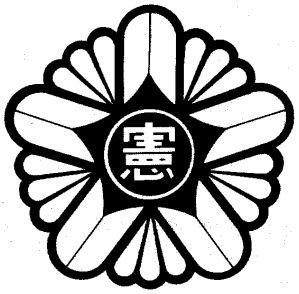
DECISIONS
OF
THE KOREAN CONSTITUTIONAL COURT
(2002)



THE CONSTITUTIONAL COURT OF KOREA

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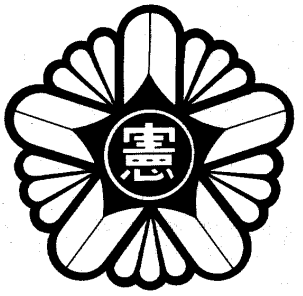

THE CONSTITUTIONAL COURT OF KOREA
2003

PREFACE

The publication of this volume is aimed at introducing to foreign readers those important cases decided from January 1, 2002 until December 31, 2002 by the Korean Constitutional Court.

This volume contains 19 cases, five full opinions and fourteen 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 Chon Jong-ik proofread the manuscript. The Research Officers of the Constitutional Court provided much needed support. I thank them all.

December 24, 2003

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

1. *Punishment of Distribution of Unwholesome Comics* Case

(14-1 KCCR 87, 99Hun-Ka8, February 28, 2002)

Contents of the Decision

1. Principle of *nulla poena sine lege* and the rule of clarity.
2. Whether the provision of the Protection of Minors Act prohibiting and punishing distribution, sales, donation, lending, or showing of comics that may contribute to causing obscene or cruel behavior of minors or that could instigate minors to commit a crime (hereinafter called the "unwholesome comics") to minors violates the rule of clarity.
3. Whether the provision of the Child Welfare Act prohibiting and punishing the manufacture or publication of books, periodicals, advertisements, or other materials that could be seriously harmful to the moral character of children violates the rule of clarity.

Summary of the Decision

1. The principle of *nulla poena sine lege* requires the elements of a crime and its punishment be determined in the form of a legislative act. The rule of clarity derived from the principle of *nulla poena sine lege* requires that elements constituting a crime be clearly defined in order to enable ordinary citizens to recognize what action is prohibited by law and what are penalties for such violation so that they can determine the course of their action accordingly. If the elements of a crime of the punitive rules are unclear because of ambiguity or abstractness in description, citizens will be unable to tell what activities are prohibited, and whether an activity constitutes a crime or not will be largely dependent on the arbitrary interpretation of a law by a judge. This would be against the rule of law which aims to protect the freedoms and the rights of citizens through application of the principle of *nulla poena sine lege.*

2. In the instant case, let us first look at the former part of definition of "unwholesome comics" used in Article 2-2 of the Protection of Minors Act, namely, "that may contribute to causing

obscene or cruel behavior of minors." The normative concept of obscenity can be clarified with a judge's supplementary interpretation, but the normative concept of cruelty has not yet been clearly adjudicated by courts. In the dictionary cruelty is defined as "callous indifference to suffering, or ruthlessness". Such definition can be applied to a wide range of feelings, wills, and actions by minors, and it includes a whole gamut of behaviors ranging from crimes including murder or physical violence to internal decisions of individuals based on individual moral, religious, or ideological background. Such a broad definition will be likely to lead to an arbitrary interpretation and execution of the law by law enforcement agencies and judges. Furthermore, the instant statutory provision prohibits and punishes those activities that "may," "contribute to causing" cruel behavior of minors. The combination of the vague notion of cruelty and such phrasing of elements of a crime could subject many materials that are acceptable to the general public to criminal punishment. If the government decides to regulate all activities falling under the prescription of the instant provision, the scope of punishment would be too wide; and if it only aims to regulate certain kinds of activities, it is unclear what activities are prohibited under the present law. Next, let us look at the latter part of the definition of "unwholesome comics" used in Article 2-2 of the Protection of Minors Act, namely, "that could instigate minors to commit a crime." It is impossible to determine whether the instant provision would be applied to punish publication of only those comics that actually lead to "the commitment of a crime knowingly or recklessly" or that led to activities that are interpreted as elements of a crime without any consideration of the intention of the wrongdoer. It is also unclear whether the provision would be applied to prosecute the publication of comics that actually bring about any attempts at a crime, any attempts at completion of a crime, or only successful completion of a crime. The instant provision uses ambiguous and abstract concept whose meaning could not be clarified with a judge's supplementary interpretation, thereby leaving it to the discretion of the enforcement agencies whether to enforce the law to particular cases. This is in violation of the rule of clarity derived from the principle of *nulla poena sine lege.*

Concurring Opinion of Justices Ha Kyung-chull and Song In-jun

The meaning of the concept used in the instant statutory provision of the Protection of Minors Act could be sharpened with a judge's supplementary interpretation. However, regulation of "comics that may contribute to causing obscene or cruel behavior of minors or that could instigate minors to commit a crime even when they have some

educational or artistic value" is an excessive restriction of the right to know of some minors such as college students who can make mature judgement for themselves. The instant provision prohibits and punishes not only distribution or sales but also manufacture of all articles or expression just because its contents might be harmful to minors. Though the need to protect minors is great, the instant provision is not appropriate as a means to achieve this legislative purpose, and it infringes upon the freedom of speech and the press as well as the freedom of science and arts. There is no balance between the private interest being infringed by the instant statutory provision and the public interest it seeks to protect, and hence, the instant statutory provision imposes an excessive restriction.

3. "Moral character,", a term denoting a "considerate and benevolent" character used in the instant statutory provision of the Child Welfare Act, means internalization of morality and ethical standards. Morality or ethics, however, does not take a single form or meaning because of large difference in historical perspectives, religions, and value systems among citizens. Therefore, the limits of application of the instant statutory provision are not clearly defined. Furthermore, it is very difficult to identify what "could be seriously harmful" to children. What standard could be employed to differentiate what is seriously harmful to children's moral character and what may be "harmful" but not seriously harmful? Among those materials that are not seriously harmful, how can one distinguish what could be seriously harmful while others could not be seriously harmful? Thus, the instant provision of the Child Welfare Act uses ambiguous and abstract concepts whose meaning could not be sharpened by a judge's supplementary interpretation, thereby leaving it to the discretion of law enforcement agencies whether to apply the law to particular cases. This is in violation of the rule of clarity derived from the principle of *nulla poena sine lege.*

Provisions on Review

Protection of Minors Act (in force before being abrogated by Act No. 5817 on February 5, 1999)

Article 2-2 (Prohibition of Sales of Unwholesome Comics, etc.)

It is prohibited for any person to engage in activities described in any of the following subparagraphs :

(i) Distribution, sales, donation, lending, or showing of comics that may contribute to causing obscene or cruel behavior of minors or that could instigate minors to commit a crime (hereinafter called "unwholesome comics") to minors, acts to aid such

activities, or to possess, manufacture, import, or export unwholesome comics for the purpose of aiding such activities.

(ii) Omitted

Article 6-2 (Penal Provisions)

Any person in violation of Article 2-2 for the purpose of profit-making shall be punished by imprisonment for not more than two years or by a fine not exceeding five million won, incarceration from 1 day to 30 days or a minor fine.

Article 7 (Joint Penal Provisions)

Where the representative of a juristic person, or an agent, employer or employee of a juristic person or individual commits an offense provided under the provisions of Articles 6 or Article 6-2 with respect to the business of such juristic person or individual, in addition to the wrongdoer punished for violating the respective article, the juristic person or the individual shall also be punished by a fine as prescribed under the applicable Article.

Child Welfare Act (wholly amended by Act No. 6151 on January 12, 2000)

Article 18 (Prohibited Acts)

It is prohibited for any person to engage in activities described in any of the following subparagraphs:

(i) - (x) [omitted]

(xi) Manufacture of books, periodicals, advertisements, or other materials that could be seriously harmful to children's moral character, or distribution, sales, donation, exchange, exhibition, performance, or broadcasting of such articles.

Article 34 (Penal Provisions)

Any person who violates the provisions of Article 18 shall be punished according to the classifications falling under the following subparagraphs:

(i) - (iii) [omitted]

(iv) Any person who commits an act specified in subparagraphs 1 through 4, 6, or 11 shall be punished by imprisonment for not more than one year or a fine not exceeding one million won;

(v) [omitted]

Article 37 (Joint Penal Provisions)

Where the representative of a juristic person, or an agent, employer or employee of a juristic person or individual commits an

offense provided under the provisions of Articles 34 or Article 35 with respect to the business of such juristic person or individual, in addition to the wrongdoer punished for violating the respective article, the juristic person or the individual shall also be punished by a fine as prescribed under the applicable Article.

Related Provisions

The Constitution

Articles 12(1), 13(1), 21(1), 22(1), 37(2)

Related Precedents

1. 12-1 KCCR 741, 98Hun-Ka10, June 29, 2000
   6-2 KCCR 15, 93Hun-Ka4, etc., July 29, 1994
   10-1 KCCR 640, 97Hun-Ba68, May 28, 1998
2. 94Do2413, Supreme Court, June 16, 1995
   2000Do4372, Supreme Court, December 22, 2000
   10-1 KCCR 327, 95Hun-Ka16, April 30, 1998

Parties

Requesting Court

Seoul District Court (97Cho4870)

Petitioner

Byun Woo-hyung and 16 others
Counsel : Kim Dong-hwan and 7 other

Original Case

Seoul District Court 97Go-Dan6217, 7393 (consolidated), Violation of the Protection of Minors Act and the Child Welfare Act

Holding

Article 2-2(i) and parts of Article 6-2 and 7 to punish violation of Article 2-2(i) of the Protection of Minors Act (in force before being abrogated by Act No. 5817 on February 5, 1999), and Article 18(xi) and parts of Article 34(iv) and 37 to punish violation of Article 18(xi) of the Child Welfare Act (wholly amended by Act No. 6151 on January 12, 2000) are unconstitutional.

Reasoning

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

A. Overview of the Case

Requesting petitioners are cartoonists and publishers of newspapers or other periodicals who publish the comic series. They were indicted for violation of the Protection of Minors Act and Child Welfare Act, and were being tried at the Seoul District Court. In the course of the trial, the petitioners argued that Article 2-2(i) and parts of Article 6-2 and 7 to punish violation of Article 2-2(i) of the Protection of Minors Act, and Article 18(xi) and parts of Article 34(iv) and 37 to punish violation of Article 18(xi) of the Child Welfare Act were unconstitutional and made a motion for constitutional review of these provisions (97Cho4870). The presiding court granted the request on August 27, 1999, and forwarded it to the Constitutional Court for constitutional review.

B. Subject Matter of Review

The subject matter of review is the constitutionality of Article 2-2(i) and parts of Article 6-2 and 7 to punish violation of Article 2-2(i) of the Protection of Minors Act (in force before being abrogated by Act No. 5817 on February 5, 1999), and Article 18(xi) and parts of Article 34(iv) and 37 to punish violation of Article 18(xi) of the Child Welfare Act (wholly amended by Act No. 6151 on January 12, 2000). The provisions are as follows:

P*rotection of Minors Act (in force before being abrogated by Act No. 5817 on February 5, 1999)*

Article 2-2 (Prohibition of Sales of Unwholesome Comics, etc.)

It is prohibited for any person to engage in activities described in any of the following subparagraphs:

> (i) Distribution, sales, donation, lending, or showing of comics that may contribute to causing obscene or cruel behavior of minors or that could instigate minors to commit a crime (hereinafter called "unwholesome comics") to minors, acts to aid such activities, or to possess, manufacture, import, or export unwholesome comics for the purpose of aiding such activities.

Article 6-2 (Penal Provisions)

Any person in violation of Article 2-2 for the purpose of

profit-making shall be punished by imprisonment for not more than two years or by a fine not exceeding five million won, penal detention or a minor fine.

Article 7 (Joint Penal Provisions)

Where the representative of a juristic person, or an agent, employer or employee of a juristic person or individual commits an offense provided under the provisions of Articles 6 or Article 6-2 with respect to the business of such juristic person or individual, in addition to the wrongdoer punished for violating the respective article, the juristic person or the individual shall also be punished by a fine as prescribed under the applicable Article.

Child Welfare Act (wholly amended by Act No. 6151 on January 12, 2000)

Article 18 (Prohibited Acts)

It is prohibited for any person to engage in activities described in any of the following subparagraphs :

(xi) Manufacture of books, periodicals, advertisements, or other materials that could be seriously harmful to children's moral character, or distribution, sales, donation, exchange, exhibition, performance, or broadcasting of such articles.

Article 34 (Penal Provisions)

Any person who violates the provisions of Article 18 shall be punished according to the classifications falling under the following subparagraphs:

(iv) Any person who commits an act specified in subparagraphs 1 through 4, 6, or 11 shall be punished by imprisonment for not more than one year or a fine not exceeding one million won ;

Article 37 (Joint Penal Provisions)

Where the representative of a juristic person, or an agent, employer or employee of a juristic person or individual commits an offense provided under the provisions of Articles 34 or Article 35 with respect to the business of such juristic person or individual, in addition to the wrongdoer punished for violating the respective article, the juristic person or the individual shall also be punished by a fine as prescribed under the applicable Article.

2. Opinions of the Requesting Court and Related Parties

A. Reason for Requesting Constitutional Review

The instant statutory provision of the Protection of Minors Act employs uncertain concepts carrying several different denotations, and the instant statutory provision of the Child Welfare Act also uses an extremely ambiguous and abstract expression "could be seriously harmful to children's moral character." It is impossible to identify what types of published materials such as comics or books would be subject to regulation under these provisions. Therefore, these provisions are against the rule of clarity derived from the principle of *nulla poena sine lege.*

B. Opinions of the Minister of Justice and Chief Prosecutor of the Seoul District Prosecutors Office

The instant statutory provisions of the Protection of Minors Act and the Child Welfare Act employ concepts with definite meanings, and they are not unclear when interpreted with due consideration to the legislative intent and the context.

3. Review

A. Principle of *Nulla Poena Sine Lege* and Rule of Clarity

The central argument of the case concerns whether the instant provisions of the Protection of Minors Act and the Child Welfare Act are in violation of the rule of clarity derived from the principle of *nulla poena sine lege.*

The principle of *nulla poena sine lege* requires the elements of a crime and its punishment be determined in the form of a legislative act. The rule of clarity, derived from the principle of *nulla poena sine lege* requires that elements constituting a crime be clearly defined in order to enable ordinary citizens to recognize what action is prohibited by law and what are penalties for such violation so that they can determine the course of their action accordingly (12-1 KCCR 741, 748, 98Hun-Ka10, June 29, 2000). A statutory provision describing elements of a crime broadly, while requiring supplementary interpretation by a judge for clarification of some concepts, is not automatically in violation of the constitutional requirement of the rule of

clarity for criminal statutes. However, if a provision prohibiting and punishing particular actions is unclear because of ambiguity or abstractness in description of elements of a crime, citizens will be unable to tell what activities are prohibited, and whether an activity constitutes a crime or not will be largely dependent on the arbitrary interpretation of law by a judge. This would be against the requirements of the principle of the rule of law which aims to protect freedom and rights of citizens through application of the principle of *nulla poena sine lege* (6-2 KCCR 15, 32 93Hun-Ka4, etc., July 29, 1994; 10-1 KCCR 640, 655, 97Hun-Ba68, May 28, 1998).

B. Unconstitutionality of the Instant Provision of the Protection of Minors Act

The instant provision of the Protection of Minors Act punishes certain activities concerning "unwholesome comics" which are defined as "comics that may contribute to causing obscene or cruel behavior of minors or that could instigate minors to commit a crime."

(1) Let us first look at one part of the definition of "unwholesome comics" used in the article 2-2 of Protection of Minors Act, namely, "that may contribute to causing obscene or cruel behavior of minors."

"Obscenity,", according to the precedents, means "description of sexual matters that aims to stimulate sexual desire of ordinary people against accepted standards of morality in an offensive or repulsive manner" (94Do2413, Supreme Court, June 16, 1995; 2000Do4372, Supreme Court, December 22, 2000), or "a naked and unabashed sexual expression which distorts human dignity or humanity and which appeals only to the prurient interest with no literary artistic, scientific or political value" (10-1 KCCR 327, 341, 95Hun-Ka16, April 30, 1998). Thus, the normative concept of obscenity can be sharpened with a judge's supplementary interpretation. The normative concept of cruelty, however, has not yet been clearly adjudicated by the court. In the dictionary cruelty is defined as "callous indifference to suffering, or ruthlessness". Such definition can be applied to a wide range of feelings, and actions of minors, and it includes a whole gamut of behaviors ranging from crimes including murder or physical violence (e.g. Article 5(2)(i) of Outdoor Advertisements, etc. Control Act; Article 6(1) of Animal Protection Act) to internal moral decisions of individuals based on individual ethical, religious, or ideological background. Such a broad definition will be likely to lead to arbitrary interpretation and execution of laws by law enforcement agencies and judges.

The instant statutory provision prohibits and punishes those activities concerning comics that "may contribute" to causing cruel behavior of minors. To "contribute" is to help achieve something. Used in the instant statutory provision, to "contribute to causing cruel behavior of minors" can be interpreted as to "help minors develop obscene or cruel attitude." This could mean strengthening of existent obscene or cruel attitude, weakening of internal restraints that have deterred realization of obscenity or cruelty, or negating the value system built upon respect for purity and geniality. Adding 'may' which means 'be likely to' or 'be possible to, the instant statutory provision could be used to penalize to subject criminal punishment publishing of historical comics that have made objective description of individuals and groups, of race and nation, and of humanity without clear distinction between good and evil or comics of a sexual nature that are acceptable to the general public. If the government decides to regulate all activities falling under the prescription of the instant provision, the scope of punishment would be too wide; and if it only regulates certain kinds of activities, it is unclear what activities would be prohibited under the present law.

(2) Next, let us look at the latter part of the definition of "unwholesome comics" used in Article 2-2 of the Protection of Minors Act, namely, "that could instigate minors to commit a crime".

