits before his death.

It would be convenient for administrative purpose if the deceased applied for benefits before his death: in that case, a careful and more accurate diagnosis could have been made to determine whether the disease resulted from exposure to defoliants. It would be far more difficult and less accurate to posthumously determine whether the cause of death of a veteran was illness related to exposure to defoliants. However, the Act stipulates that in cases where a veteran died before enforcement of the Act or after applying for benefits under the Act, the cause of death would be determined by the certificate of death or medical records. This means that difficulty in accurately determining the cause of death does not only exist in cases where a veteran died before applying for benefits after the Act entered into force.

In conclusion, the statutory provision stipulating that whether family members of a defoliant victim qualify to apply for benefits under the Act depends on the fact whether or not the deceased applied for benefits before his death discriminates against family members of

a defoliant victim who died before applying for benefits arbitrarily and without a reasonable basis, and hence, is unconstitutional.

(2) Dissenting Opinion

Details of rewarding those who rendered distinguished service to the State are problems for the legislative policy. The legislature should prepare necessary measures with due consideration to the economic status of the State, financial means available, and public sentiment, and there exists a large degree of discretion.

The reasons that only family members of a defoliant victim who applied for benefits before his death qualify for compensation under the Act are as follows: First, the State can refuse protection of the bereaved family of an individual if the deceased, during his lifetime, was delinquent in exercising his legally protected rights; Second, because it takes a while to confirm that a veteran indeed suffered from an illness related to defoliant exposure, due to the lack of veterans hospitals, doctors and laboratory equipment, special treatment is required for a veteran who died after applying for benefits but before being recognized as a defoliant victim; Third, if a veteran is not required to apply for benefits, it is almost impossible to find out how many defoliant victims there are, and this leads to difficulty in assessing actual budget required to make compensation and the standard of the compensation itself; Fourth, if family members of a deceased defoliant victim are allowed to apply for benefits regardless of whether the veteran applied for benefits before his death, a decision of qualification for benefits will have to be based on records of medical facilities other than those designated and entrusted by the provisions in the Act. Considering the complications inherent in aftereffects of exposure to defoliants, this would bring questions of accuracy and reliability of the system recognizing defoliant victims; Fifth, considering the fact that family members of a veteran who was recognized as a defoliant victim but failed to be classified into class I-VII following a physical examination do not qualify for benefits under the Act, a question of equity would arise if the complainants are allowed to apply for benefits under the Act.

In conclusion, the statutory provision, stipulating that whether family members of a defoliant victim qualify to apply for benefits under the Act depends on the fact whether or not the deceased applied for benefits before his death has a reasonable basis, is not against equity or justice, is not arbitrary, and hence, is constitutional.

C. Aftermath of the Case

Instead of a decision of unconstitutionality, the Court found the instant statutory provision nonconforming to the Constitution and ordered to leave the statutory provision effective temporarily for a limited period until the legislature revises the Act in a manner consistent with the Constitution. Following the decision, the National Assembly revised the Act on January 26, 2002. According to the revised Act, the bereaved family members of a Vietnam War veteran who died of illness related to exposure to defoliants before applying for benefits under the Act can apply for compensation whether or not the deceased applied for benefits before his death.

8. *Ban on the Shuttle Bus Operation* Case (13-1 KCCR 1441, 2001Hun-Ma132, June 28, 2001)

In this case, the Constitutional Court upheld a provision prohibiting department stores and large discount stores from operating shuttle buses running from and to the stores.

A. Background of the Case

In late 1990s, the number of large retailers increased rapidly, and department stores began to run shuttle buses to attract more customers. Shuttle bus operation by these businesses gave rise to friction between them and smaller retailers and companies in the passenger transport service. Passenger transport service business are subject to strict regulations concerning license requirements, fares, and route of its operation because of the strong public nature of the service, but there was almost no restriction on the shuttle bus operation by large retailers and discount stores because the buses charged no fare. As the number of shuttle buses increased continuously, the passenger transport service companies complained of financial difficulties from the decrease in passengers. So the Administration urged large retailers and discount stores to reduce the number of shuttle bus runs autonomously, but to no avail. On the contrary, the number of shuttle bus operations increased. Thus, on December 29, 2000, the National Assembly revised the Passenger Transport Service Act to prohibit shuttle bus operation by department stores and large discount stores. Complainants who manage department stores or large discount stores filed a constitutional complaint arguing that the statutory provision violated the freedom to conduct one's occupation (freedom of business).

B. Summary of the Decision

Four Justices decided to uphold the instant provision while four Justices decided it was unconstitutional. Because six votes are required to declare a provision unconstitutional or to uphold a constitutional complaint, the Court denied the complaint.

(1) Opinion of Constitutionality

The freedom of occupation can be restricted when it is necessary for national security, for maintenance of law and order, or for public welfare. The Court has ruled that the legislature could impose broader restrictions on the freedom to conduct one's occupation than the freedom to choose one's occupation.

The main line of business of department stores and large discount stores is "sales of merchandise," and not "passenger transport service." On the other hand, imprudent shuttle bus operation by department stores has caused damage to the passenger transport service business, which is public in nature, thus disrupting the maintenance of a sound passenger transport service. Endless rivalry between competing department stores and discount stores as well as a difference in the transportation environment of larger metropolitan areas and smaller cities have led to the failure of autonomous efforts to reduce shuttle operation by reducing the number of shuttle runs and routes. Therefore, the legislative purpose of the Act, namely, to establish an order in passenger transport service and to protect the passenger transport service business, is legitimate. Such legislation is also appropriate as the means. The instant provision prohibits shuttle bus operations to "draw passengers" by "setting and operating specific routes", and allows exceptions in areas where there is no public transportation. The provision also allows the Minister of Construction and Transportation, Mayor or Governor to order "extension or change of existing routes" or "operation of out-of-the-way routes or routes yielding no returns" when it is deemed necessary to facilitate smooth passenger transportation and to improve passenger transport service. Thus, inconvenience to consumers is minimized. The private interest of the complainants in the case is decrease in sales upon prohibition of shuttle bus operation by the Act. The public interest served by the legislation, on the other hand, is the establishment of order in passenger transport service and the achievement of the overall development of passenger transport service; and establishment of social market economic order by pursuing balanced growth and stability of national economy and by democratization of the economy through harmony among the economic agents as stipulated by Article 119 of the

Constitution. Therefore, the instant provision of the Act passes the balance of interest test. While the instant provision may restrict the complainants' freedom of business, it is within the limit prescribed by the Constitution.

(2) Opinion of Unconstitutionality

Operating a Shuttle bus is not a socially detrimental activity, and it is one aspect of an exercise of a constitutionally protected basic right. Therefore, it should be permitted in principle, and should only be regulated through specific legislation selectively restricting the pattern and scope of shuttle bus operation in cases where it is necessary to protect the interests of passenger transport service businesses. Such regulatory method satisfies the requirements for legislative restriction on basic rights. However, in the instant case, the statutory provision prohibits all shuttle bus operation basically and comprehensively, and allows only extremely limited exceptions. Such an inverted method of regulation inevitably results in prohibiting shuttle bus operation where there is no need for regulations, namely, where there is no harm done to passenger transport service businesses, and this is excessive restriction. The instant provision is against the principle of proportionality, and hence, unconstitutional.

9. *Installation and Maintenance of Lavatories at Police Detention Facilities* Case
(13-2 KCCR 103, 2000Hun-Ma546, July 19, 2001)

In this case, the Constitutional Court declared that the lavatories at police detention facilities extremely lacking sufficient cover of users violated the complainants' right to personality derived from the human dignity and worth stated on Article 10 of the Constitution.