Let us not go into details about whether "to instigate someone to commit a crime" is a concept associated with a singular meaning. It is impossible to determine whether the instant provision would be applied to punish publication of only those comics that actually lead to "the commitment of a crime knowingly or recklessly" or that led to activities that are interpreted as elements of a crime without any consideration of the intention of the wrongdoer. It is also unclear whether the provision would be applied to prosecute the publication of comics that actually bring about any attempts at a crime, any attempts at completion of a crime, or only successful completion of a crime. It is also unclear and impossible to determine if publication of only those comics actively promoting ill behavior is subject to regulation, or publication of comics which passively loosen individual committment to abide by the law can also be regulated; or whether publication of only those comics whose contents actively encourage committment of a crime is punishable or whether publication of comics which only introduce a criminal case from the victim's perspective but that could lead some minors to mimic the crime with some scrutiny is also subject to punishment under the instant statutory provision.

(3) Thus, the instant provision uses ambiguous and abstract concept whose meaning could not be sharpened with a judge's supplementary interpretation, thereby leaving it to the discretion of law

enforcement agencies whether to enforce the law to particular cases. This is in violation of the rule of clarity derived from the principle of *nulla poena sine lege.*

C. Unconstitutionality of the Instant Provision of the Child Welfare Act

The instant article of the Child Welfare Act prohibits and punishes manufacture and publication of books, periodicals, advertisements, or other materials that could be seriously deleterious to children's moral character, or distribution, sales, donation, exchange, exhibition, performance, or broadcasting of such articles. "Moral character", a term denoting "considerate and benevolent" character used in the instant statutory provision of the Child Welfare Act, means the internalization of morality and ethical standards. While morality or ethics could take a definite form or meaning for individual citizens according to their historical perspectives, religion, and value systems, it is impossible to assign a singular meaning to morality for all law enforcement agencies and citizens. Therefore, the limits of application of the instant statutory provision are not clearly defined. Even if children's internalized virtue could be defined, it is very difficult to identify what "could be seriously harmful" to children. What standard could be employed to differentiate what is seriously harmful to children's moral character and what may be harmful but not seriously harmful? Among those materials that are not seriously harmful, how can one distinguish what "could be" seriously harmful while others "could not be" seriously harmful?

Thus, the instant provision of the Child Welfare Act uses ambiguous and abstract concept whose meaning could not be clarified by a judge's supplementary interpretation, thereby leaving it to the discretion of law enforcement agencies whether to apply the law to particular cases. This is in violation of the rule of clarity derived from the principle of *nulla poena sine lege.*

4. Conclusion

The instant statutory provisions of the Protection of Minors Act and the Child Welfare Act are unconstitutional, and the Court declares so by the consensus of all justices except Justices Ha Kyung-chull and Song In-jun who wrote a concurring opinion on the adjudication of the instant statutory provision of the Protection of Minors Act.

5. Concurring Opinion of Justices Ha Kyung-chull and Song In-jun

While the majority of Justices concluded that the instant provision of the Protection of Minors Act is in violation of the rule of clarity derived from the principle of *nulla poena sine lege*, we disagree because we think that the meaning of the concept used in the instant statutory provision of the Protection of Minors Act could be sharpened with a judge's supplementary interpretation. We are writing a concurring opinion because we believe that the scope of application of the instant article of the Protection of Minors Act is too broad, thereby excessively restricting the people's right to know and the freedom of speech and the press as well as the freedom of learning and the arts.

Comics whose contents have political, religious, literary, artistic, educational, medical, scientific, or academic value are not excluded from regulation under the instant provision of the Protection of Minors Act. While these comics may be enlightening or instructive, thereby contributing to the formation of a sound personality of minors, or they may contribute to causing obscene or cruel behavior of minors or that they lead minors to develop certain capacities to achieve their full potentials, the instant provision could prohibit access of minors to these comics as long as there is a doubt whether these comics may could instigate minors to commit a crime. Such a comprehensive ban is an excessive restriction of the right to know of some minors such as college students who can make mature judgement for themselves.

Since the instant provision is legislated to protect minors, the means of regulation should be limited to such narrowly defined means as blocking the chain of supply to minors. A comprehensive ban on publication and circulation of certain materials for the purpose of juvenile protection is excessive because it debases level of adults' right to know to that of a juvenile's, thereby violating the adults' right to know (10-1 KCCR 327, 354, 95Hun-Ka16, April 30, 1998).

The instant statutory provision of the Protection of Minors Act prohibits and punishes possession, manufacture, import, or export of unwholesome comics. However, as the Act did not adopt the rating system that the Juvenile Protection Act has adopted, it is impossible to prevent access of minors to such comics through regulation of the chain of supply. Because creation and publication of comics could be made subject to punishment under the Act if the law enforcement agency deems that the contents could be deleterious to minors, cartoonists or publishers would choose to make contents of comics appropriate for viewing by minors rather than risk punishment.

Although the readers of newspapers or periodicals published by requesting petitioners are mostly adults, publication of such materials could be subject to punishment under the instant provision since such act could be deemed as an act to provide minors with the access to the unwholesome comics because the current supply market does not have an effective barrier to block access of minors to such materials. Although the need to protect minors is great, the instant provision is not appropriate as a means to achieve this legislative purpose, and it infringes upon the freedom of speech and the press as well as the freedom of science and arts. There is no balance between the private interest being infringed by the instant statutory provision and public interest it seeks to protect, and hence, the instant statutory provision imposes an excessive restriction.

For these reasons, we are writing a concurring opinion expressing our view that the instant statutory provision is in violation of rule against excessive restriction, thus it is unconstitutional.

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

2. *Pledge to Abide by the Law Case*

[14-1 KCCR 351, 98Hun-Ma425, etc., (consolidated), April 25, 2002]

Contents of the Decision

1. Whether Article 14 of the Ordinance for Parole Review requiring inmates imprisoned for violation of the National Security Act or the Assembly and Demonstration Act to submit a pledge to abide by the national laws of the Republic of Korea for consideration of parole release violates the freedom of conscience of these inmates because of the contents of the pledge.
2. Whether Article 14 of the Ordinance for Parole Review violates the freedom of conscience of inmates because of the coercive measures it employs.
3. Whether Article 14 of the Ordinance for Parole Review requiring only those inmates imprisoned for violation of the National Security Act or the Assembly and Demonstration Act to submit the pledge to abide by the laws for consideration of parole release violates the right of equality of these inmates.

Summary of the Decision

1. The instant pledge which requires certain inmates to declare that they would abide by the national laws and respect the constitutional order once released on parole is merely a reconfirmation of the general duty duly required of all citizens. It does not require them to think certain new thoughts or perform particular actions under any hypothetical or actual situation. Therefore, as the instant pledge to abide by the law does not contain any specific or active requirement in its contents, and requirement to submit the pledge is a process only to confirm the existing constitutional duty of inmates. Requiring submission of the pledge does not intrude upon the domain of conscience.

2. Freedom of conscience can only be infringed when there is an unavoidable conflict between moral conviction within an individual's inner mind and requirements of the external legal order. When existing laws do not prohibit or order certain actions but only offer to give special privileges or recommend certain activities, individuals can either renounce the opportunity to receive the proffered benefits or refuse to act according to such recommendation, thus preserving their

conscience without breaching the existing law. Therefore, such laws cannot infringe on the freedom of conscience of individuals.

In the instant case, Article 14 of the Ordinance for Parole Review does not compel submission of the pledge to abide by the national laws. An inmate considered for parole can refuse to submit such pledge even if the parole review board requests submission of the pledge for parole review: Whether to submit the pledge or not depends on his own will. Parole is a privilege conferred upon inmates by the law enforcement agency according to decisions based on the correctional or criminal policy, and it is not a right that every inmate in entitled to. While a prisoner refusing to submit the pledge to abide by the law may not be released on parole because of the instant article of the Ordinance for Parole Review, his refusal to submit the pledge would not further weaken his legal standing nor undermine his legal status in any way.

The instant provision does not levy any new legal duty on such inmate, nor does it force submission of the pledge with compulsory performance, punishment, or imposition of legal disadvantages. Therefore, it does not infringe on the freedom of conscience.

3. North Korea still endeavors to bring about the communist revolution in the entire peninsula, and to protect itself against such external threats, the government of South Korea has no choice but to defend against North Korea's attempts at radical revolution in South Korea. Illegal activities by individuals aiming to disturb the basic order of free democracy or overthrow the government, either in alliance with the North Korean government or through independent decision of its own, have largely been dealt with either the National Security Act or the Assembly and Demonstration Act because of the nature of such activities. It is under such circumstance that the parole review board examines, in addition to things ordinarily taken into consideration to determine eligibility for parole, whether inmates imprisoned for violation of the National Security Act or the Assembly and Demonstration Act are willing to observe the national laws once released on parole. Thus, differential treatment of such inmates is not without a reasonable basis, and is appropriate as a means to achieve the policy objectives.

The purpose of differential treatment of inmates convicted for violation of the National Security Act or the Assembly and Demonstration Act is clear and important while the means to achieve the legislative objective is a mere reconfirmation of the general duty required of all citizens that does not entail any infringement on the basic rights of citizens. Thus, it is obvious that the principle of proportionality is observed in the differential treatment of different groups, and therefore, the instant provision does not violate the

constitutional principle of equality.

Dissenting Opinion of Justices Kim Hyo-jong and Choo Sun-hoe

1. Reason that the Constitution protects the freedom of conscience and domain of protection

In our earlier adjudication concerning the domain of protection for the freedom of conscience, the Constitutional Court ruled that "conscience" protected by Article 19 of the Constitution includes not only one's world view, view of life, ideology, and other beliefs but also value judgments or ethical decisions in one's inner self affecting formation of one's personality. The majority opinion in the instant case is in conflict with this precedent in that it confines the domain of conscience protected by the Constitution to the sphere of morality, more specifically, to only imminent and specific ethical judgment regarding one's moral integrity. This is clearly either a limited interpretation or overruling of precedent.

Furthermore, the majority opinion prescribes the domain of the constitutionally protected freedom of conscience using three conditions. Constitutional review based on such deductive reasoning can be used to limit, instead of extend, the constitutionally protected domain of the freedom of conscience when there are only few legal precedents concerning the matter, and hence, should be avoided.

2. Whether requiring submission of the pledge to abide by the law falls within the protected domain of the freedom of conscience

A. The majority of Justices in the instant case concludes that requiring submission of the pledge to abide by the law "only confirms and makes citizens vow to uphold their constitutional duty,", and "therefore, it does not intrude upon the domains of conscience." We do not object to such a conclusion when applied to ordinary prisoners. However, such a conclusion would not be appropriate when a prisoner, who is holding onto the communist ideology sentenced to life imprisonment for attempts to overthrow the government by force and violence in violation of the National Security Act, is required to submit such a pledge. No one has the right to overthrow the government using violent means. However, it infringes on the freedom of conscience to force him to confess of or change such ideas as long as the ideas remain in his thoughts.

B. In a free democratic society, the rights of even opponents of free democracy are protected; only their specific actions can be restrained when they are deleterious to the public interest. The government must protect itself against extremists trying to overthrow the

government via violence and force. In a free democratic society, however, the government can only penalize the opponents of democracy for their "actions"; it should not force them to renounce their ideology or make them pledge to abide by the law against their beliefs using any form of direct or indirect means of coercion. This is what distinguishes a free democratic society from a communist regime.

C. In form, requiring the pledge to abide by the law is different from the ideological conversion programs in the past. However, there is no practical difference between the two; an inmate imprisoned for violation of the National Security Act for action based on his belief in communism is required to express an intention to change such belief under both programs. Thus, both are used to effectively separate and isolate individuals with particular ideological beliefs from ones with same beliefs.

D. Even if the concept of conscience used by the majority of Justices is adopted, an individual can claim the violation of such basic rights as the freedom of conscience and freedom of expression even when he was denied important benefits by the government. While the court will need to examine each case to determine what is such an important benefit, exclusion of a long-term prisoner from parole consideration is certainly one of such cases because parole may be one of the most important matters in his life.

E. Therefore, requiring submission of the pledge to abide by the law for parole consideration is a matter within the domains of the freedom of conscience protected by Article 19 of the Constitution.

3. Whether requiring submission of the pledge to abide by the law violates the freedom of conscience

A. Since requiring submission of the pledge to abide by the law directly affects "a person's world view, view of life, ideology, or other beliefs or values or ethical judgments in one's mind," it directly restrains the freedom of mind. In the instant case, while the "expressed action" of refusal to submission of the required pledge is the basis for a sanction by the state, the demand for submission of the pledge by the State forces a formation and confession of certain thoughts. This is not a realization of conscience;. It is ineffectively coercion of the formation of certain thoughts.

B. Requiring submission of the pledge to abide by the law is not based on an act, and the legislature has not delegated detailed rule-making concerning the pledge to the Administrative Branch. Therefore, this is in violation of Article 37(2) of the Constitution stipulating that freedoms and rights of citizens may be restricted by "acts" only.

C. Even if one argues that requiring submission of the pledge is

not a matter of inner freedom but only a restriction on the freedom to realize conscience, the instant provision fails the proportionality test.

The instant provision of the Ordinance may have a valid legislative purpose in that the pledge is used to judge the likelihood of recidivism of an inmate. However, appropriateness of the means chosen to achieve the legislative purpose is questionable for the following reasons: First, submission of the pledge may not serve a guarantee against recidivism; and second, it is not clear that those released on parole without submission of the pledge are more likely to be recidivists.

If requiring submission of the pledge aims to assist judgments whether the released inmate is likely to be a recidivist, the instant provision excessively restricts freedom of conscience because interviews or other means used for parole review of ordinary inmates could be employed to achieve such a legislative purpose.

An individual asked to submit the pledge in order to be reviewed for parole release suffers a serious conflict of interests: He can either express his intent to change his fundamental belief to be released, or he can choose to retain his inner belief by remaining silent. Thus, the injury inflicted on conscience by requiring the pledge to abide by the law is far greater than the public interest of acquisition of information necessary for parole review, and the instant provision fails the balance of interest test.

Provisions on Review

Ordinance for Parole Review (Amended by Ordinance of the Ministry of Justice No. 467 on October 10, 1998)

Article 14 (Procedural Rules; Parole Review)

(1) [omitted]

(2) Inmates imprisoned for violation of the National Security Act or the Assembly and Demonstration Act should be required to submit a pledge to abide by the national laws of the Republic of Korea before being released on parole, thus ensuring that such prisoners would observe the laws once they are set free.

(3) [omitted]

Related Provisions

The Constitution

Articles 11(1), 19

Criminal Act

Article 72 (Requirements for Parole)

(1) A person under execution of imprisonment or imprisonment without prison labor who maintains good behavior and has shown sincere repentance may be provisionally released by administrative action when ten years of a life sentence or one-third of a limited term of punishment has been served.

(2) If a fine or minor fine has been imposed concurrently with the punishment specified in the preceding paragraph, the amount thereof shall be paid in full in order for the parole to be granted.

Criminal Administration Act

Article 50 (Composition of Parole Review Board)

(1) The review board shall be composed of board members of not less than 5 but not more than 9, including the chairman.

(2) The Vice Minister of Justice shall chair the review board, and the Minister of Justice shall appoint or commission the board members from among judges, public prosecutors, lawyers, public officials belonging to the Ministry of Justice and persons of learning and experience in correction affairs.

(3) Matters necessary for the review board shall be determined by the Ordinance of the Ministry of Justice.

Article 51 (Review of Paroles)

(1) In case where a convicted prisoner, who has served a term of imprisonment under Article 72(1) of the Criminal Act, maintains an excellent incarceration record and is deemed not likely to commit a second offense, the warden shall, under the conditions as prescribed by the ordinance of the Ministry of Justice, propose that the review board make an examination of his parole.

(2) The review board shall, when reviewing eligibility for parole, take into account all circumstances such as the convicted prisoner's age, charge, motive for crime, term of sentence, records of criminal administration, means of livelihood and living environment after parole, and the likelihood of committing a crime again, etc.

(3) The review board shall, after voting for eligibility for parole, apply for permission for parole to the Minister of Justice within 5 days.

Article 52 (Permission for Parole)

The Minister of Justice may grant permission, when he deems that the application for a parole made by the review board under Article 51 is justifiable.

Enforcement Decree of the Criminal Administration Act

Article 153 (Criteria, etc. for Candidates for Parole Review)

The parole review board shall examine a person who has served the term as provided in Article 72 (1) of the Criminal Act, and falls under one of the following subparagraphs, and shall decide on the application for parole:

(i) A person whose accumulated scores rank at the top of the class on the review of records of criminal administration; and

(ii) A person who does not fall under subparagraph 1 but is deemed unlikely to commit a crime again and very likely to adapt to society.

Article 156 (Review, etc. of Parole)

Matters necessary for reviewing parole shall be prescribed by the Ordinance of the Ministry of Justice.

Ordinance for Parole Review (Amended by Ordinance of the Ministry of Justice No. 467 on October 10, 1998)

Article 3 (Subject of Review)

(i) The parole review board (hereinafter called "the board") shall take into account the prisoner's personal background, circumstance of the convicted crime, existence of persons who can look after the prisoner once released on parole, or other pertinent matters when reviewing eligibility for parole.

(ii) [omitted]

Related Precedents

3 KCCR 149, 89Hun-Ma160, April 1, 1991
7-1 KCCR 416, 93Hun-Ma12, March 23, 1995
9-1 KCCR 245, 96Hun-Ka11, March 27, 1997
9-2 KCCR 548, 92Hun-Ba28, November 27, 1997
10-2 KCCR 159, 96Hun-Ba35, July 16, 1998
11-2 KCCR 770, 98Hun-Ma363, December 23, 1999

Parties

Complainants

1. Cho O-rok (98Hun-Ma425)
   Court-Appointed-Counsel : Lee Kyung-woo

2. Cho O-won (99Hun-Ma170)
   Counsel : Lee Jae-myong and 1 other
3. Lee O-chul and 28 others (99Hun-Ma498)
   Counsel : Kang Kum-Sil and 9 others

Holding

The complaints filed by Complainants Cho O-rok and Cho O-won are rejected, and the complaints filed by other complainants are dismissed.

Reasoning

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

A. Overview of the Case

(1) 98Hun-Ma425

The complainant was detained for violation of the National Security Act on February 2, 1978, and a sentence of life imprisonment was finalized on December 26, 1978. He was serving his term at Andong Correctional Institution when he was excluded from parole release on August 15, 1998 for refusing to submit the pledge to abide by the law. On November 26, 1998, the complainant filed a constitutional complaint against Article 14(2) of the Ordinance for Parole Review requiring inmates imprisoned for violation of the National Security Act to submit the pledge to abide by the law for parole review, alleging that the provision infringed on his freedom of conscience, the right to pursue happiness, and the right to equality.