A. Background of the Case

Police detention facilities are places where individuals detained through legal procedures, or individuals subject to the decision of a judge or a disposition restricting bodily freedom, are confined. The facilities mainly confine arrested or detained suspects. Complainants were arrested at the scene for violating the Assembly and Demonstration Act, and were kept at a police detention facility for about 48 hours. At the police station, the complainants were denied the use of bathrooms outside of the detention facility. However, lavatory

within the detention facility was of an open structure with insufficient cover and it did not cover all parts of the users' body from exposure. The complainants filed a constitutional complaint arguing that the forced use of such lavatory within the detention facilities violated basic rights, such as human dignity and worth, stated in Article 10 of the Constitution.

B. Summary of the Decision

The Constitutional Court, on a unanimous vote, declared that installation and maintenance of such inhumane lavatory facilities violated the right of personality protected by Article 10 of the Constitution, and ruled as follows:

Restriction of the freedom and basic rights of a detainee who is presumed innocent should be kept to a minimal extent necessary to prevent the detainee from escaping or destroying evidence and to maintain order and safety of the detention facility.

It is necessary to keep an eye on the actions of the detainees because there are detainees who, in a very unstable state, hurt oneself or commit suicide, attack other detainees, or attempt to escape. Therefore, installing a lavatory within the detention facility so that detainees do not have to go outside the detention facility, and designing the detention facility structure so as to allow observation of the lavatory as well as the detention cell has legitimate purpose. However, attention should not be only given to efficiency of surveillance and control of order.

Forcing all detainees to use such an inadequate lavatory exposure would constitute excessive restriction on detainees' freedom and basic rights, and it is against the principle of proportionality requiring employment of least restrictive means when restricting people's basic rights.

It is not impossible to install a lavatory facility providing more sufficient cover for users while enabling surveillance of the actions of all detainees in the detention facility.

The complainants must have felt ashamed, embarrassed, and humiliated whenever using a lavatory because their most private body parts could be exposed and unbearable stench and loud noise followed the use. Some may have suppressed the bodily needs. Other detainees must have felt displeased and offended whenever someone else used the lavatory.

Article 10 of the Constitution states that "all citizens shall be assured of human dignity and worth and have the right to pursue happiness." Human dignity and worth, which is the ultimate purpose

of all basic rights, and a fundamental ideal, should be respected to the utmost extent at all circumstances.

Forcing the complainants to use the aforementioned lavatory during the entire detention period takes away the most basic human dignity of the complainants, beyond endurance, and it violates the right to personality derived from Article 10 of the Constitution.

C. Aftermath of the Case

The State made amends to all lavatories in all police detention facilities around the nation following the decision of the Court.

10. *Motion Pictures Rating* Case
(13-2 KCCR 134, 2000Hun-Ka9, August 30, 2001)

In this case, the Constitutional Court invalidated the provisions of the Promotion of the Motion Pictures Industry Act allowing the Korea Media Rating Board (hereinafter called the "KMRB") to substantially ban the screening of a particular film for an indefinite period of time by withholding a rating, because such practice of the KMRB is tantamount to censorship.

A. Background of the Case

Articles of the Promotion of the Motion Pictures Industry Act require a rating of a film by the KMRB prior to its showing, prohibit showing of a film not rated by the KMRB, and allow the KMRB to withhold the rating for a period less than three months if the film contains scenes with excessive depiction of violence or obscenity, so as to harm the established social morals and customs, or pervert the social order. Provisions of the Act also allow the Minister of Culture and Tourism to ban the showing of an unrated film, and allow punishment of persons disobeying the disposition with imprisonment or a fine. Provisions of the Public Performance Act require organization of the KMRB to maintain the public order and ethics in public performance and to protect underage audiences, and the KMRB is entrusted with the authority to deliberate and vote on the rating of a film. Members of the KMRB are appointed by the President of the Republic of Korea among those individuals meeting certain qualifications and recommended by the president of the National Academy of Arts. According to the Public Performance Act, the State can subsidize the KMRB to meet its expenses from the national treasury.

Mr. A, the president of a motion picture production and distribution company, requested rating of a film to the KMRB to screen a film, but the KMRB decided to withhold the rating for two months based on the Act because the film contained obscene material. When the two-month period was over, Mr. A again applied for the rating, and the KMRB deferred the rating for another three months. Mr. A then filed a lawsuit against the KMRB seeking revocation of the deferment decision, and applied to the Court for a request for constitutional review of the related provisions in the Promotion of the Motion Pictures Industry Act. The presiding court granted the application, and requested a constitutional review of the provisions to the Constitutional Court.

B. Summary of the Decision

(1) Majority Opinion

The Constitutional Court issued a decision of unconstitutionality, on a majority vote of seven Justices, as follows:

Article 21(1) of the Constitution states that "all citizens shall enjoy the freedom of speech and the press, and freedom of assembly and association," and Article 21(2) of the Constitution stipulates that "licensing or censorship of speech and the press, and licensing of assembly and association" is not permitted. Any means of expression can be protected by Article 21(1) guaranteeing freedom of speech and the press, and a motion picture is clearly a means of expression protected by the constitutional freedom of speech and the press. Censorship as stipulated in Article 21(2) means the inspection of a view or an opinion before its expression by a State administrative agency or a quasi-State administrative agency, as preventive measures, to judge and assort its contents and to prohibit the expression of unendorsed opinion. The Constitution absolutely bans such censorship, and it is not permissible even if it is based on Statute.

The KMRB can withhold a rating of a motion picture when a person planning to show the film submits it for review. Members of the KMRB are appointed by the President of the Republic, and details of composition and procedures of the KMRB are to be stipulated by the presidential decree. Furthermore, the State can subsidize KMRB from the national treasury. A film which did not receive a rating by the KMRB cannot be shown in the screens around the nation, and an individual violating this rule can be made subject to criminal prosecution. Because there is no limit as to how many times the KMRB can defer a rating of a submitted film, the KMRB can prohibit showing of a film for an indefinite period of time. Considering

these facts, it can be concluded that the KMRB is an administrative body for all practical purposes, and that withholding the rating of a film is censorship prohibited by the constitution.

(2) Dissenting Opinion

The KMRB is an autonomous civic group, and is not a quasi-State administrative agency. Therefore, the decision to defer the rating of a film by KMRB is not a form of censorship.

C. Aftermath of the Case

On January 26, 2002, the National Assembly revised the provisions of the Promotion of the Motion Pictures Industry Act according to the decision of the Court. The revised Act repealed the withholding of a film rating, and adopted the "for restricted showing" rating. All films rated "for restricted showing" can only be shown at restricted theatres.

11. *Subpoena of Witness by Public Prosecutor* Case
(13-2 KCCR 238, 99Hun-Ma496, August 30, 2001)

In this case, the Constitutional Court declared that constant subpoena of a witness in criminal proceeding of the complainant by the public prosecutor in order to prevent him from meeting the complainant violated the complainant's right to a fair trial, and hence, is unconstitutional.

A. Background of the Case

Complainant is a member of the National Assembly, and was charged for allegedly receiving bribes from witness A. During the trial, the public prosecutor requested examination of witness A, who was in detainment, and the presiding court granted.

The public prosecutor subpoenaed witness A 270 times to the prosecutor's office and made him stay there all day long for a 15-month period from the time of investigation until witness A actually took a stand in the court. The reason for this was to make sure that witness A would not change his statements in court and to prevent witness A from meeting the complainant's attorneys.

During his stay in the public prosecutor's office, witness A could meet with his relatives and friends and make phone calls to his acquaintances in a more friendly environment than that in the detention facility.

The complainant filed a constitutional complaint arguing that the public prosecutor's subpoena of witness A, irrelevant to the investigation, to the office to threaten and coax him from altering his statements in the court violated his right to a fair and speedy trial.