(2) 99Hun-Ma170

The complainant was detained for violation of the National Security Act in February, 1993, and received an eight year sentence. He was serving his term at Chunchon Correctional Institution when he was excluded from parole release on August 15, 1998 and again on February 25, 1999 for refusing to submit the pledge to abide by the law. On March 25, 1999, the complainant filed a constitutional complaint against Article 14(2) of the Ordinance for Parole Review for the reasons cited in the above case.

(3) 99Hun-Ma498

The complainants received one and a half year to five year sentences for violation of the National Security Act between 1996 and 1998, respectively. The complainants were excluded from parole on February 25, 1999 for refusing to submit the pledge to abide by the law. On August 24, 1999, the complainants filed a constitutional complaint against Article 14(2) of the Ordinance for Parole Review for the reasons cited in the above case.

B. Subject Matter of Review

The subject matter of review is the constitutionality of Article 14(2) (hereinafter called the "instant provision") of the Ordinance for Parole Review (amended by Ordinance of the Ministry of Justice No. 467 on October 10, 1998, hereinafter called the "Ordinance on review"). The provision and related provisions are as follows:

Ordinance for Parole Review (Amended by Ordinance of the Ministry of Justice No. 467 on October 10, 1998)

Article 14 (Procedural Rules to Check during a Parole Review)

(2) Inmates imprisoned for violation of the National Security Act or the Assembly and Demonstration Act should be required to submit a pledge to abide by the national laws of the Republic of Korea before being released on parole, thus ensuring that such prisoners would indeed observe the laws once they are set free.

Criminal Act

Article 72 (Requisites for Parole)

(1) A person under execution of imprisonment or imprisonment without prison labor who has behaved himself well and has shown sincere repentance may be provisionally released by administrative action when ten years of a life sentence or one-third of a limited term of punishment has been served.

Criminal Administration Act

Article 50 (Composition of Parole Review Board)

(3) Matters necessary for the review board shall be determined by the Ordinance of the Ministry of Justice.

Article 51 (Review of Paroles)

(1) In case where a convicted prisoner, who has served a term of imprisonment under Article 72(1) of the Criminal Act, maintains an excellent incarceration record and is deemed not likely to commit a second offense, the warden shall, under the conditions as prescribed

by the ordinance of the Ministry of Justice, propose that the review board make an examination of his parole.

(2) The review board shall, when reviewing eligibility for parole, take into account all circumstances such as the convicted prisoner's age, charge, motive for crime, term of sentence, records of criminal administration, means of livelihood and living environment after parole, and the likelihood of committing a crime again, etc.

(3) The review board shall, after voting for eligibility for parole, apply for permission for parole to the Minister of Justice within 5 days.

Article 52 (Permission for Parole)

The Minister of Justice may grant permission, when he deems that the application for a parole made by the review board under Article 51 is justifiable.

Enforcement Decree of the Criminal Administration Act

Article 153 (Criteria, etc. for Candidates for Parole Review)

The parole review board shall examine a person who has served the term as provided in Article 72 (1) of the Criminal Act, and falls under one of the following subparagraphs, and shall decide on the application for parole:

(i) A person whose accumulated scores rank at the top on the review of records of criminal administration; and

(ii) A person who does not fall under subparagraph 1 but is deemed unlikely to commit a crime again and very likely to adapt to society.

Article 156 (Review, etc. of Parole)

Matters necessary for reviewing parole shall be prescribed by the Ordinance of the Ministry of Justice.

Ordinance for Parole Review (Amended by Ordinance of the Ministry of Justice No. 467 on October 10, 1998)

Article 3 (Subject of Review)

(1) The parole review board (hereinafter called "the board") shall take into account the prisoner's personal background, circumstance of the convicted crime, existence of persons who can look after the prisoner once released on parole, or other pertinent matters when reviewing eligibility for parole.

2. Complainants' Arguments and Opinion of the Minister of Justice

A. Complainants' Arguments

Requiring submission of the pledge to abide by the law violates the freedom of conscience and the right to pursue happiness by formation of a mind free from outside influence because it, in effect, requires ideological conversion, or at the least, compels explicit expression of the intent to abide by the national laws. It violates the right of equality of inmates imprisoned for violation of the National Security Act or the Assembly and Demonstration Act as only these inmates, and not other prisoners incarcerated for other crimes, are required to submit the pledge in order to obtain review by the parole board.

In addition, the instant provision is in violation of Article 37(2) of the Constitution because it does not have a legitimate purpose, does not employ appropriate means to achieve the legislative purpose, and excessively restricts the basic rights of individuals. It is also against Article 12(1) of the Constitution stipulating due process of law.

B. Opinion of the Minister of Justice

The instant provision does not directly infringe on the basic rights of the complainants. Moreover, since the basic rights of the complainants are no longer being violated because they had all been released after filing of the constitutional complaints, the complaint has become moot and is unjustified. The pledge necessary for parole consideration does not require an inmate to renounce his former belief, and whether to submit the pledge or not is entirely up to the inmate. Thus, requiring submission of the pledge does not infringe on the basic rights and freedom of conscience of an inmate. Unlike other criminals, a so-called political criminal is convinced that violation of existing laws through his actions is justified, and he objects to the existing legal order in a systematic fashion. Thus, differential treatment of such prisoner from other inmates in making judgment about the likelihood of recidivism has a reasonable basis, and does not violate the principle of equality. Requiring the pledge to abide by the law is necessary to make an accurate judgment about the likelihood of recidivism of inmates imprisoned for violation of the National Security Act. It is appropriate as a means to achieve such legislative purpose, and infringement on the basic rights is minimal as such requirement does not intrude upon inner freedom nor compel formation of certain decisions. The instant provision serves to protect the impor-

tant national interest by the proper criminal administration to perpetrators of the public security related laws, and the private interest at hand, namely disadvantage suffered by inmates required to submit the pledge to abide by the law, is negligible. Therefore, there is a balance between the public interest being protected and the basic rights being infringed, and the principle of proportionality is observed.

3. Review

A. Legal Prerequisites

(1) Directness

In order for a statutory provision to be the subject for a constitutional complaint, the complainants must directly and presently suffer infringement on their own basic rights by the provision without any specific intermediary administrative disposition. Here, directness of infringement of the basic rights implies that there has been a restriction of freedom, levying of duties, or deprivation of rights or a legal status by the statute itself, not by a particular disposition of an administrative agency (11-2 KCCR 593, 605, 98Hun-Ma55, November 25, 1999). Existence of a specific administrative action enforcing a statute, however, does not always prohibit filing of a constitutional complaint against a statutory provision. Even if there was an administrative disposition to enforce the statutory provision, an individual can file a constitutional complaint under the following conditions as long as the administrative action is based on the statutory provision: when there is no remedy process to relieve citizens from the infringement on their rights or interests by illegal disposition of an administrative agency; or even if there exists a remedy process, when the prospect of relief of individual rights through such process is dismal and when it only forces the individual to take an unnecessary detour (9-2 KCCR 295, 304, 96Hun-Ma48, August 21, 1997; 11-2 KCCR 593, 606, 98Hun-Ma55, November 25, 1999).

In the instant case, the parole review board would first select inmates who could be ultimately set free on parole amidst a group of prisoners who have been incarcerated for violation of the National Security Act or the Assembly and Demonstration Act, have served the minimum imprisonment term required to be considered for parole, and have kept up an excellent behavioral record during the imprisonment term. The instant provision is applied to inmates only when the board requests the submission of the pledge to inmates screened and selected. Request for submission of the pledge, however, is only an intermediary measure to collect necessary information to make a final decision

whether to release someone on parole. The requisitioned inmate needs not obey such request nor would he be automatically released on parole upon submission of the pledge. The private interest of an inmate would be affected not by the request to submit the pledge but by the final decision of the Minster of Justice to release him on parole or not. Thus, request for submission of the pledge by the parole review board is an intermediary measure recommending or suggesting submission of the pledge, and it is not an independent administrative disposition that would be subject to an administrative litigation. Then, it cannot be expected that the complainants institute an administrative litigation against the request to submit the pledge by the parole review board or take other measures to relieve the infringement of their rights before filing the instant constitutional complaint. Then, prerequisite of directness cannot be denied just because the complainant did not take other steps to remedy the infringement, and the instant constitutional complaints are all valid in terms of directness of infringement of the basic rights.

(2) Justiciable Interest

The complainants' sentences were suspended 98Hun-Ma425 and 99Hun-Ma170 cases on February 25, 1999 and on August 15, 1999, respectively. Complainants Lee O-chul, Jung O-jae, Yoon O-joon, Chun O-eun, Bae O-kyun, Yang O-hoon, Jang O-sang, Cho O-byung, Kim O-hak, Roh O-cho, Park O-seo, Lee O-yeol, Kim O-joon, Kim O-soo, Kim O-hee, Kim O-seok, Jang O-seop, Min O-woo, Park O-eun were released on suspension of sentences on August 15, 1999, and Complainant Kim O-jung was released on suspension of sentences on December 31, 1999. Complainant Choi O-joo was released on February 29, 2000 upon the completion of the prison term, and Complainants Lee A-chul, Na O-young, Jung O-hong, Lee O-gu, Kim O were released on suspension of sentences on August 15, 2000. Complainants Kang O-won, Jung O-chan, Jung O-ki were all released upon the completion of the prison terms between July 13, 2001 and August 3, 2001, respectively.

Since all complainants are released, requiring the submission of the pledge to abide by the law would no longer pose any constitutional problem for the complainants, and the complaints have become moot. However, a constitutional complaint has not only a subjective function of providing relief for infringement on individual rights but also an objective function of defending and maintaining the constitutional order. Even if the complaints have become moot during the review, the Court needs to recognize the existence of an objective justiciable interest when the infringement on the basic rights is likely to be

repeated and a constitutional clarification of the matter has an important meaning for the defense and maintenance of the constitutional order (3 KCCR 356, 367, 89Hun-Ma181, July 8, 1991; 4 KCCR 51, 56-57, 91Hun-Ma111, January 28, 1992). Requiring the submission of the pledge to abide by the law is likely to repeat, and adjudication on the constitutional validity of such a requirement would bear an important meaning for the defense of the constitutional order. Therefore, the justiciable interest is still recognized in the case.

(3) Filing Time Limit

(A) 98Hun-Ma425

The parole review board demanded the complainant to submit the pledge to abide by the law before excluding him from parole on August 15, 1998. Then, the complainant must have known that there was an infringement on his basic rights following his refusal to submit the pledge by August 15, 1998. According to the court record, the constitutional complaint in the case was filed on November 26, 1998, and it is apparent that the complaint was filed over sixty days after the cause of the grievance was known. This would make the complaint unfit for constitutional review. However, the complainant did not file a complaint against an administrative disposition, but against the provision of the Ordinance which forms the basis for such a disposition. Since the provision was promulgated and entered into force on October 10, 1998 (In fact, the provision in question was being applied even before it was promulgated), the instant constitutional complaint was filed before tolling of the statute of limitation.

(B) 99Hun-Ma170

The complainant was excluded from parole on August 15, 1998 and again on February 25, 1999 for refusing to submit the pledge to abide by the law. Then, the complainant must have known the existence of the cause of an infringement on his basic rights following his refusal to submit the pledge by February 25, 1999. According to the court record, the constitutional complaint in the case was filed on March 25, 1999, and it is apparent that the complaint was filed before tolling of the statute of limitation for a constitutional complaint.

(C) 99Hun-Ma498

The complainants were excluded from parole release on February 25, 1999 for refusing to submit the pledge to abide by the law. The complainants must have known the existence of the cause of an infringement on their basic rights following their refusal to submit the pledge by February 25, 1999. According to the court record, the constitutional complaint in the case was filed on August 24, 1999, and

it is apparent that the complaint was filed after tolling of the statute of limitation for a constitutional complaint expired.

(4) Sub-conclusion

While other complaints meet the legal prerequisites of directness and existence of justiciable interest, the complaint in 99Hun-Ma498 case was filed after tolling of the statute of limitation, and therefore, shall be dismissed.

B. Review on Merits

(1) Infringement on the Freedom of Conscience

Article 19 of the Constitution stipulates that "All citizens shall enjoy the freedom of conscience." Constitutionally protected conscience refers to a specific and dire state of mind: It refers to a strong and sincere inner voice that his moral integrity will disintegrate if the individual does not take certain actions after judging the rights or wrongs of a matter. It does not refer to conscience as an obscure or abstract concept (9-1 KCCR 245, 263, 96Hun-Ka11, March 27, 1997).

Freedom of conscience, so-called starting point for any personal freedom, serves to guarantee the moral identity of an individual necessary for maintenance of human dignity and unhindered development of individual personality. However, not every action based on an inner decision belong to the domain of the freedom of conscience protected by the Constitution. Before making judgments about whether there was an infringement on the freedom of conscience, we need to first determine the constitutionally protected domain of the freedom of conscience. We should approach this problem by examining conditions and the degree of protection when there is a conflict between an action (or an inaction) based on the conscience of an individual and the requirements of the positive law.

In this light, conscience is protected by the Constitution under the following conditions: First, the content of the positive law in question should deal with a matter related to the domains of conscience. Second, compulsory legal measures such as coercion of performance, punishment, or imposition of legal disadvantages should follow any violation of such law. Third, perpetration should be a result of command of conscience. We shall examine whether the requirement of the submission of the pledge to abide by the law encroaches upon freedom of conscience under this guideline.

(A) Contents of the Pledge to Abide by the Law and the Domains of Conscience

Observance of the legal order of a state by its citizens forms the ideological basis for the existence and function of the state. In a free democratic government governed by the rule of law, freedom of mind and freedom to criticize the existing legal order are duly protected, and there exists the means to change or amend the Constitution and other laws through a legitimate process. Existence of such the government, however, is dependent on the autonomous participation and observance of the legal order by its citizens. Therefore, while there is no explicit provision in our Constitution stipulating such duty, it is the basic duty of all citizens to abide by the Constitution and other laws of the state.

Contents of the pledge to abide by the law required by the instant provision include the "vow to respect the national legal order of the Republic of Korea." An inmate needs to fill out his name, Korean identification number, convicted crime, circumstance of conviction as well as sentence, pledge to abide by the established legal order of the Republic of Korea, future life plan, and other statements if desired. There is no standardized form of expression for the pledge, and in practice, most inmates simply write that "they will abide by the laws of Korea".

As seen above, it is clear that all citizens have a general duty to observe the laws of the state under the Constitution. The instant pledge which requires certain inmates to declare that they would abide by the national laws and respect the constitutional order once released on parole is merely a reconfirmation of the general duty duly required of all citizens. It does not newly require them to think certain thoughts or perform particular actions under any hypothetical or actual situation. The instant pledge to abide by the law does not contain any specific or active requirement in its contents, and the requirement to submit the pledge is a process only to confirm the existing constitutional duty of inmates. Therefore, requiring submission of the pledge does not intrude upon the domain of conscience.

Among the complainants are some long-term prisoners who have refused to renounce their beliefs in communism. They may be convinced that the contents of the National Security Act are contrary to their political beliefs or that the free democratic regime is against their ideologies, and their such beliefs may be known to others. However, as long as the contents of the pledge used for parole review require nothing more than what has been described above, such pledge does not touch upon the domains of conscience. Basically, the Constitution does not protect anyone's right to overthrow the existing legal order or a free democratic order using such unconstitutional means as force

or violence with vehement disrespect for the Constitution or other laws of the land. Requiring submission of a pledge to abide by the existing legal order or to respect the extant constitutional regime does not violate any constitutionally protected freedom or right, including the freedom of conscience.

(B) Legally Compelled Submission of the Pledge to Abide by the Law and Violation of the Freedom of Conscience

Freedom of conscience can only be infringed when there is an unavoidable conflict between moral conviction within an individual's inner mind and the requirements of the external legal order. When existing laws do not prohibit or order certain actions but only offer to give special privileges or recommend certain activities, individuals can either renounce the opportunity to receive the proffered benefits or refuse to act according to such recommendation, thus preserving their conscience without breaching the existing law. To declare that there is a violation of the freedom of conscience by the demand of an existing legal order, the law being enforced should impose a new legal duty that did not exist beforehand, and failure to observe the law should be dealt with such compulsory legal measures as compulsory performance, punishment, or imposition of legal disadvantages. Here, imposition of a legal disadvantage does not mean infringement on individual rights, but it refers to change in the current legal status or standing for the worse toward the future, such as deprivation of an existing legal status or worsening of legal standing of an individual.

In the instant case, Article 14 of the Ordinance for Parole Review does not compel submission of the pledge to abide by the national laws. An inmate considered for parole can refuse to submit such pledge even if the parole review board requests submission of the pledge for parole review: Whether to submit the pledge or not depends on his own will. Parole is a privilege conferred upon inmates by the law enforcement agency according to decisions based on the correctional or criminal policy, and it is not a right that every inmate in entitled to (7-1 KCCR 416, 422, 93Hun-Ma12, March 23, 1995). Parole is a privilege or benefit that an inmate incidentally enjoys when the law enforcement agency decides that parole is appropriate. While a prisoner refusing to submit the pledge to abide by the law may not be released on parole because of the instant article of the Ordinance for Parole Review, his refusal to submit the pledge would not further weaken his legal standing nor undermine his legal status in any way. He only needs to serve the remaining term of imprisonment. The instant provision does not levy any new legal duty on such inmate, nor does it force submission of the pledge with compulsory performance, punishment, or imposition of legal disadvantages. Therefore, it does not infringe on the freedom of conscience.

The instant provision of the Ordinance essentially pronounces that there will be no parole unless the pledge is submitted. While the provision does not force submission of the pledge against one's conviction with punishment, or imposition of legal disadvantage, the provision uses parole release, one of the most instinctive desires of any inmate, as a bait to lead inmates to submit the pledge. Such practice may seem to violate the freedom of conscience of some long-term prisoners who are convinced that they should not recognize the legal order of the Republic of Korea because of their political beliefs or ideologies. However, it would be inaccurate to conclude that there is an infringement on freedom of conscience only because the bestowment of certain benefits is contingent upon performance of an action or inaction based on free will.

In implementing its policy, including its criminal administration policy such as parole, a state can decide to confer benefits to only a limited number of citizens satisfying predetermined qualifications.