B. Summary of the Decision

(1) Majority Opinion

The Constitutional Court issued a decision of unconstitutionality, on a majority vote of eight Justices, as follows:

(A) Witness A made his testimony in court after the complaint was filed, and the court of the first instance and the appellate court has rendered a final judgment on the complainant. Therefore, as the act of violation has ended, it may seem that the complainant does not have a justiciable interest in the case. Generally, a constitutional complaint where the complainant does not have a legally protectable interest is dismissed by the Court because the Court's decision would not help remedy the violation. However, a justiciable interest is to be recognized in cases where the same type of violation of basic rights is likely to be repeated and where the clarification of the constitutional dispute bears a great significance for defense of the constitutional order. This is such case.

(B) As can be seen in the provision protecting the bodily freedom, the provision ensuring the right to a speedy trial by a judge, and the provision presuming innocence of the accused, the Constitution clearly recognizes the right to a fair trial as one of the basic rights of the citizens.

A fair trial requires examination and testimony of all evidence before a judge in the open court. The public prosecutor and the defendant must also be given fair opportunities to assert or defend themselves. Therefore, if one of the parties in a criminal trial is allowed to monopolize access to witnesses or prevent the other party's meetings with witnesses, this would violate the right to a fair trial.

If the public prosecutor, a party to a criminal trial, provides particular accommodation to a detained witness, such accommodation may be used as the means to win over the witness. Threats to deprive a witness of such accommodation may act as psychological pressure.

Therefore, providing accommodation could be detrimental to protection of the right to a fair trial.

Undesirable side effects such as persuasion of witness or abettal of perjury may occur when both parties of a trial have equal access to witnesses. However, such side effects should be prevented through prosecution of such criminal activities. To grant access of witness to one party or to hinder the other party's meeting with witness in order to prevent occurrence of such side effects is by no means justifiable.

In sum, the public prosecutor's subpoena of witness A, not to conduct investigation on other cases but to provide accommodation to A and prevent A from meeting the complainant's attorneys, constitutes an abuse of the governmental authority, and it violates the complainant's constitutional right to a fair trial.

(2) Dissenting Opinion

The complaint should be dismissed on account of lack of a justiciable interest because there is neither likelihood of repetition of violation of rights nor importance of constitutional clarification in the case.

12. *Rejection Campaign by the Citizen's Alliance for the 2000 General Election* Case
[13-2 KCCR 263, 2000Hun-Ma121, 2000Hun-Ma202 (consolidated), August 30, 2001]

In this case, the Constitutional Court reviewed the constitutionality of provisions of the Act on the Election of Public Officials and the Prevention of Election Malpractices, and the Court upheld the provision prohibiting a "rejection campaign" of civic groups, the provision limiting an election campaign period, and the provision permitting an incumbent to hold a briefing session on his or her legislative activities to the electorate until the day before an election campaign begins officially.

A. Background of the Case

(1) On January 24 and February 2, 2000, the Citizens' Alliance for the 2000 General Elections[1)] announced a list containing 109 individuals not fit to be nominated by the political parties for the general

National Assembly election scheduled for April 13, 2000, and vowed to launch a campaign against them being elected (hereinafter called the "rejection campaign") if they were nominated by the parties. According to provisions in the Act on the Election of Public Officials and the Prevention of Election Malpractices (hereinafter called the "Act"), an election campaign is defined as "an act for winning an election, or for making another candidate be or not be elected," and an election campaign is only allowed during the period from the time of completion of candidacy registration to a day before the election day. According to the Act, the rejection campaign of the civic groups conducted prior to the official election campaign period falls into the category of illegal campaign activities and is prohibited. Civic groups argued that the rejection campaign was not like an election campaign of a candidate trying to be elected, but rather, it was an act to serve the public interest by providing objective data about a candidate, thereby satisfying the citizens' right to know about candidates running for public election and helping them in their choice of representatives. Complainant, Citizens' Alliance, filed a constitutional complaint alleging that the provisions prohibiting the rejection campaign violated the freedom of political expression and the right to political participation.