When a provision does not legally compel performance of a certain action but is only employed to decide whether to bestow certain benefits, such provision does not infringe on freedom of conscience, even though conferred benefit might be very critical and it is painful to give up the opportunity to receive such benefit. The only constitutional problem in such case is whether it violates the principle of equality in bestowing such benefits.

In summary, submission of the pledge to abide by the law based on the instant provision is merely a precondition to receive benefit of parole release, and each inmate is free to choose to meet eligibility requirement for this benefit following his inner voice.

(2) Violation of the Due Process Clause

Article 12(1) of the Constitution stipulates that "No person shall be punished, placed under preventive measures or subject to involuntary labor except as provided by statute and through due process of law." Due process of law, an independent constitutional principle incorporated into the Constitution by the above provision, implies that not only formal procedure but also substantive contents of the law need to be reasonable and just. Under the principle, infringement on life, freedom, and property of citizens by any governmental power can only be allowed through legitimate procedures based on reasonable and just legislation (9-1 KCCR 509, 515, 96Hun-Ka17, May 29, 1997).

In the instant case, the instant provision of the Ordinance concerning the pledge to abide by the law does not infringe on the freedom of conscience of an inmate as seen above. Then, we need

not look further to determine that the there does not exist any violation of the principle of due process of law; the principle applies only when there is an encroachment of basic rights such as infringement on life, freedom, or property.

(3) Violation of the Right to Parole

Article 72(1) of the Criminal Act stipulates that "A person under execution of imprisonment or imprisonment without prison labor who maintains good behavior and has shown a sincere repentance may be provisionally released by administrative action when ten years of a life sentence or one-third of a limited term of punishment has been served." Parole as used in this provision refers to the release of a prisoner before the expiry of a sentence, based on good behavior during his prison term, to promote successful integration of an inmate into the general society. It is an administrative disposition based on the criminal administration policy to avoid unnecessary confinement of an individual who deeply regrets his crime and to encourage inmates to strive to achieve a sense of moral integrity. The chairperson of the parole review board established at each correctional institution applies for permission for parole of an inmate to the Minister of Justice, and the Minister of Justice may grant permission, when he deems that the application for parole made by the review board is justifiable (Article 51 and 52 of the Criminal Administration Act). The board members shall take a vote to decide whether it is appropriate to request parole for a particular inmate before the chairperson of the board applies for permission for parole of an inmate to the Minister of Justice. In order for an inmate to be considered for parole by the board, the inmate needs to have served at least one-third of the sentenced term, and he either needs to be one of the most well behaved inmate or the chairperson of the board must have determined that he should be considered for parole. Once a list of candidates to be considered for parole are selected, the board determines whether to apply for permission for parole for a particular inmate after considering diverse factors such as the convicted prisoner's age, convicted crime, criminal motive, term of sentence, criminal administration record, means of livelihood and living environment after parole release, and the likelihood of recidivism. As explained here, an inmate is not being released on parole based on an individual request or desire for parole release. Rather, parole is a privilege conferred upon an inmate by the law enforcement agency according to decisions based on correctional or criminal policies. An inmate who has met requirements prescribed in Article 72(1) of the Criminal Act does not automatically obtain a subjective right to demand parole release, and the administrative authority is not legally bound to release the inmate on parole.

An inmate can enjoy the benefit of release before the expiry of his sentence only when there is a specific administrative disposition to release an inmate on parole based on Article 72(1) of the Criminal Act (7-1 KCCR 416, 421-422, 93Hun-Ma12, March 23, 1995)

As seen above, an inmate does not have the subjective right to demand parole, and hence, the instant provision does not infringe upon the right to parole.

(4) Violation of the Right of Equality

(A) Standard of Review

Whether a strict or relaxed standard is to be used for equality review of a particular case depends on the scope of the legislative-formative power given to the legislature. Those cases where the Constitution specifically demands equality shall be scrutinized under a strict standard. If the Constitution itself designates certain standards not to be used as basis for discrimination or certain domains in which discrimination shall not take place, strict scrutiny should be employed to determine whether there is discrimination. Next, if differential treatment causes a great burden on the related basic rights, the legislative-formative power shall be curtailed, and strict scrutiny should be used for the constitutional review of the case(11-2 KCCR 770, 787, 98Hun-Ma363, December 23, 1999).

The instant provision deals with the review procedure for parole review, and the criminal administrative authority is allowed a large degree of discretion in the matter. Moreover, the Constitution does not explicitly proscribe discrimination in this field. As seen above, the instant provision concerning the pledge to abide by the law does not infringe on the freedom of conscience or other basic rights of the complainants, and thus, there is no burden on the related basic rights caused by differential treatment. Therefore, constitutional review of the instant provision does not require use of a strict standard, and it suffices to use a relaxed standard to determine reasonableness of the provision.

(B) Legislative Purpose of Requiring Submission of the Pledge to Abide by the Law

Since its inception, the Republic of Korea has confronted North Korea, and under such special conditions of the nation, many persons have been imprisoned for violation of the public security laws. Many inmates incarcerated for violation of the public security laws have either remained hostile or disapproved the constitutional regime of the Republic of Korea. Considering such tendency of these inmates, the instant statutory provision requires them to pledge allegiance to

the existing constitutional order to the maximum degree permissible under the Constitution in order to preserve the existing constitutional system of the Republic of Korea. It replaced the ideological convertsion program requiring inmates imprisoned for violation of the public security laws such as the National Security Act to renounce their belief in communist ideologies. The present requirement of submission of the pledge aims to silence criticism on the past ideological conversion program that it violated the freedom of conscience. It also aims to satiate the consitutional requirement only by reconfirming the duty to abide by the law that is duly required of all citizens while relieving the psychological burden of inmates subject to parole review.

(C) Proportionality in Differential Treatment

The instant provision does not require all inmates to submit the pledge to abide by the law regardless of their convicted crimes, but only demand the pledge from those inmates imprisoned for perpetration of the National Security Act and the Assembly and Demonstration Act for parole consideration.

North Korea still endeavors to bring about a communist revolution to the entire peninsula, and to protect itself against such external threats. The government of South Korea has no choice but to defend against North Korea's attempts at a radical revolution of South Korea. Illegal activities by individuals aiming to disturb the basic order of free democracy or overthrow the government, either in alliance with the North Korean government, or through independent decision of its own, have largely been dealt with either the National Security Act or the Assembly and Demonstration Act because of the nature of such activities. It is under such circumstance that the parole review board examines, in addition to things ordinarily taken into consideration to determine eligibility for parole, whether inmates imprisoned for violation of the National Security Act or the Assembly and Demonstration Act are willing to observe the national laws once released on parole. Thus, differential treatment of such inmates is not without a reasonable basis, and is appropriate as a means to achieve the policy objectives.

The purpose of differential treatment of inmates convicted for violation of the National Security Act or the Assembly and Demonstration Act is clear and important while the means to achieve the legislative objective is a mere reconfirmation of the general duty required of all citizens that does not entail any infringement on the basic rights of citizens. Thus, it is obvious that the principle of proportionality is observed in differential treatment of different groups, and therefore, the instant provision does not violate the constitutional principle of equality.

4. Conclusion

The complaints filed by complainants Cho O-rok and Cho O-won are rejected, and the complaints filed by other complainants are dismissed.

This decision is pursuant to the consensus of all justices except Justice Kwon Seong who wrote a concurring opinion and Justices Kim Hyo-jong and Choo Sun-hoe who wrote a dissenting opinion.

5. Concurring Opinion of Justice Kwon Seong

A. We can demarcate the domain of the freedom of conscience not overlapping with the domain of the freedom of religion, freedom of ideology, or general freedom of action and call them the "original domain of the freedom of conscience." Conscience within the original domains, then, indicates the inherent mentality of each person recognizing what is good or bad and pursuing what is good. In other words, it refers to the human instinct recognizing and judging good or evil, and selecting and deciding to act for what is good in the moral sphere. In this sense, internal decision about academic or artistic problems is not an issue of conscience, and political ideologies and beliefs as well as religious tenets and principles that are not directly associated with the issue of moral good or bad is not within the domain of the freedom of conscience.

Constitutional freedom generally refers to freedom from interference or coercion by the state. Coercion followed by punishment or legal disadvantage when an individual refuses to comply with the demands of the State, and continued interference to disturb the inner peace of an individual are some examples of infringements on the freedom.

B. It does not infringe on the freedom of conscience of citizens for the state to recommend or induce citizens to act for what is good and stay away from what is evil. However, it is encroachment on the freedom of conscience if the state decides what is good or bad for citizens and forces citizens to accept such decisions. Judgment of good or bad must ultimately be left with each individual, and in this regard, freedom of conscience implies that each individual should be able to autonomously decide what is good or bad for himself.

Freedom of conscience also includes freedom to act on what an individual believes is good.

Finally, freedom of conscience includes freedom not to be questioned about the contents of conscience.

C. Freedom of conscience defined in the above manner would be

in direct conflict with the positive law when an individual deems something good and decides to act on it when the existing legal order has declared it evil, or when an individual decides that something is evil and refuses to act on it when the existing legal order has declared it good.

Choice or decision mentioned here does not merely refer to personal preference of each individual, but rather, to an unalterable ethical resolution of an individual based on his decision to choose good or bad. It refers to a decision based on conviction about one's ethical and moral identity that would lead a person to declare "I would not be a human being if I do such an evil thing or I would not be a human being if I don't act".

Some provisions of the existing law reflect judgments on good and evil by members of the society. When the court concludes that it has no choice but to apply such provisions, individuals who violated such provisions will not be able to avoid punishment. The issue of the freedom of conscience arises in such occasion when there is a direct conflict between the judgment of the majority and the minority about what is good or bad. Since it is in effect tantamount to punishment of the minority disagreeing with judgment of the majority, the principle of protection of the minority could become another important issue here.

D. As noted by the majority of Justices, the instant provision which requires certain inmates to declare that they would abide by the national laws and respect the constitutional order once released on parole is only a reconfirmation of the general duty duly required of all citizens. Requiring submission of such pledge does not force the complainants to make a judgment on good or evil and then disclose the result of such judgment. Therefore, requirement of submission of the pledge is not within the domain of the freedom of conscience.

The complainants in the case were imprisoned for violation of the National Security Act. They violated the law to pursue political beliefs or to achieve political objectives of their preference. They refused to submit the pledge stating that they would not commit such crimes again after being released because such pledge was contrary to their political beliefs. Generally, refusal of submission of such pledge is to show off and reconfirm their firm and unchanging political beliefs. It could be interpreted as a strategic choice following the conclusion that it would be more advantageous to achieve their political objective to act that way. On the contrary, there is not enough evidence in the case to conclude that refusal to submit the pledge was based on their attempt to protect their ethical and moral identity as human beings. It seems that the complainants' refusal to submit the pledge to abide by the law is not based on their conscientious, or moral,

judgment that to submit the pledge would be an evil thing to do. In conclusion, their refusal to submit the pledge had nothing to do with conscience.

6. Dissenting Opinion of Justices Kim Hyo-jong and Choo Sun-hoe

We do not agree with the majority of Justices about the protected domain of the freedom of conscience. We believe that the pledge to abide by the law also lies within the constitutionally protected domain of the freedom of conscience. We conclude that it is unconstitutional to limit this freedom based not on statute but on an ordinance of the Minister of Justice, and that the instant provision requiring submission of the pledge violates the principle of the proportionality.

A. Reason that the Constitution Protects Freedom of Conscience and the Domain of Protection

(1) Reason that the Constitution Protects Freedom of Conscience

In a free democratic state, the governmental authority retains its legitimacy only when it guarantees the basic rights of its citizens. Authority of the state is derived from citizens. But at times, the state may wield its authority to the disadvantage of particular individuals to protect and preserve the community. Individuals will accept such disadvantage only when their is a common understanding that no basic right can be restricted without any overriding public interest.

Among basic rights, freedom of conscience retains a special standing. When there is a conflict between an individual and the state, freedom of conscience, especially freedom of mind, constitutes the last protection for individuals that should not be intruded upon by the state, no matter how great the public need is. Therefore, in order for each citizen to enjoy human dignity, be assured of his worth, and to preserve his fundamental morality and personal beliefs, the state needs to guarantee freedom of conscience above everything else. This is the basic condition of, or demand for, a free democratic state.

(2) Domain of Protection for Freedom of Conscience

(A) In its earlier adjudication concerning the domain of protection for freedom of conscience, the Constitutional Court ruled that "conscience" protected by Article 19 of the Constitution includes not

only one's world view, view of life, ideology, and other beliefs but also value judgments or ethical decisions in one's inner self affecting formation of one's personality. Freedom of conscience includes freedom of inner thought which precludes the state from intervening on people's ethical judgment about right or wrong as well as good or evil. It also includes freedom not to be forced by the government to publicly disclose one's ethical judgment (3 KCCR 149, 153-154, 89Hun-Ma160, April 1, 1991; 9-2 KCCR 548, 571, 92Hun-Ba28, November 27, 1997; 10-2 KCCR 159, 166, 96Hun-Ba35, July 16, 1998).

The domain of conscience, then, is broader than that of a choice between a moral good or evil. The Court has explicated the reasons for recognizing such broad scope of conscience as follows:

""Such interpretation would be pursuant to our Constitution which, unlike the constitutions of other nations, has an independent article explicitly stipulating protection of freedom of conscience while distinguishing it from freedom of religion and separating it from freedom of thoughts. This is declaration of the principle that the state would not intrude upon freedom of inner thoughts, nor interfere with one's value judgment. It is to better protect freedom of mental activities, a basis of democracy, which should not be abridged by any state authority and which has been an essential element for progress and development of the human race. Article 18 (2) of the International Covenant of Civil and Political Rights (so-called "International Human Rights Covenant B") that the Republic of Korea acceded to in 1990 stipulates that no one shall be subject to coercion which would impair his freedom to adopt belief of his choice." (3 KCCR 149, 153-154, 89Hun-Ma160, April 1, 1991)

Therefore, the protected domain of freedom of conscience dose not include only morality choices between good or evil. It also includes one's world view, ideology, or other beliefs. This bears important significance in the adjudication of the matter. That is the reason the Constitutional Court concluded that an order of public apology is an issue within the domain of the freedom of conscience (3 KCCR 149, 153-154, 89Hun-Ma160, April 1, 1991)

The Court has recognized a broad scope of freedom of conscience because the Constitution does not have an independent article to protect freedom of thoughts or ideology and because freedom of conscience is an important basis of democracy.

(B) The majority opinion in the instant case, however, is in conflict with the precedent of this Court in that it confines the domain of conscience protected by the Constitution to the sphere of morality, more specifically, to only imminent and specific ethical judgments regarding one's moral integrity. This is clearly either limited interpreta-

tion of or overruling of precedent.

The majority of Justices does not cite the aforementioned precedent about the domain of conscience. Rather, the majority of Justices quotes the ruling on the refusal to take the breathalizer test (96Hun-Ka11), and adds new conditions to recognize that there is an issue of the freedom of conscience involved in a particular case. The majority of Justices concludes that constitutionally protected conscience refers to "a specific and dire state of mind" necessary to preserve "one's ethical and moral identity." Such view limiting the domain of constitutionally protected conscience is not in harmony with the aforementioned precedent, and it is contrary to the ruling of this precedent that included not only moral conscience, in the narrow sense, but also one's world view, view of life, ideology, or other beliefs within the constitutionally protected domain of conscience. If conscience protected under the Constitution only refers to "a specific and dire state of mind" necessary to preserve "one's ethical and moral identity," the Court would have reached at a different conclusion on the case concerning the order of public apology (89Hun-Ma160 case). The precedent on the order of public apology was adjudicated based on the Court's view that concept of conscience has a broader scope than what the majority of Justices in the instant case is willing to recognize.

(C) Furthermore, the majority opinion prescribes the domain of the constitutionally protected freedom of conscience using three conditions. As the second condition, it requires that "Compulsory legal measures such as compulsory performance, punishment, or imposition of legal disadvantage should follow violation of the law." We are deeply concerned about reasonableness and effectiveness of this conclusion.

The Court rendered but very few decisions about the freedom of conscience thus far. Under such circumstance, attempts to define the concept based on deductive reasoning may not be appropriate. Freedom of conscience is a very sensitive issue dealing with the inner mind of individuals in connection with the state authority. By defining the freedom of conscience as such, the Court may be binding itself to only superficial or conceptual examination of cases concerning freedom of conscience. If above definition of conscience is adopted, the Court would only look at each case to determine whether a given case meets three conditions required to make it an issue of constitutionally protected conscience: The Court would not look at each case in its entirety respecting individual and specific circumstance of each case. This may lead to rulings far from existing realities in cases of such an important and sensitive basic right as the freedom of conscience.

Such approach is also contrary to the generally adopted method of constitutional interpretation, namely, "constitutional interpretation through specific cases." Constitutional review based on such deductive

reasoning can be used to limit, instead of extend, the protected domain of the freedom of conscience.

The Constitution is the supreme law of the land that takes an open and abstract form. The Constitution has taken such form to give enough room for appropriate constitutional interpretation for diverse relations over many generations to come. It would be inappropriate for the Court to define the domain of constitutionally protected basic rights based on deductive reasoning when there are not enough precedents accumulated about the issue.

B. Whether requiring submission of the pledge to abide by the law is an issue within the protected domain of the freedom of conscience

(1) The majority of Justices in the instant case concludes that requiring submission of the pledge to abide by the law "only confirms and makes citizens vow to uphold their constitutional duty", and "therefore, it does not intrude upon the domains of conscience."

We do not object to such a conclusion when applied to ordinary prisoners. However, such a conclusion would not be appropriate when a prisoner, who is holding onto the communist ideology sentenced to life imprisonment for attempts to overthrow the government by force and violence in violation of the National Security Act, is required to submit such pledge for parole.

The majority of Justices concedes that there may be some long-term prisoners who have refused to renounce their beliefs in communism among the complainants and they may firmly believe that the contents of the National Security Act are contrary to their political beliefs or that a free democratic regime is against their ideologies. They, however, conclude that "the Constitution does not protect anyone's right to overthrow the existing legal order or a free democratic order using such unconstitutional means as force or violence, and such pledge to abide by the law or respect the existing constitutional regime does not violate any constitutionally protected freedom or right, including freedom of conscience."

Such conclusion is contrary to the Constitution guaranteeing freedom of conscience, and there is also a gap in the argument's logic.