(2) Mr. A was nominated by the ruling party as a candidate for an electoral district in the general National Assembly election scheduled for April 13, 2000. According to the provision of the Act permitting an incumbent to hold a briefing session on his or her legislative activities to the electorate before an election campaign begins officially, the National Assembly member from Mr. A's electoral district held briefing sessions and sent out written reports to publicize his legislative activities, but Mr. A, a candidate who is not currently a member of the National Assembly, was not even allowed to publicize the fact that he would run for the National Assembly election before the election campaign began officially. Thus, Mr. A filed a constitutional complaint, alleging that the instant statutory provision violated the right of equality and the right to hold public office, and is against the principle of equal opportunities.

B. Summary of the Decision

(1) The Constitutional Court upheld the provision prohibiting rejection campaign and the provision limiting election campaign period, on a unanimous vote, as follows:

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1). A coalition of about 470 nongovernmental organizations.

(A) Provision Prohibiting Rejection Campaign

A rejection campaign by a third party who does not have direct interest in the outcome of an election is different from a rejection campaign by candidates against their opponents, in that it is not launched for the purpose of winning an election but for the public good of preventing the election of an unfit candidate. However, when a rejection campaign goes beyond simple expression of opinion about a particular candidate and takes a more intentional, systematic, and deliberate approach, methods or modes employed in a rejection campaign by a third party is not much different from those employed in a rejection campaign by candidates. A rejection campaign launched by a third party, contributes whether significantly or not to the election of a competing candidate, and in some cases, because of its alleged public cause, it may affect the outcome of an election more drastically than a negative campaign against the candidate by opponents. Considering these facts, it can be concluded that there is essentially no difference between a rejection campaign of a third party and that of other candidates as both have the same methods and effects. If a rejection campaign without the purpose of winning an election is allowed without regulation intended for campaigns, some candidates might take advantage of this and tacitly use a third party to slander competing candidates. Moreover, such criterion is so vague as to allow arbitrariness by the election supervising authorities, and this wold hinder the management of a fair election.

The present statutes allow civic groups to invite candidates for interviews or debates, and provide other legitimate ways for these groups to participate in election campaigns during the election campaign period. Civic groups can also express their support or disapproval for party nomination of a particular candidate before the official election campaign period. In sum, the present election laws provide the civic groups with other means to provide objective data about candidates to electors, thereby contributing to realization of people's right to know and helping them choose their representatives hence making efforts to minimize the restriction of rights.

The instant provision categorizes a rejection campaign launched by a third party with no objective to win an election as a form of an election campaign and regulates such activities. However, the Act has supplementary provisions designed to limit the restriction of the freedom of political expression to a minimal extent, and there is a balance of interests between the restriction imposed on the private freedom of expression and the public interest of managing a fair election.

(B) Provision Limiting Election Campaign Period

If there is no limit regarding the election campaign period, overheated race between candidates will make it very difficult to effectively manage an election and prevent illegal activity. Prolonged competition between candidates will bring about increased election expense, thereby causing much socioeconomic loss for the society as a whole. Also, in such case, difference in financial means will cause inequality in election, because - young, but qualified, newcomers lacking resources will be deprived of opportunities to be elected. Considering the purpose and manners of restriction, common election activities in Korea, and practical necessity, restriction of the election period is reasonable and necessary, and does not excessively restrict the freedom of election campaign.

(2) The Constitutional Court upheld the provision permitting a member of the National Assembly to hold a briefing session on his or her legislative activities to the electorate before the official election campaign period, on a majority vote of five Justices, as follows:

(A) Majority Opinion

To report his or her parliamentary activities is a political duty of a representative to the electorate, and is an essential part of the job of a legislator in the National Assembly. Therefore, it should be allowed without any restriction as long as there is no other reason not to. Only that interpreting the instant provision, activities allowed before the official campaign period should be limited to reports on parliamentary activities as a representative of particular electorate, and all other activities amounting to election campaign activities should be banned. Inequality of election campaign opportunities arising from inadequate regulation of pre-election campaign of an incumbent National Assembly member is inequality *de facto* caused by administrative action, and not inequality *de jure* directly caused by the instant provision.