Certainly, no one has the right to overthrow the government using violent means; However, it infringes on the freedom of conscience to force him to confess or change such idea as long as the idea remains in his thoughts. It would be hard to argue that there is no infringement on the freedom of conscience when requiring submission of the pledge to bide by the law, albeit in effect or indirectly, forces an

individual with a particular world view or ideology to change his inner beliefs.

We cannot readily agree with the claim that "such pledge to abide by the law or respect the existing constitutional regime does not violate any constitutionally protected freedom or right, including the freedom of conscience."

Neutrality of the State on the world view or ethical judgment is precondition on guaranteeing the freedom of conscience. Freedom of conscience is based on the understanding that no matter what kind of world view or moral belief an individual has, the state should not force him to adhere to a certain world view or moral belief and that the state must tolerate individual's choice on the matter. In principle, freedom of conscience and freedom of expression of even those individuals who may prefer a regime that may not be free nor democratic are protected to a certain extent under the constitution of a free democratic society. In other words, in a free democratic society, conscience and expression that may not be in harmony with the existing free democratic regime are protected.

(2) Protection of the free democratic basic order is one of the superior values of the Constitution. While the Constitution is based on moral relativism, the state is justified to restrain actions that may be harmful to a free democratic basic order. Under the free democratic regime, diverse opinions about ideologies and beliefs are not indiscriminately ignored nor made uniform. Emphasis on "free" democratic basic order implies that there should be no forceful or discriminatory governance and that individual opinions and actions should be tolerated, as long as they do not injure the legal interests of other individuals or public interest.

Therefore, in a free democratic society, the rights of even opponents of free democracy are protected; only their specific actions can be restrained when they are deleterious to the public interest. The government must protect itself against extremists trying to overthrow the government via violence and force. In a free democratic society, however, the government can only penalize the opponents of democracy for their "actions"; it should not force them to renounce their ideology or make them pledge to abide by the law against their beliefs using any form of direct or indirect means of coercion. This is what distinguishes a free democratic society from a communist regime.

(3) Let us next examine what it means to submit the pledge to abide by the law to the long-term prisoners who have thus far refused to convert their ideologies.

In form, requiring the pledge to abide by the law is different from the ideological conversion programs in the past. However, there is no

practical difference between the two; an inmate imprisoned for violation of the National Security Act for action based on his belief in communism is required to express an intention to change such belief under both programs. Thus, both are used to effectively separate and isolate individuals with particular ideological beliefs from ones with same beliefs.

A letter of conversion is a written statement renouncing previously held communist ideology. In his official opinion about the instant case, the Minister of Justice wrote that "the ideology conversion program has been replaced by requirement of submission of the pledge to abide by the law because the ideology conversion program may infringe on individual freedom of conscience as it requires an explicit expression renouncing inner beliefs and imposes certain legal disadvantage if the individual refuses to convert."

Requiring submission of the pledge to abide by the law, like the ideology conversion program, forces a communist to renounce his communist ideology and makes him publicly express it.

To such individual, a decision to submit the pledge to abide by the law is fundamentally identical to that to submit a letter of conversion. To him, "to abide by the law of a free democratic regime" is tantamount to "renouncement of the creation of a communist society". This is to change his world view, ideology, and beliefs. To such individual, the pledge is not merely a document without much significance as the majority of Justices claims.

While interpretation of laws and legal judgment take an important place in the legal process, there are many cases whose outcome will be dependent on how the judges appraise the facts constituting a case.

The central issue of the case is the meaning of submission of the pledge to those inmates who have firmly held onto the communist ideology. The majority of Justices take the issue too lightly. The Constitutional Court must determine whether the case at hand contains elements concerning freedom of conscience through individual and substantial review of specific circumstances of the case.

The pledge to abide by the law, like the ideology conversion program, requires expression of a renouncement of inner beliefs. Since constitutionally protected conscience includes conscience that affects individual's world view, ideology, and beliefs, requiring submission of the pledge is an issue within the protected domain of the freedom of conscience.

(4) Let us next examine whether it is legal coercion limiting freedom of conscience to exclude individuals who refused to submit the pledge to abide by the law for parole.

The majority of Justices points out that submission of the pledge is not compulsory and that the result of refusal to submit the pledge is merely exclusion from parole, which is a favor or benefit that an inmate only incidentally enjoys. The majority of Justices concludes that there is no coercion such as an imposition of a legal disadvantage to force submission of the pledge, and hence, there is no infringement on the freedom of conscience.

Furthermore, the majority writes that "When a statutory provision does not legally compel performance of a certain action but is only employed to decide whether to bestow certain benefits, such provision does not infringe on the freedom of conscience, even though such benefit might be very critical and it is painful to give up the opportunity to receive such benefit. "

Even if the concept of conscience used by the majority of Justices is adopted, it is too formal an interpretation to conclude that exclusion from parole release upon refusal to submit the pledge is not a legal disadvantage. Such view is far from the constitutional spirit puting an emphasis on the protection of basic rights.

Let us consider a prisoner imprisoned for life for violation of the National Security Act, and let us say that while he meets all other qualification necessary for parole, he is excluded from parole because he refused to submit the pledge to abide by the law. Even for such inmate who has a very firm ideological belief, it is very difficult to decide whether to return to his family and enjoy his freedom after being released on parole or to spend the rest of his life confined by holding onto his belief tenaciously. Since submission of the pledge would mean renouncement of the communist ideology that he has held on to heretofore and betrayal of his comrades, he would experience a conflict of conscience when deciding whether to submit the pledge or forego the opportunity for parole. We cannot look at this problem under the conceptual "rights and benefits" dichotomy.

While a conceptual tool could contribute to legal stability, it would not yield a reasonable conclusion pertinent to a particular case. Constitutional adjudication is a process to give concrete and substantial meanings to abstract and open provisions of the Constitution by applying them to actual cases. In this light, it would not be appropriate to decide whether there has been limitation of basic rights based on a simple criterion of whether a particular disposition is "infringement on rights or deprivation of benefits." How could we say that it is not an issue of freedom of conscience when impoverished individuals holding onto the communist ideology are denied basic social security aid or medical care for refusing to submit the pledge to abide by the laws of the free democratic regime because such benefits are not considered rights?

An individual can claim violation of such basic rights as freedom of conscience and freedom of expression even when he was denied important benefits by the government. While the court will need to examine each case to determine what is such an important benefit, exclusion of a long-term prisoner from parole consideration is certainly one of such cases because parole may be one of the most important matters in his life.

The majority of Justices employ such terms as "legal disadvantage" and "legal coercion" to conclude that there is no issue concerning freedom of conscience in the case. This conclusion is too formal for a question of infringement on such vital constitutional value as the freedom of conscience[1].

(5) While the instant provision requiring submission of the pledge to abide by the law does not directly compel expression of conscience of an inmate, it does forcibly demand that he subscribes to the pledge in effect whether he may recover his bodily freedom or continue his permanent stay in the confined facility depends on his decision to submit the pledge or not. In reality, this is to indirectly compelling an inmate to express his conscience - ideology, or beliefs.

If the inmate refuses to subscribe to the pledge, it would be a passive declaration that they would not abide by the national laws, or that they would continue to hold on to their previous beliefs or ideology. This is a restriction of the freedom of silence.

The pledge to abide by the law is bigger than something that "prisoners can refuse to submit and as a result, not enjoy the benefit of parole release." It falls within the domain of the freedom of conscience protected by Article 19 of the Constitution. We would not

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1). A U.S. Supreme Court decision concerning the matter is very instructive. In Speiser v. Randall, 357 U.S. 513 (1958), Justice Brennan delivered the opinion of the Court, saying that "when we deal with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied." (According to the U.S. Supreme Court decisions, freedom of conscience is protected by the First Amendment stipulating the freedom of expression and the freedom of religion.)

In Speiser v. Randall, the U.S. Supreme Court ruled that a California statute requiring the veterans to file an oath that they do not advocate the overthrow of the Federal or State Government by force, violence or other unlawful means in order to qualify for tax exemptions denied the freedom of speech of such veterans. The Court concluded that deterrent effect of such statute would be the same as if the State were to fine them for this speech. The Court went on to point out that the argument of the California State Government that because a tax exemption was a "privilege" or "bounty," its denial would not infringe speech was incorrect. The Court further wrote that the denial of a tax exemption for engaging in certain speech necessarily would have the effect of coercing the claimants to refrain from the proscribed speech, and that the denial was "frankly aimed at the suppression of dangerous ideas."

be able to say that it is unrelated to freedom of conscience to offer parole to an inmate who is imprisoned for religious reasons on the condition that he step over a cross because there is no legal disadvantage.

Freedom of conscience is a very delicate matter dealing with the inner minds of citizens, and there could be various ways to restrict it by the State who has diverse policy measures. The Constitutional Court, the last bastion for basic rights protection, should examine substantial effects that a particular state action might have on the inner minds of citizens in reviewing a case concerning the freedom of conscience from diverse angles.

C. Whether requiring submission of the pledge to abide by the law violates freedom of conscience

(1) "Freedom of conscience protected by Article 19 of the Constitution includes not only forum internum that include freedom to form conscience and freedom to make a decision based on one's conscience, but also forum externum that include freedom to express and take actions based on decisions of one's conscience. While forum internum is an absolute freedom that may not be abridged under any circumstance as long as it stays within one's mind, forum externum is a relative freedom that can be restricted by Statute when it is necessary to do so for national security, the maintenance of law and order, or for public welfare under Article 37 (2) of the Constitution (10-2 KCCR 159-166, 96Hun-Ba35, July 18, 1998).

(2) Requiring submission of the pledge to abide by the law directly restricts inner freedom of a person in that it deals with an individual's world view, view of life, ideology, beliefs, or other moral judgment.

While what matters is the pledge which can be said to be a form of "expression,", it is an issue not in the domains of forum externum but in the domain of forum interium since the State in effect coerces an individual to make confession of one's inner beliefs.

In other words, the pledge in question does not stop at requiring an individual to submit himself externally but goes on to compel one to convince oneself internally the legitimacy of such a submission as a condition of parole. Article 16(2) of the Constitution of Spain stipulates that "nobody may be compelled to make statements regarding his religion, beliefs or ideologies"; Article 18(2) of the International Covenant of Civil and Political Rights (so-called "International Human Rights Covenant B") that the Republic of Korea acceded to in 1990 stipulates that no one shall be subject to coercion which would impair

his freedom to have or to adopt a religion or belief of his choice; and Article 4(1) of the Basic Law for the Federal Republic of Germany stipulates that "...freedom to profess a religious or philosophical creed shall be inviolable." These provisions have been adopted to prevent infringement on inner freedom brought by compelling one to confess one's beliefs. This is an outcome of a constitutional tradition to prevent religious confession such as "stepping on the cross.".

Since requiring submission of the pledge to abide by the law is forcing an individual to either confess one's inner mind or preventing him from keeping silence, it infringes upon the freedom to decide whether to confess one's beliefs or not. This means that requiring the pledge is not merely a problem of expression of inner thoughts, but rather a problem of inner thoughts itself.

Otherwise, one can argue that it would not be a problem concerned with inner freedom to ask "I would not ask what your beliefs are, but tell me whether it is A or not."

Since the pledge is a restriction on whether to confess one's inner freedom, it touches upon the inner part of the freedom of conscience, and thus, is linked with the essential aspect of the freedom of conscience.

(3) Let us next examine whether requiring submission of the pledge to abide by the law is a restriction of basic rights by an Act. We think that, since requiring submission of the pledge to abide by the law falls within the protected domain of the freedom of conscience, it can only be restricted by an Act when necessary to do so for national security or other compelling reasons. However, no act has been passed to legitimize the requirement of such a pledge, and the legislature has not delegated to the administration detailed rule-making concerning the pledge. It has only been implemented based on Ordinance for Parole Review (Amended by Ordinance of the Ministry of Justice No. 467 on October 10, 1998). It is in violation of the Constitution to limit the basic rights of citizens by ordinance of the Ministry, not by act nor with delegation of rule-making, and is unconstitutional.

(4) Let us next see whether requiring submission of the pledge violates the principle of proportionality.

Even if one argues that requiring submission of the pledge is not a matter of inner freedom but only a restriction on the freedom to realize conscience, the instant provision violates the principle of proportionality.

The instant provision of the Ordinance may have a valid legislative purpose in that the pledge is used to judge the likelihood of recidivism of an inmate. However, appropriateness of the means chosen to achieve the legislative purpose is questionable. While there may

be some individuals who adamantly object to the legal order of the Republic of Korea among violators of the public security laws, failure to submit the pledge is passive refusal. Recidivism can be said to be a form of active refusal of the existing legal order, and the likelihood of recidivism is affected by numerous contingencies such as political or social conditions of the society when an inmate is released, and individual living environments. It is not clear whether an inmate released on parole after submitting the pledge is not likely to commit another crime or whether likelihood of recidivism would be higher if inmates were to be released without submitting the pledge.

If requiring submission of the pledge aims to assist judgment whether the released inmate is likely to be a recidivist, other means used for parole review of ordinary inmates could be employed to achieve such a legislative purpose. A potential candidate for parole could first be screened by using the incarceration record during the imprisonment term. The members of Parole Review Board could question the inmate about the status of mind and future plans during the interview for parole review, and could indirectly make assessment about the inmate's ideology and about whether he accepts the constitutional order of the Republic of Korea. Likelihood of recidivism could thus be examined thoroughly.

The instant provision excessively restricts freedom of conscience because it forces an inmate to make a written confession about things related to fundamental beliefs or conscience.

An individual asked to submit the pledge in order to be reviewed for parole release suffers a serious mental conflict: he can either express his intent to change his fundamental belief to be released, or he can choose to retain his inner belief by remaining silent. Thus, the injury inflicted on individuals' conscience by requiring the pledge to abide by the law is far greater than the public interest of acquisition of information for parole review, and the instant provision fails the balance of interest test.

D. Conclusion

In conclusion, we think that the instant provision is unconstitutional because it infringes upon the inner freedom of conscience, encroaches upon the basic rights of citizens not based on acts legislated by the National Assembly, and violates the principle of proportionality even when one deems it as restriction of freedom to realize one's conscience.

Justices Yun Young-chul (Presiding Justice), Han Dae-hyun, Ha Kyung-chull, Kim Young-il, Kwon Seong, Kim Hyo-jong, Kim

Aftermath of the Case

The decision put an end to a constitutional debate about the pledge required of inmates imprisoned for violation of public security laws. However, voices calling for abolishment of the pledge based on political consideration did not disappear altogether. The pledge requirement was abrogated with revision of the Ordinance for Parole Review on July 31, 2003.

3. *Ban on Improper Communication on the Internet* Case

(14-1 KCCR 616, 99Hun-Ma480, June 27, 2002)

Contents of the Decision

1. Whether Article 53(1) of the Telecommunications Business Act banning communication which contain contents that could harm the public peace and order or social morals and good customs violates the rule of clarity.
2. Whether Article 53(1) of the Telecommunications Business Act violates the rule against excessive restriction.
3. Whether Article 53(2) of the Telecommunications Business Act delegating legislation regarding specific contents of communication deemed harmful to the public peace and order or social morals and good customs to the Presidential Decree is in violation of the rule against blanket delegation.
4. Whether Article 53(3) of the Telecommunications Business Act allowing the Minister of Information and Communication to order a telecommunications business operator to refuse, suspend, or restrict communications that could harm the public peace and order or social morals and good customs and Article 16 of the Enforcement Decree of Telecommunications Business Act which enumerate contents of communication that could harm the public peace and order or social morals and good customs based on Article 53(2) of the Telecommunications Business Act are unconstitutional.

Summary of the Decision

1. The rule of clarity is especially important in legislation that regulates freedom of expression. When it is unclear what kind of expression is being prohibited by such legislation, it is very likely that a person would abstain from expressing himself lest he should be punished for making such expression when he is not certain that what he is about to express is subject to regulation or not. Therefore, it is constitutionally required that statutes regulating freedom of expression should be specific and clear about what expression is the subject of regulation. Improper communication, defined as communication with contents that could "harm the public peace and order or social morals and good customs", is too unclear and ambiguous. "The public peace and order" is almost identical to "national security" and "the main-

tenance of law and order" used in Article 37(2) of the Constitution, and "social morals and good customs" is indistinguishable from "public morals or social ethics" stipulated in Article 21(4) of the Constitution, respectively. Such terms do not concretize the concepts used in the Constitution. Since "the public peace and order" and "social morals and good customs" are such abstract concepts, different individuals would make different judgments about whether a particular expression is harmful to "the public peace and order" or "social morals and good customs" because of differences in individual value systems or ethical views. Furthermore, it would be difficult to objectively define their meaning through the ordinary interpretation of law by enforcement agencies.

2. Article 53 of the Telecommunications Business Act regulates communication that could "harm the public peace and order or social morals and good customs." Ambiguity, abstractness, and comprehensiveness of the concept of improper communication inevitably results in the regulation of communication that should not be regulated, and leads to the violation of the rule against excessive restriction. Article 53 of the Act could be used to regulate "indecent" expression which this Court has explicitly held to be protected under the Constitution, or those provocative "media materials harmful to juveniles," communication of which should not be prohibited when expressed or accessed by adults because they are not obscene, citing that such expressions are against "social morals and good customs." It could be employed to regulate expressions regarding sexuality, marriage, or family system for harming "social morals and good customs," and it could be used to regulate expressions regarding sensitive political or social issues by labelling them as harmful to "the public peace and order." This would violate the essential features of freedom of expression.

3. Article 53(2) of the Telecommunications Business Act stipulates that "the objects, etc. of the communication, which are deemed harmful to the public peace and order or social morals and good customs under paragraph (1), shall be determined by the Presidential Decree." This is in violation of the rule against blanket delegation. As seen above, the concepts of "the public peace and order" or "social morals and good customs" are very vague and ambiguous, and the provision employing such terms does not provide citizens with ideas about the criteria or basic contents of regulation by the presidential decree. It also does not provide appropriate guidelines to the administrative agency, and fails to control administrative regulation properly. Thus, the administrative agency could even regulate those expressions that should be protected under the Constitution according to its own judgment or preference about what the concepts of "the public peace and order" or "social morals and good customs" should represent.

This is evident in Article 16(ii) and Article 16(iii) of the Enforcement Decree of Telecommunications Business Act which employ terms as unclear and broad as those used in Article 53(1) of the Telecommunications Business Act.

4. Article 53(3) of the Telecommunications Business Act, which stipulates refusal, suspension, or restriction of improper communication, and Article 16 of the Enforcement Decree of Telecommunications Business Act that provide definitions of improper communication are unconstitutional because the legitimacy of Article 53(1) and Article 53(2), which are clearly unconstitutional, is a precondition for their constitutionality.

Dissenting Opinion of Justices Ha Kyung-chull, Kim Young-il, and Song In-jun

1. Concerning Article 53(1) and 53(2) of the Telecommunications Business Act

According to the interpretive rule of preference for constitutionality, which espouse the principle of maximum protection and least restriction of basic rights, "public peace and order" or "social morals and good customs" used as standards for delegation of legislation in the instant statutory provisions could be construed as the "minimum level of public order or social morals and good customs that all citizens should abide by and comply with." It cannot be argued that the above terms do not function as effective guidelines for administrative regulation or that they inevitably result in excessive regulation of those expressions that should not be regulated, and they provide a relatively clear standard for the delegation of the rule-making power. Constitutionality of a statutory provision is a matter of creating limits within which a statutory provision could exist effectively. It does not require optimization of policy judgment. While the above statutory provisions may not be the best possible legislation, in terms of the rule of clarity, it is constitutional as long as it is not impermissible under the rule against blanket delegation because of the vagueness of the concepts employed by these statutory provisons. In other words, the statutory provisions are constitutional as long as any citizen can predict the basic features concerning the standard and scope of improper communication that would be regulated by the provisions of the presidential decree based on delegation by the Act.

2. Concerning Article 16 of the Enforcement Decree of the Telecommunications Business Act

The instant provision specifies and finalizes the contents of improper communication delegated by Article 53(2) of the Act. It is obvious that "telecommunications with contents that aim at a criminal act or that abet a criminal act", as stipulated by Article 16(i) of the Decree, refers to communication either to commit or incite crimes punishable under the criminal codes, and therefore, this is not against the rule of clarity. However, "telecommunications with contents that aim at committing anti-state activities" and "telecommunications with contents that impede the good customs and other social orders", as stipulated by Article 16(ii) and Article 16(iii), employ concepts that are too abstract and unclear to prevent arbitrary judgments of law enforcement agencies. These provisions could be abused to infringe on the freedom of expression, and hence, they violate the rule of clarity.

3. Article 53(3) of the Telecommunications Business Act

According to this statutory provision, the Minister of Information and Communication can not only order the deletion of a particular message identified as a improper communication but also close down a web site or suspend use of the particular user ID of the individual who posted the improper writing. However, the instant statutory provision does not impose any legal responsibility on such individuals. It is clear that an independent order for deletion of a particular expression would not be effective as the means to deal with improper communications when communications in cyberspace posts a problem. Closure of the web site operated by a particular internet service provider (ISP) or suspension of use of a specific user ID are only confined to a particular service managed by the ISP. The user would not be prevented from using online services offered by other service providers. In this light, the statutory provision does not violate the principle of proportionality, thereby encroaching on the freedom of expression. According to the Administrative Procedures Act, users of telecommunication services are considered to be interested parties. He is to be notified in advance when administrative agencies are rendering certain dispositions, and should be given an opportunity to submit opinions regarding such disposition. Furthermore, he can participate at formal or public hearings. Under these circumstances, it would not be against due process even if the instant statutory provision does not grant the right to make statements to a telecommunication service user. Therefore, the statutory provision is not in violation of the principle of proportionality nor due process of law, and does not

infringe on the freedom of expression.

Provisions on Review

Telecommunications Business Act (wholly amended by Act No. 4394 on August 10, 1991)

Article 53 (Regulation of Improper Communication)

(1) A person in use of telecommunications shall not make communications with contents that harm the public peace and order or social morals and good customs.

(2) The objects, etc. of the communication, which are deemed harmful to the public peace and order or social morals and good customs under paragraph (1), shall be determined by Presidential Decree.

(3) The Minister of Information and Communication may order a telecommunications business operator to refuse, suspends or restrict the communication under paragraph (2).

Article 71 (Penal Provisions)

A person falling under any of the following subparagraphs shall be punished by imprisonment for not more than two years or by a fine not exceeding twenty million won: (Amended by Act No. 5220, December 30, 1996)

(i) - (vi) [omitted]

(vii) A person who fails to implement orders under Article 53(3) or 55

(viii) [omitted]

Enforcement Decree of Telecommunications Business Act (wholly amended by Presidential Decree No. 13558 on December 31, 1991)

Article 16 (Improper Communication)

Telecommunications which are deemed to be harmful to the public peace and order or social morals and good customs under Article 53(2) of the Act shall be as follows:

(i) Telecommunications with contents that aim at a criminal act or of that abet a criminal act;

(ii) Telecommunications with contents that aim at committing the anti-state activities; and

(iii) Telecommunications with contents that impede the good customs and other social orders.

Related Provisions

The Constitution

Articles 12(1), 21, 37(2)

Juvenile Protection Act

Article 10 (Criteria for Deliberation of Media Materials Harmful to Juveniles)

(1) In performing the deliberation in accordance with the provisions of Article 8, the Juvenile Protection Committee and each deliberative organ shall identify the media material in question as harmful to juveniles, in the case where the media materials in question fall under any of the following subparagraphs:

(i) Provocative or obscene materials which may stimulate sexual desires in juveniles;

(ii) Materials which may cause violence and brutality of juveniles or incite them to commit a crime;

(iii) Materials which may stimulate or glorify the exercise of all sorts of violence including rape and the abuse of drugs;

(iv) Materials which are anti-social and unethical and that may hamper the cultivation of good character and a sense of civic consciousness in juveniles; and

(v) Materials which are feared to affect harmfully the mental and physical health of juveniles.

(2) - (3) [omitted]

Related Precedents

1. 4 KCCR 255, 90Hun-Ba27, etc., April 28, 1992
   10-1 KCCR 327, 95Hun-Ka16, April 30, 1998
2. 10-1 KCCR 327, 95Hun-Ka16, April 30, 1998
3. 3 KCCR 336, 91Hun-Ka4, July 8, 1991
   11-1 KCCR 633, 98Hun-Ba70, May 27, 1999

Parties

Complainant

Kim Sun-wook

Counsel : 1. Legal Corporation Duksoo
Attorney-in-charge : Kim Ki-joong
2. Legal Corporation Hankyul
Attorney-in-charge : Cho Kwang-hee

Holding

1. Article 53 of the Telecommunications Business Act (wholly amended by Act No. 4394 on August 10, 1991) and Article 16 of the Enforcement Decree of Telecommunications Business Act (wholly amended by Presidential Decree No. 13558 on December 31, 1991) are unconstitutional.

2. The complaint filed against parts of Article 71(vii) of the Telecommunications Business Act (Amended by Act No. 5220 on December 30, 1996) concerning Article 53(3) of the same Act is dismissed.

Reasoning

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

A. Overview of the Case

The complainant is a student at Hankook Aviation University, and has signed up to Nownuri, a comprehensive computer network service provided by Nowcom, Inc., under the user ID of "I-ui-je-ki (request for correction - Trans.)".

On June 15, 1999, the complainant posted a message entitled "Exchange of Gunfire in the West Sea, Sloppy Kim Dae-Jung!" on the "urgent message board" of the internet community "Chanwoomul." On June 21, a system manager for Nownuri deleted this message from the board, and suspended the complainant's use of Nownuri service for one month according to an order of the Minister of Information and Communication.

On August 11, 1999, the complainant filed a constitutional complaint against Article 53 and parts of Article 71(vii) concerning Article 53(3) of the Telecommunications Business Act as well as Article 16 of the Enforcement Decree of Telecommunications Business Act, alleging that the provisions infringe on his freedom of expression as well as freedom of science and arts, is against due process, and violates the principle against excessive restriction.

B. Subject Matter of Review

The subject matter of review is the constitutionality of Article 53 ("Minister of Communication" in Article 53(3) was changed to "Minister of Information and Communication" in accordance with Act No. 5220 on December 30, 1996) of the Telecommunications Business Act (wholly amended by Act No. 4394 on August 10, 1991), Article 71(vii) (amended by Act No. 5220 on December 30, 1996) of the same Act concerning Article 53(3) of the same Act, and Article 16 of the Enforcement Decree of Telecommunications Business Act (wholly amended by Presidential Decree No. 13558 on December 31, 1991). The provisions are as follows:

Telecommunications Business Act (wholly amended by Act No. 4394 on August 10, 1991)

Article 53 (Regulation of Improper Communication)

(1) A person in use of telecommunications shall not make the communication with contents that harm the public peace and order or social morals and good customs.

(2) The objects, etc. of the communication, which are deemed harmful to the public peace and order or social morals and good customs under paragraph (1), shall be determined by Presidential Decree.

(3) The Minister of Information and Communication may order a telecommunications business operator to refuse, suspend, or restrict the communication under paragraph (2).

Article 71 (Penal Provisions)

A person falling under any of the following subparagraphs shall be punished by imprisonment for not more than two years or by a fine not exceeding twenty million won: (Amended by Act No. 5220, December 30, 1996)

(vii) A person who fails to implement orders under Article 53(3) or 55

Enforcement Decree of Telecommunications Business Act (wholly amended by Presidential Decree No. 13558 on December 31, 1991)

Article 16 (Improper Communication)

Telecommunications which are deemed to be harmful to the public peace and order or social morals and good customs under Article 53(2) of the Act shall be as follows:

(i) Telecommunications with contents that aim at a criminal act or that abet a criminal act;

(ii) Telecommunications with contents that aim at committing

anti-state activities; and

(iii) Telecommunications with contents that impede the good customs and other social orders.

2. Complainants' Arguments and Opinion of the Minister of Information and Communication

A. Complainants' Arguments

(1) The statutory provision of the Article 53(1) and (2) of the Telecommunications Business Act only provides an abstract and comprehensive criterion of communication that could "harm the public peace and order or social morals and good customs" to regulate certain expression, and this allows the arbitrary intervention of an administrative agency in regulating expression. Article 16(3) of the Enforcement Decree of Telecommunications Business Act concretizes the above provisions and also employs very abstract phrases such as "telecommunications with contents that aim at committing the anti-state activities" and "telecommunications with the contents that impede the good customs and other social orders."

A statutory provision restricting freedom of expression should be specific and clear, and would be "void for vagueness" when ambiguous terms are used. The scope of application for "public peace and order" or "social morals and good customs" is too wide and unclear, and use of such terms would abridge the freedom of expression. It enables law enforcement agencies to conveniently and arbitrarily apply the law. Thus, it not only encroaches on the freedom of expression but also is against the rule of law, the principle of separation of powers, and the principle of *nulla poena sine lege.*

(2) According to the above provisions, ordinary expression of opinion about changes in the national political system that does not call for force or violence as well as any criticism against the government, could be regulated. It would also prohibit expression of "indecent expression that may target adults" in addition to obscene expression banned by the Constitution and the Criminal Act, and thus, violates the essential aspect of the freedom of expression.

(3) Article 53(3) of the Telecommunications Business Act bestows on the Minister of Information and Communication the authority to order an internet service provider to "refuse, suspend, or restrict" communication containing improper materials, and the internet service provider who does not obey such order may be subject to criminal punishment under Article 71(vii) of the same Act. This provision practically gives the Minister of Information and Communication an

unrestricted power to block expression on the PC communication or Internet. The internet service provider, on the other hand, is not given an opportunity to raise an objection or submit his opinion about such order by the Minister of Information and Communication under the current law. Moreover, the law does not provide any legal procedure through which an individual whose freedom of expression is directly restricted can raise an objection or submit his opinion, and the law does not provide any means of relief for the wrongful restriction of the freedom of citizens. This is against due process of law, as stipulated by Article 12(1) of the Constitution.

(4) Even if it is necessary to regulate "improper communication", Article 53(3) of the Telecommunications Business Act is in violation of the principle against excessive restriction as stipulated by Article 37(2) of the Constitution because it allows suspension or prohibition of the use of internet communication service by the user in addition to removal of the message containing problematic expression.

B. Opinion of the Minister of Information and Communication

(1) The instant provisions themselves dose not restrict basic rights of people without an administrative action, and therefore, the instant constitutional complaint against the provisions are unjusticiable because it does not satisfy the directness requirement.

(2) The instant provisions employ "public peace and order" or "social morals and good customs" which are value judgements. However they delegate detailed rule-making to the enforcement decree to specify the contents of these concepts. The meanings of "public peace and order" and "social morals and good customs" used to define improper communication are not unclear when compared to "public morals and social ethics," "national security," and "the maintenance of law and order" used in Article 21(4) and 37(2) of the Constitution. Currently, numerous acts employ these concepts in their provisions, and they are not so unclear as to threaten legal stability by impeding predictability.

(3) The instant provisions do not allow preliminary inspection or censorship by the government, and it does not contain any means to directly regulate individuals who provided the particular information in cyberspace. Therefore, it does not infringe on the freedom of expression.

(4) The Telecommunications Business Act is enacted to regulate business practices of telecommunication service providers. Therefore, an individual user is not a directly interested party of an administrative disposition based on the Act, and procedural rights for an

individual user need not be guaranteed. If procedural rights of users and businesses to object to an administrative disposition ordering refusal, suspension, or restriction of communications were to be guaranteed before it takes effect, such disposition would not function effectively as the means to regulate circulation of improper information because of the accessibility and speed of the online media.

(5) The provisions pass the proportionality test requiring the legitimacy of the end, appropriateness of the means, use of the least restrictive means, and balance of interests.

C. Opinion of the Director of the National Intelligence Service

Opinions of the Director of the National Intelligence Service are mostly in agreement with the opinions of the Minister of Information and Communication.

D. Opinion of the Juvenile Protection Committee

Article 53 of the Telecommunications Business Act is especially important for the maintenance of sound social morals and good customs in our society, protection of teenagers, and the management of a wholesome and safe cyberspace in the current internet age. If the instant provision is declared unconstitutional, the Information and Communication Ethics Committee would not be able to perform even legitimate reviews for improper communication.

E. Opinion of the Commissioner General of the National Police Agency

Premeditated and habitual activities to negate the free democratic regime, or to praise and propagate the North Korean regime, abusing the characteristics of the Internet or PC communication, are illegal under the present legal order, and it is necessary to regulate such activities to protect the currently adopted political system. Therefore, it is inevitable to impose a sanction on the activities of individuals responsible for improper communication in the cyberspace.

3. Review of Legal Prerequisites

A. According to Article 68(1) of the Constitutional Court Act, a person whose constitutionally protected basic right has been violated by an exercise or non-exercise of governmental power can file a

constitutional complaint. Here, a person whose basic right has been violated refers to an individual whose basic right has been directly and presently infringed upon by an exercise or non-exercise of governmental power, and it does not include a third party who only has indirect, practical, or economic interest in the matter (4 KCCR 579, 580, 92Hun-Ma175, September 4, 1992; 10-2 KCCR 461, 470-471, 97Hun-Ma372, August 27, 1998).

The Court will examine *sua sponte* whether the self-relatedness prerequisite has been satisfied for the complaint filed against parts of Article 71(vii) of the Telecommunications Business Act concerning Article 53(3) of the same Act.

Article 71(vii) stipulates that "a person who fails to implement orders under Article 53(3)" should be punished by imprisonment for not more than two years or by a fine not exceeding twenty million won. The provision makes it clear that the subject of punishment is not a user of telecommunication service, but a telecommunication business operator.

Therefore, this part of the complaint lacks self-relatedness, and is unjusticiable.

B. Let us examine the argument of the Minister of Information and Communication that the instant constitutional complaint is unjusticiable because the instant statutory provisions do not directly infringe upon basic rights.

(1) In Case of Article 53(1), (2) of the Telecommunications Business Act and Article 16 of the Enforcement Decree of Telecommunications Business Act

Above provisions are inseparable from each other. Collectively, they define the contents of improper communication and prohibit such communication. They order users of telecommunications not to exchange communication that may be harmful to the public peace and order or social morals and good customs.

As such, users of telecommunications are prohibited from exchanging communication with improper contents not by an administrative disposition but by these provisions directly. Then, the directness of infringement of the basic rights is satisfied.

(2) In Case of Article 53(3) of the Telecommunications Business Act

In order for a statutory provision to be a subject for a constitutional complaint, the statutory provision should directly infringe upon the basic rights of citizens by the statute itself, not by particular disposition of an administrative agency. Existence of a specific administrative action enforcing the provision does not always prohibit filing of a constitutional complaint against a statutory provision. Even if

there was an administrative disposition to enforce the statutory provision, an individual can file a constitutional complaint under the following conditions as long as the administrative action is based on the statutory provision: when there is no remedy process to relieve citizens from an infringement of their rights or interests by illegal dispositions of administrative agencies; or even if there exists a remedy process, when the prospect of relief of individual rights through such process is dismal and when it only forces the individual to take an unnecessary detour (4 KCCR 194, 203, 90Hun-Ma82, April 14, 1992; 9-2 KCCR 295, 303-304, 96Hun-Ma48, August 21, 1997)

Article 53(3) of the Telecommunications Business Act stipulates that the Minister of Information and Communication could order refusal, suspension, or restriction of communication with improper materials. Infringement of basic rights by this provision, then, would require existence of an administrative disposition in the form of an order by the Minister of Information and Communication.

A person whose freedom of expression is infringed upon by this provision is an individual user of a telecommunication service such as the complainant. There is a possibility that such user would not be allowed to seek relief for the infringement of his rights through an administrative litigation because he is a third party, not the party, as far as the administrative disposition of the Minister of Information and Communication is concerned. Therefore, the complainant could file a constitutional complaint against this provision since the case qualifies as an exception to the general rule.

(3) In conclusion, the argument of the Minister of Information and Communication that the instant statutory provisions do not directly infringe upon basic rights is without merit.

4. Review on Merits

A. Regulation of Improper Communication under the Telecommunications Business Act

(1) Concept of Improper Communication and Its Regulation

According to Article 53(1) of the Telecommunications Business Act, "improper communication" refers to communication with contents harmful to the public peace and order or the social morals and good customs.

Article 53(2) of the same act delegates the detailed rule-making required to determine communication harmful to the public peace and

order or the social morals and good customs to a presidential decree. Based on the delegation of legislation by this provision, Article 16 of the Enforcement Decree of Telecommunications Business Act define the following three types of communication as improper: Telecommunications with contents that aim at a criminal act or that abet a criminal act; Telecommunications with contents that aim at committing the anti-state activities; and telecommunications with contents that impede the good customs and other social orders.