Therefore, the instant provision does not treat candidates who are not currently members of the National Assembly differently from candidates who are current members of the Assembly without a reasonable basis. So it does not violate the candidates' right of equality and the right to hold public office, does not infringe on the freedom of expression of electors, and is not against the principle of equal opportunities in election campaigns.

(B) Dissenting Opinion

According to the instant provision, a candidate who is currently a member of the National Assembly is allowed to conduct election campaign activities without time limit: while election campaign activities before the official election campaign period are banned, the

incumbent can make an excuse that it is a part of his job to report on his parliamentary activities to his electorate. As a result, a candidate who is an incumbent National Assembly member, is given a longer election campaign period compared to those candidates who are not incumbent. Therefore, the instant provision discriminates against candidates who are not incumbents, without reasonable basis, and deprives them of the equal opportunity in election campaigns. It thus violates the principle of equality and is against the constitutional provision calling for equal opportunity in election campaigns.

C. Aftermath of the Case

While some supported the rejection campaign by civic groups as a revolution in the election culture through the grassroots movement, some criticized it because the movement targeted only some candidates, thereby violating the constitutional principle calling for equal opportunity.

After the decision, some newspapers published editorials that civic groups should not engage in activities beyond the limits imposed by laws, such as insubordination of current election laws, and should make the campaign a new starting point to diversify NGO activities while others called for revision of the laws to allow a rejection campaign by civic groups.

13. *Date of the First Phase of the Judicial Examination* Case
(13-2 KCCR 353, 2000Hun-Ma159, September 27, 2001)

In this case, the Constitutional Court upheld the State's decision to administer the first phase of the Judicial Examination on Sunday.

A. Background of the Case

The State announced that the first phase of the Judicial Examination would be administered on Sunday through the general exam schedule for civil servants in 2000, and the complainant submitted an application for the test accordingly. However, because the exam was administered on Sunday, the complainant, who is a Christian, was forced to forsake his religious duty of going to church and attending prayer on a Sunday, in order to take the examination. Thus, the complainant filed a constitutional complaint arguing that administering the Judicial Examination on a Sunday violated the freedom of

religion and the right of equality.

B. Summary of the Decision

The Constitutional Court upheld the State's decision, on a unanimous vote, as follows:

Article 20(1) of the Constitution states that "all citizens shall enjoy the freedom of religion," and Article 20(2) stipulates that "no state religion shall be recognized, and church and state shall be separated." Scheduling the Judicial Examination on Sunday is a matter related to the freedom of religious activity. However, the freedom is not an absolute one, but one that can be restricted for the maintenance of law and order or for public welfare.

A test administered by the State should be scheduled to allow majority of citizens to take test with minimum inconvenience to their daily lives, such as school and work. To administer a test which so many people take, the State has not much of an option but to rent buildings of intermediate schools or high schools and mobilize about two thousands civil servants to supervise administration of the test. If a test is administered on a weekday, individuals who have jobs or are students will be forced to absent themselves from the office or school, and there will be difficulty in supervising the test administration. Considering these factors, scheduling the administration of the Judicial Examination on a Sunday is for the convenience of most of the people who have signed up for the test. Restriction on the freedom of religion thereof is unavoidable for public welfare, and does not violate the essential aspect of the freedom of religion.

Unlike numerous Western countries where Christian culture forms the basis of society in Korea, Sunday is merely a holiday, not a day set out for specific religious service. Considering this and many other factors examined above, it can be concluded that the State's decision to administer the Judiciary Examination on Sunday does not unreasonably discriminate against the complainant's religion from other religions.

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