Moreover, Article 53(3) of the Telecommunications Business Act stipulates that the Minister of Information and Communication can order a telecommunications business operator to refuse, suspend, or restrict the communication that could harm the public peace and order or social morals and good customs, and Article 71(vii) of the Act stipulates punishment of a person who fails to implement orders under Article 53(3) by imprisonment for not more than two years or by a fine not exceeding twenty million won in order to secure the effectiveness of the regulation.

(2) Reason for and Structure of Regulation of Improper Communication

Interference with the contents of traditional means of communication such as telegrams and telephone conversation had not been permitted, in principle, to protect the secrecy of communication. With the advance of technology, telegrams and telephones not only function as a means of private communication but also as a means to spread information to the mass, and it has become necessary to control the influence of such means of communication.

The order of the Minister of Information and Communication to refuse, suspend, or restrict the improper communication functions as an important means to regulate not only information transmitted through such traditional means of communication as wired or mobile telephones but also information circulated through such online media as PC network or Internet.

This regulation system of improper communication has the following structure and characteristics.

First, an administrative agency, the Minister of Information and Communication, directly regulates the contents of expressions.

Second, the legal structure of regulation forms a triangular relation linking the Minister of Information and Communication, telecommunication service providers, and telecommunication service consumers. While only telecommunication service providers are subject to the administrative disposition of the Minister and penal clause, telecommu-

nication service consumers are the ones whose freedom of expression are abridged by such regulation in fact. The subject of order and punishment is distinguished from the entity whose freedom of expression is restricted, and ultimately, threats of criminal punishment are used to secure the effectiveness of the regulation for the freedom of expression. Since a telecommunication service consumer is only a third party and not the party directly receiving the administrative order, it will be difficult for him to participate in an administrative procedure or institute an administrative litigation to seek relief for infringement of his basic rights.

Third, the regulation takes the form of *ex post facto* restriction of freedom of expression. However, considering the power relation between the users and the telecommunication service providers and that between the telecommunication service providers and the Minister of Information and Communication, it is highly likely that the service providers would regulate the contents of communication of service consumers through the user's agreement form even if the Minister has not given any specific order to refuse communication of particular messages. The user, in turn, would have to look out for himself when using such service. In other words, this could lead to substantially continuous self-censorship.

B. Restriction of Freedom of Expression

(1) Freedom of Expression and rule of clarity

Elements of regulation by the law must be clearly defined in order to inform individuals being subject to the law what actions would be regulated under the law so that they can determine the course of their action accordingly, and this would prevent discriminatory or arbitrary interpretation of law by providing an objective guideline to the law enforcement agency (4 KCCR 255, 268-269, 90Hun-Ba27, etc., April 28, 1992). The rule of clarity is an expression of the democracy and the rule of law, and it is required of all legislation restricting basic rights of citizens. The rule of clarity is an inherent part of the principle of *nulla poena sine lege,* the principle of statutory taxation, and the principle of the rule against blanket delegation.

The rule of clarity takes on an especially important meaning in legislation restricting the freedom of expression. In a democratic society, freedom of expression is an essential tool to realize the people's sovereignty. Ordinarily, the freedom of expression functions to encourage exchange of diverse opinions, interpretations, and ideas among individuals and during the course, to verify validity of such expressions. However, restriction of freedom of expression by an unclear

statutory provision would bring about the chilling effect on constitutionally protected expression, and cause malfunctioning of this freedom. When it is unclear what kind of expression is being prohibited by such legislation, it is very likely that a person would abstain from expressing himself lest he should be punished for making such expression because he is not certain that what he is about to express is not subject to regulation. Therefore, it is constitutionally required that statutes regulating freedom of expression should be specific and clear about what expression would be subject to regulation (10-1 KCCR 327, 342, 95Hun-Ka16, April 30, 1998).

(2) Freedom of Expression and Principle Against Excessive Restriction

The principle against excessive restriction as stipulated by Article 37(2) of the Constitution functions as a limit for all legislation restricting citizens' basic rights. Therefore, legislation restricting freedom of expression should be in accordance with the principle. In the case of freedom of expression, the principle against excessive restriction is closely linked with the rule of clarity seen above. Restriction of freedom of expression through an unclear statutory provision would result in regulation of even those expression that should be constitutionally protected, and this would violate the principle against excessive restriction.

C. Constitutionality of Article 53(1) of the Telecommunications Business Act

(1) Violation of rule of clarity

(A) Article 53(1) of the Telecommunications Business Act stipulate that "a person in use of telecommunications shall not make the communication with contents harming the public peace and order or social morals and good customs."

As seen above, in order to restrict the freedom of expression, the requirement of the rule of clarity becomes more demanding. Even more specific and clear stipulation of expression that would be subject to regulation is especially required for legislation regulating the contents of expressions like the instant provision.

(B) The concept of improper communication defined as that with contents "harming the public peace and order or social morals and good customs" is too unclear and ambiguous.

Article 37(2) of the Constitution stipulates that the freedoms and

rights of citizens may be restricted by Act only when necessary for national security, the maintenance of law and order or for public welfare, and Article 21(4) of the Constitution stipulates that speech or the press shall not undermine public morals and social ethics. Article 53(1) of the Telecommunications Business Act defines improper communication as "communication harming the public peace and order or social morals and good customs" and prohibits such communication. "The public peace and order" is almost identical to "national security" and "the maintenance of law and order" used in Article 37(2) of the Constitution, and "social morals and good customs" is indistinguishable from "public morals or social ethics" stipulated in Article 21(4) of the Constitution, respectively. Such terms do not concretize the concepts used in the Constitution. The meaning of Article 53(3) of the Act is so unclear and abstract that it can be said that the article does not define the concept of "improper communication" but rather, is a duplicate of the Constitution stipulating the minimal condition of restriction of basic rights and the limits of freedom of speech and press.

Since "the public peace and order" and "the social morals and good customs" are such abstract concepts, different individuals may make different judgments about whether a particular expression is harmful to "the public peace and order" or "the social morals and good customs" because of differences in individuals' value systems or moral values. Furthermore, it would be difficult to objectively define their meaning through an ordinary interpretation of law by enforcement agencies.

While Article 53(2) of the same Act delegates the detailed rule-making about the specifics of improper communication to a presidential decree, it is unpredictable from the statute itself how the presidential decree would define the subject of regulation. In other words, it does not inform citizens what types of communication would be prohibited. People may have vague ideas about what "public peace and order" and "social morals and good customs" may mean, but such ideas would be very subjective and would lead to different meanings for different individuals.

Of course, the necessity to employ indefinite concepts in legislation cannot be denied altogether, and use of such concepts as "public peace and order" and "social morals and good customs" are not always prohibited. Sometimes, use of such terms would be allowed in light of the legislative purpose, nature of legal relations subject to regulation, and contents of related statutory provisions. However, it violates the rule of clarity required for regulation of constitutionally protected freedom of expression to comprehensively regulate contents of expression using such vague notion as "harming public peace and order or social morals and good customs" without further details. This would be so even if Article 53(2) of the Act delegates detailed rule-making

about the subject of the regulation to a presidential decree.

The Minister of Information and Communication argues that the statutory provisions do not violate the rule of clarity because they employ concepts similar to those used in the Constitution. However, it cannot be allowed to employ concepts used in the Constitution or abstract notions similar to those used in the Constitution to legislate individual statutes restricting people's liberties and rights.

(C) It would not be easy to legislate statutes that would be clear not to bring about "a chilling effect" on the freedom of expression and at the same time effectively regulate what are clearly improper communication. While there may be diverse and divergent subjects of regulation, the state should not give up its pursuit to uphold the rule of clarity through individualization or categorization. If this is not possible, the state must choose underregulating rather than excessively restricting of expression. There would be more to lose than to gain to restrict expression who is not proven to be detrimental to the public good. This is the basic nature of the freedom of expression.

(D) In conclusion, Article 53(1) of the Telecommunications Business Act violates the rule of clarity because it does not specify what kind of expression would be subject to regulation.

(2) Violation of Principle Against Excessive Restriction

(A) Necessity of such regulatory measures as deletion of messages cannot be denied considering the rapid speed of online information dissemination. However, while restriction of circulation of expression to protect juveniles could be allowed, generally, regulation or suppression of online expression based on its contents should not be allowed unless it contains materials clearly illegal or obviously detrimental to the public good (i.e. child pornography, divulgence of national secrets, or copyrights violation). Comprehensive regulation of contents of expression based on vague doubt about harmfulness or possibile harmfulness is not in accordance with the freedom of expression.

Article 53 of the Telecommunications Business Act regulates communication that could "harm the public peace and order or social morals and good customs." Ambiguity, abstractness, and comprehensiveness of the concept of improper communication inevitably results in regulation of communication that should not be regulated, and leads to violation of the rule against excessive restriction.

(B) Article 53 of the Act could be used to regulate "indecent" expression which this Court has explicitly held to be protected under the Constitution (10-1 KCCR 327, 95Hun-Ka16, April 30, 1998), citing that these expressions are against "social morals and good customs".

This Court has ruled that comprehensive prohibition of indecent expression would violate the freedom of expression because "indecent" expression, unlike "obscene" expression, has some social value. This Court defined "indecent" expression as a sexual expression not reaching the level of obscenity, expressions of not too much violence, rather detailed description of a murder scene, humor based on sexual matters, or satire on distorted social morals and good customs or ethics that may contain some vulgarity (10-1 KCCR 352-353, 95Hun-Ka16, April 30, 1998). A lot of such indecent expressions may cumulatively be against "the public peace and order" or "social morals and good customs."

(C) Media materials harmful to juveniles refer to those materials whose circulation and management are regulated for the purpose of juvenile protection. They include not only such illegal expressions as obscene materials that are also prohibited for adults but also those expressions which contain contents that may be unsuitable for teenagers but not for adults.

Comprehensiveness of the concepts of "the public peace and order" or "social morals and good customs" may lead to regulation of those expressions for which it would be enough to prohibit access by juveniles, classifying them as improper communication. While it may be necessary to block teenagers from accessing provocative materials which may stimulate sexual desire of juveniles (refer to Article 10(1)(i) of the Juvenile Protection Act), prohibition of such expression or access by adults is not required as long as the materials are not obscene. However, under the instant provisions, these expressions may be subject to regulation because they may be classified as improper communication since they contain contents harmful to the "social morals and good customs".

(D) The instant statutory provision also blocks routes to present and solve the social problems in a sound manner through free debates and exchange of comments expressing diverse opinions. It could be employed to regulate expressions regarding sexuality, marriage, or the family system (i.e. expressions regarding living together before marriage, contractual marriage, or homosexuality) for harming "social morals and good customs," and it could be used to regulate expressions regarding sensitive political or social issues (i.e. expressions about opposition to conscription, conscientious objection to war, reunification issues), by labelling them as harmful to "the public peace and order." This would inevitably have a chilling effect on the users of telecommunication services, and open discussions would be impossible for some social issues. This would violate the essential features of the freedom of expression.

Unlike a totalitarian society, a democratic society does not believe that a state can do no harm. Diversity and moral relativism form the

fundamental principles of a democratic society. It would distort the free market of ideas and the press if a state could freely wield its power to decide what expression to allow and what to ban based on such relative and variable concepts as "public peace and order" or "social morals and good customs." Furthermore, the state could abuse such power to achieve certain political or ideological goals, and any criticism toward the head of the state would be regulated for being harmful to "public peace and order." In a previous ruling, this Court has said that the government should not be the primary organ to judge whether certain expression or information is valuable or harmful and that such judgment should be left to the self-correction mechanism inherent in a civil society, that is, competition of ideas and opinions (10-1 KCCR 327, 339-340, 95Hun-Ka16, April 30, 1998)

(E) Means of regulating improper communication has not changed much since its adoption through Article 6 of former Telecommunications Act in 1961. This is not desirable in order to adapt to the changing environment where the Internet and other online media have become more important.

One of the primary media being subject of regulation for improper communication is the Internet. Unlike the broadcast media, it is "the most participatory media", or "media encouraging expression of individuals." Scarcity of radio wave frequencies, pervasiveness of broadcasts, and lack of control by recipients of information characterize the broadcasting media. Because of such characteristics, public responsibility and the public interest aspect have been emphasized for use of such media, and forceful regulatory measures that may not be applied to other types media were justified. However, the Internet does not have equivalent characteristics: The barrier to entry is low; Mutual exchange of expression is possible; And active and premeditated action by participants is necessary. The Internet has become the largest and most powerful media, and regulation of expression on the Internet with emphasis on maintenance of order would be detrimental to the promotion of freedom of expression. Technological advance about the media continue to widen the scope of freedom of expression and bring about changes in the quality of such expression. In this light, new regulatory measures within Constitutional limits should be developed to keep up with the continuously changing environment in this field.

(F) In conclusion, Article 53(1) of the Telecommunications Act restricts freedom of expression too excessively and comprehensively, and therefore, violates the principle against excessive restriction.

D. Constitutionality of Article 53(2) of the Telecommunications Business Act

(1) Article 53(2) of the Telecommunications Business Act stipulating that "the objects, etc. of the communication, which are deemed harmful to the public peace and order or social morals and good customs under paragraph (1), shall be determined by the Presidential Decree" violates the rule against blanket delegation.

(2) The rule against blanket delegation is the rule of clarity applied in cases of delegation of legislation to the administrative branch. The phrase that "matters delegated to him [the President - Trans.] in a concrete, limited scope by statute," as stipulated by Article 75 of the Constitution, means that the parental statute should specify the basic contents and scope of the matters to be determined by the presidential decrees in sufficient details so that anyone could predict their content in outline (3 KCCR 336, 341, 91Hun-Ka4, July 8, 1991). The requirement for specificity and the clarity of delegation varies with the type and the nature of the subject matter. It becomes more exacting in the areas which directly abridges or is likely to infringe upon basic rights than in the areas dealing public benefits. The specificity requirement should be especially demanding in the instant case where freedom of expression is restricted based on the contents of expression and individuals would be made subject to criminal punishment for violation of regulatory measures.

However, concepts of "public peace and order" or "social morals and good customs" are very abstract and unclear, and the provision employing such terms does not provide citizens with even vague ideas about the criteria or basic contents of regulation by presidential decrees.

(3) The instant statutory provision also does not provide appropriate guidelines to the administrative agency, and thereby fails to control administrative regulation properly. This would be possible when the statute clearly defines the scope of delegation. But "public peace and order" or "social morals and good customs" cannot limit the scope of administrative regulation. Thus, the administrative agency could even regulate those expressions that should be protected under the Constitution according to its own judgment or preference about what the concepts of "the public peace and order" or "the social morals and good customs" should represent.

This is evident in Article 16(ii) and Article 16(iii) of the Enforcement Decree of Telecommunications Business Act which has defined "communication that are deemed to be harmful to the public peace and the order or the social morals and good customs" as "telecommunications with contents that aim at committing the anti-state activi-

ties" or "telecommunications with contents that impede the good customs and other social orders." These terms to regulate communication are as unclear and broad as those used in Article 53(1) of the Telecommunications Business Act.

(4) Article 53(2) of the Telecommunications Business Act delegates the detailed legislation specifying contents of improper communication to the presidential decree, stipulating that "the objects... of the communication which are deemed harmful to the public peace and order or the social morals and good customs." This is against Article 37(2) of the Constitution requiring specification of the details of regulation by "Act" to decide when it is "necessary for national security, the maintenance of law and order or for public welfare" or what communication would be against "public morals or social ethics in Article 21(4) of the Constitution". The provision has wrongfully delegated what should have been legislated by the National Assembly to the executive branch. In case of administrative actions restricting liberties and rights of citizens, it is not enough that essential features of such restriction are based on statutes legislated by the parliament: essential features of such restriction need to be decided by the legislature itself (11-1 KCCR 633, 644, 98Hun-Ba70, May 27, 1999).

(5) In conclusion, Article 53(2) of the Telecommunications Business Act violates the rule against blanket delegation because it does not delegate the detailed rule-making in a specific and clear manner and it is not possible to predict the contents and scope of improper communication to be regulated through a presidential decree.

E. Constitutionality of Article 53(3) of the Telecommunications Business Act

We need not look further to conclude that Article 53(3) of the Telecommunications Business Act is unconstitutional since legitimacy of Article 53(1) and Article 53(2) of the Act, which are unconstitutional, is a precondition for its constitutionality. Article 53(3), which deals with refusal, suspension, or restriction of improper communication, may be against due process since it does not provide telecommunication service consumers, who are being made subject to the regulation under the Act, with the opportunity to express opinions. We would like to point out that it may be against the rule against excessive restriction if we were to interpret that refusal, suspension, or restriction of communication includes suspension of use of a particular user ID or closure of the web site since it would make it impossible for that user to circulate other legitimate information through the service.

F. Constitutionality of Article 16 of the Enforcement Decree of Telecommunications Business Act

Since Article 53(2) of the Telecommunications Business Act is unconstitutional as seen above, Article 16 of the Enforcement Decree of Telecommunications Business Act based on legitimacy of Article 53(2) is also unconstitutional.

5. Conclusion

In conclusion, Article 53 of the Telecommunications Business Act and Article 16 of the Enforcement Decree of Telecommunications Business Act infringe on the freedom of expression of the complainant, and hence, are unconstitutional. The complaint filed against parts of Article 71(vii) of the Telecommunications Business Act concerning Article 53(3) of the same Act is dismissed. This decision is pursuant to the consensus of all justices except Justices Ha Kyung-chull, Kim Young-il, and Song In-jun who wrote a dissenting opinion.

6. Dissenting Opinion of Justices Ha Kyung-chull, Kim Young-il, and Song In-joon

The majority of Justices concluded that Article 53(1) and 53(2) of the Telecommunications Business Act are contrary to the rule against blanket delegation and the rule against excessive restriction, and that Article 53(3) of the Act and Article 16 of the Enforcement Decree which are based on legitimacy of Article 53(2) are unconstitutional.

We, however, disagree with the majority of Justices in their conclusion that Article 53(1) and 53(2) are against the Constitution. Accordingly, we have a different opinion regarding constitutionality of Article 53(3) of the Act and Article 16 of the Enforcement Decree. We are writing this dissenting opinion to clarify our disagreement.

A. About Article 53(1) and 53(2) of the Telecommunications Business Act

(1) These statutes are legislation restricting freedom of expression since they define improper communication which would be subject to regulation. They do not prescribe contents of improper communication definitely and completely in themselves, but delegate detailed rule-making about the scope of improper communication to a presidential decree.

All legislation abridging basic rights of citizens need to observe the rule of clarity, one of the principal features of the principle of the rule of law. As the majority of Justices observed, in case of delegation of legislation, the rule against blanket delegation is one of the main issues and the requirement of the rule of clarity is satisfied by deciding whether the statute is in accordance with the rule against blanket delegation.

(2) The majority opinion wrote that the requirement of the rule of clarity becomes more exacting for legislation regulating the freedom of expression because of the role and function that freedom of expression plays in a democratic society and the chilling effect on expression that an unclear statute engenders. In addition, the requirement for the specificity and clarity of delegation becomes more demanding in this area.

In order to decide whether the above provisions are against the rule against blanket delegation, the following elements should be considered.

First, disadvantage suffered by the telecommunication service users by the instant statutory provisions is refusal, suspension, or restriction of use of service by the telecommunication businesses; more specifically, deletion of the particular expression, suspension of user ID, or closure of the web site. This should be distinguished from restriction of freedom of expression by threats of criminal punishment, because requirements of the rule of clarity have been more exacting as it is more likely that the chilling effect on expression would be greater if criminal punishment were to be employed as the means of regulation.

As such, if relatively light means of regulation is employed to restrict expression violating certain laws and if the degree of seriousness of such means of regulation is by no means equivalent to criminal punishment, specially exacting standard of review concerning the rule of clarity or the rule against blanket delegation need not be employed just because the issue on review concerns the freedom of expression.

Second, a statute delegating detailed rule-making to presidential decrees or other lower forms of legislation need not be perfectly clear in itself. In other words, these statutes demand a degree of clarity that may not be as strict as that required by other statutes that do not delegate legislation to lower rules.

In the instant case, the provision directly applied to telecommunications service users are not the provisions of the Act but provisions of presidential decree. An expression would not be regulated for being harmful to "the public peace and order" or "the social morals and good customs": it can only be regulated for violating the specific provision in the enforcement decree. Therefore, the concepts of "public peace and

order" or "social morals and good customs" only need to give specific guidelines for legislation of the enforcement decree. In the meanwhile, the provisions in the enforcement decree need to be more specific, and they need to meet more exacting demands of the rule of clarity because violation of these provisions would directly lead to administrative regulation.

(3) The majority of Justices conclude that "the public peace and order" or "the social morals and good customs" are very abstract and subjective concepts. They rule that these concepts do not provide appropriate guidelines for administrative regulation, and thus, the statutory provision employing these terms does not function as effective limits for administrative agency responsible for delegated legislation. Furthermore, the majority of Justices conclude that ambiguity and comprehensiveness of these concepts would inevitably lead to regulation of those communication that should not be regulated, and lead to violation of the rule against excessive restriction. They write that the instant statutory provision could be used to regulate "indecent" expression which this Court has explicitly held to be protected under the Constitution, or those provocative "media materials harmful to juveniles" whose expression or access by adults should not be prohibited altogether. Let us examine the validity of such arguments.

The interpretive rule of preference for constitutionality requires the Court to interpret the statutes, which may seem unconstitutional at first glance, in a way that maintains their normative validity if the text and the legislative intent of the statute provide any room for the decision of constitutionality. In other words, this principle requires the Court to abstain from issuing the decision of unconstitutionality needlessly. The rule is based on the principle of the separation of powers and deference to the legislative power.

According to the interpretive rule of preference for constitutionality which espouse the principle of maximum protection and least restriction of basic rights, "public peace and order" or "social morals and good customs" used as standard for delegation of legislation in the instant statutory provisions could be construed as the "minimum level of public order or social morals and good customs that all citizens should abide by and comply with."

The legislative intent of legislators when adopting the provision stipulating "A person in use of telecommunications shall not make the communication with contents of harming the public peace and order or the social morals and good customs" was not to regulate all expressions that have even the faintest hint of harming the public peace and order or the social morals and good customs in the broad sense. The provision reflects the opinion of legislators that they cannot help but regulate communication that could threaten the minimum level of public

order or social morals and good customs that our society requires while taking the importance of the freedom of expression into consideration.

While the concepts of the public peace and order or the social morals and good customs are indeed abstract, they are intermediary concepts adopted because it is impossible to regulate all kinds of specific and diverse forms of expression using a single criterion, and as such, they are not concepts that may not be accepted at all cost.

If the public peace and order or the social morals and good customs are construed thus, it cannot be argued that above terms do not function as effective guidelines for administrative regulation or that they inevitably result in excessive regulation of those expressions that should not be regulated in the first place.

In other words, the above concepts only refer to those which "all citizens should abide by and comply with." Provocative media materials harmful to juveniles, or materials that juveniles should be prevented from accessing while adults should be allowed to access, would not be regulated under the label of improper communication. Furthermore, since they refer to "the minimum level of public order or social morals and good customs", "indecent" expression which this Court has explicitly held to be protected under the Constitution would not be regulated for being improper communication.

It is difficult to specify what is "the minimum level of public order or social morals and good customs that all citizens should abide by and comply with" because this varies with changes in society. It would be very difficult to decide whether expression supporting or urging opposition to conscription, conscientious objection to war, or homosexuality is against such standard, and these are but some of the numerous boundary problems.

Legislators opted to delegate detailed rule-making to the administration for these reasons. The provisions of decrees, an output of administrative regulation, could be subject to review by either the Constitutional Court or ordinary courts. If the agencies were to legislate a provision to regulate expressions that are not proscribed as improper communication or employ unclear terms in legislating a provision, such provision would be either unconstitutional or would not be applied at all.

"The minimum level of public order or social morals and good customs that all citizens should abide by and comply with" can only be concretized and made clear through specific administrative regulation and judgment of the Constitutional Court or ordinary courts regarding the validity of such legislation.

The concepts of "public peace and order" or "social morals and good customs" reviewed in light of the interpretive rule of preference for constitutionality render a relatively clear meaning as a standard for

delegation of legislation. They do provide specific guidelines to the agencies about the contents, purpose, and scope of delegation. Therefore, the provision does not engender the danger of excessive restriction.

(4) While concluding that above provisions violate the rule against blanket delegation, the majority of Justices also write that the state should not give up its pursuit to uphold the rule of clarity through individualization or categorization even if there may be diverse and divergent subjects of regulation.

While we conclude that the instant statutory provisions are constitutional, it does not mean that we believe that the instant statutory provisions are optimal choices for the legislative policy purpose. Constitutionality of a statutory provision will be decided on whether it could effectively suggest legitimate limits. It does not require the optimization of policy judgments.

It is not impossible to find a way to improve the clarity of expression for the better protection of the freedom of expression even if the instant statutory provisions are delegating legislation.

For example, the provision in the Enforcement Decree about improper communication could be included in the parental Act. Or the provision of the Act could enumerate examples of improper communication and then delegate detailed legislation about specific contents of improper communication. Such method may be more desirable.

However, the requirements of clarity of delegated legislation would not be totally satisfied even if the above method of legislation had been adopted. It would be still unclear to decide what expression should be banned when the agencies faced problems on the boundary.

In other words, the rule of clarity that matters in delegation of legislation is the degree of clarity. Existence of room for improvement does not automatically make a statute unconstitutional.

While the above statutory provisions may not be the best possible legislation in terms of the rule of clarity, it is constitutional as long as it is not impermissible under the rule against blanket delegation because of vagueness of the concepts employed by these statutory provisons. In other words, the statutory provisions are constitutional as long as any citizen can predict the basic features about standard and scope of improper communication that would be regulated by the provisions of presidential decree based on delegation by the Act.

B. About Article 16 of the Enforcement Decree of the Telecommunications Business Act

(1) The instant provision specifies and finalizes the contents of

improper communication according to delegation by Article 53(2) of the Act. The central issue in deciding the constitutionality of the provision is whether the provision violates the rule of clarity, thereby infringing on the freedom of expression

(2) It is obvious that "telecommunications with contents that aim at a criminal act or that abet a criminal act", as stipulated by Article 16(i) of the Act, refers to communication either to commit or incite crimes punishable under criminal codes, and therefore, this is not against the rule of clarity.

(3) However, "telecommunications with contents that aim at committing the anti-state activities" and "telecommunications with contents that impede the good customs and other social orders", as stipulated by Article 16(ii) and Article 16(iii), employ concepts that are too abstract and unclear to prevent the arbitrary judgment of law enforcement agencies. These provisions could be abused to infringe on the freedom of expression, and hence, they violate the rule of clarity.

In case of "telecommunications with contents that aim at committing the anti-state activities" stipulated in Article 16(ii), "anti-state activities" are very abstract and unclear. Under provisions with such vague notions, it would be up to the discretion of law enforcement agencies whether a certain activity should be regulated as an anti-state activity in a specific case, and it would be highly probable that opinions criticizing the government would be regulated as anti-state activities. Thus, it is not difficult to predict that an infringement on the freedom of expression by this provision will occur. Therefore, the criterion proffered by Article 16(ii) is not complete in itself as a provision regulating the freedom of expression.

In case of "telecommunications with contents that impede the good customs and other social orders" stipulated in Article 16(iii), the concepts of "good customs and other social orders" is not any better than the concepts of "the public peace and order or the social morals and good customs" used in the enabling statute in terms of clarity. Such abstract criterion would not prevent the arbitrary judgment of law enforcement agencies. While the use of criterion given by Article 16(iii) would be allowed for the enabling statute, it is too abstract and unclear to be a final provision regulating the freedom of expression.

Even when compared to Article 16(i), The criteria suggested by Article 16(ii) and 16(iii) clearly lack specificity.

Article 13 and 15 of the Regulation of Information Communication Ethics Committee Review as well as Article 17 of the Detailed Rules on Information Communication Ethics Committee Review provide more specific criteria related to Article 16(ii) and Article 16(iii) of the Enforcement Decree of Telecommunications Business Act. We would

like to point out that while the criteria suggested by the provisions of the Enforcement Decree need not be as detailed as those of the Regulation or the Detailed Rules, they can infringe on the freedom of expression because they are too broad when compared with the provisions of the Regulation and the Detailed rules.

In addition, Article 10 of the Juvenile Protection Act and Article 7 of the Enforcement Decree of Juvenile Protection Act providing for the criteria for deliberation of media materials harmful to juveniles provide more specific criteria from the enabling clause than criteria offered by Article 16(ii) and Article 16(iii) of the Enforcement Decree of Telecommunications Business Act. This again leads to the conclusion that Article 16(ii) and Article 16(iii) of the Enforcement Decree do not satisfy the requirements of the rule of clarity.

(4) Therefore, while Article 16(i) of the Enforcement Decree of Telecommunications Business Act does not violate the rule of clarity, Article 16(ii) and Article 16(iii) of the Enforcement Decree are against the rule of clarity, theryby infringing on the freedom of expression.

C. Article 53(3) of the Telecommunications Business Act

(1) The instant statutory provision enables the Minister of Information and Communication to order a telecommunications business operator to refuse, suspend, or restrict improper communication, thereby restricting the freedom of expression of the complainant.

Freedom of expression, like all other rights and liberties, could be restricted by the Act when necessary for national security, the maintenance of law and order, or for public welfare. In such case, the principle against excessive restriction, the guiding principle of legislation restricting individual rights and liberties stipulated by Article 37(2) of the Constitution must be satisfied. Also, when the Minister issues an order for refusal, suspension, or restriction of improper communication, whether the requirements of due process of law such as guaranteeing of an opportunity to submit opinions regarding such order for the telecommunications service user is observed carries some significance. Next let us examine these issues.

(2) Rule Against Excessive Restriction

(A) First, the legitimacy of legislative purpose to prevent ill effects of online media and encourage sound development of telecommunications service through regulation of improper communication is accepted. The means of regulation chosen to achieve such purpose, namely, the issuance of an order by the Minister of Information and Communication for refusal, suspension, or restriction of improper communication is one of the effective and appropriate methods.

(B) Moreover, we believe that the issuance of an order by the Minister of Information and Communication for refusal, suspension, or restriction of improper communication satisfies the requirements of the necessity of the means or the doctrine of the least restrictive means and the balance of interest for the following reasons.

First, under the current system of regulation, no legal duty is directly imposed on individual telecommunication service users. In case of telecommunication service providers, they are first ordered to refuse, suspend, or restrict improper communication, and they will be subject to criminal punishment (Article 71(vii) of the Telecommunications Business Act) only when they do not follow such order. In light of such facts, it would be hard to conclude that such regulation is excessive in terms of the necessity of the means or the doctrine of the least restrictive means.

Second, according to the instant statutory provision, the Minister of Information and Communication can not only order deletion of a particular message identified as improper communication but also close down the host of online bulletin boards or suspend use of the particular user ID of the individual who posted the improper writing. It is clear that an independent order for deletion of a particular expression would not be effective as the means to deal with improper communication when communication in cyberspace posts a problem.

The individual could repeatedly post an identical or similar message with improper contents after the original message has been deleted. This occurs frequently in real life. In such case, there is not an effective means to stop such individual if closure of the web site or suspension of the user ID is not allowed. Therefore, permission of use of the above methods of regulation is unavoidable, and thus, not excessive.

Third, closure of the web site operated by a particular internet service provider (ISP) or suspension of use of a specific user ID are only confined to a particular service managed by the ISP. The user would not be prevented from using online services offered by other service providers. Therefore, the private interest being neglected is not greater than the public interest protected by the above methods of regulation.

(C) In conclusion, the instant statutory provision granting the Minister of Information and Communication the authority to order a telecommunications business operator to refuse, suspend, or restrict improper communication satisfy the requirements of legitimacy of the end, the appropriateness of the means, the necessity of the means or the doctrine of the least restrictive means and the balance of conflicting interests. Therefore, the statutory provision does not infringe

on freedom of expression in violation of the principle against excessive restriction.

(3) Due Process of Law

(A) Article 21(1) of the Administrative Procedures Act stipulates that the administrative agency should notify the parties of the contents of the disposition, the legal basis, and other necessary information when it renders an administrative disposition imposing duties on or restricting the rights or interests of the parties. Article 22(3) of the same Act stipulates that the parties should be given an opportunity to submit opinions regarding the administrative disposition when an administrative agency issues such administrative disposition unless there was a formal hearing or a public hearing.

According to Article 2(iv) of the Administrative Procedure Act, the term "parties" is defined as the direct counter parties of the disposition of administrative agencies, or interested parties who are requested to participate in the administrative procedure by administrative agencies *ex officio* or upon personal request.

A user of telecommunication services can be viewed as interested parties to the order to refuse, suspend, or restrict improper communication based on Article 53(3) of the Telecommunications Business Act under Article 2(iv) of the Administrative Procedures Act based on the decision of administrative agency *ex officio* or upon personal request. He is thus granted the opportunity to be notified of the administrative disposition in advance and to submit opinions about the disposition.

According to Article 22(1) and 22(2) of the Administrative Procedures Act, an administrative agency could host a formal or public hearing even when other Acts and their subordinate statutes do not provide provisions concerning a formal or public hearing, if the administrative agency decides that it is necessary. In such case, the telecommunication services consumer could participate in a hearing as an interested party, submit arguments, present documentary evidence, and address questions to the relevant witness and expert witness (Article 31(2) of the same Act); request administrative agencies for the inspection or duplication of the documents regarding the investigation results of the cases, and other documents related to the dispositions concerned, (Article 37 of the same Act); and be notified of the hearing when the administrative agency has decided to hold a public hearing (Article 38 of the same Act)

(B) Article 21(4) of the Administrative Procedures Act stipulates that the administrative agency may choose not to notify the parties of its administrative disposition in advance when "an urgent disposition is necessary for the safety and welfare of the general public" or when other exceptional conditions are met. Furthermore, Article 22(4)

stipulates that the administrative agency need not conduct hearing of opinions when conditions listed in Article 21(4) are met, or when parties have clearly indicated the intent to renounce the opportunity to submit their opinions.

In other words, the Administrative Procedures Act provides exceptional conditions such as "when an urgent disposition is necessary for the safety and welfare of the general public," under which the agency may omit advance notification of an administrative disposition or hearing of opinions (submission of opinions · formal hearing · public hearing).

In the information communication review process, most parties are not given the opportunity to submit opinions because of the rapidity of information proliferation: It wold be impossible to attain effectiveness of regulation if every telecommunications service consumer were given a chance to submit his opinion.

(C) As seen above, even if Article 53(3) of the Telecommunications Business Act does not provide a telecommunication service user with an opportunity to submit his opinion when an administrative agency issues a disposition, the user, as an interested party, would be notified in advance when an administrative agency is about to render a disposition, would be given an opportunity to submit opinions regarding such disposition, and participate at a formal or public hearing under the Administrative Procedures Act.

While most parties in the information communication review process are not given the opportunity to submit opinions regarding an administrative disposition, this is not because of lack of a statutory provision providing the right to submit opinion but to secure effectiveness of regulation when proliferation occurs so rapidly. This is also based on the Administrative Procedure Act.

Since the telecommunication services user would be given procedural safeguards through the Administrative Procedures Act, the statutory provision cannot be said to violate due process of law because it does not explicitly grant the right to submit opinions against an administrative disposition.

(4) Therefore, the statutory provision is not in violation of the principle of proportionality nor due process of law, and does not infringe on the freedom of expression.

D. In conclusion, we agree with the majority of Justices in their conclusion to dismiss parts of the provisions on review. But unlike the majority, we think that Article 53 of the Telecommunications Business Act and Article 16(i) of the Enforcement Decree of Telecommunications Business Act are constitutional, and thus the complain against these provisions should be rejected. Furthermore, we believe

that Article 16(ii) and 16(iii) of the Enforcement Decree of Telecommunications Business Act are unconstitutional and infringe on freedom of expression because they are against the rule of clarity.

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

Aftermath of the Case

After the decision, the National Assembly amended the Telecommunications Business Act through Act No. 6822 on December 26, 2002, and changed the term improper communication to illegal communication. The amended provisions specify what types of communication would be prohibited under the Act, and give an individual subject to the regulatory disposition an opportunity to submit his opinion. The academic society whole-heartedly welcomed this decision, and the Korean Society for Media Law, Ethics and Policy Research designated the decision as the "Decision of the Year Regarding Media Law."

4. *Cumulative Taxation of Income from Assets of Spouses* Case

(14-2 KCCR 170, 2001Hun-Ba82, August 29, 2002)

Contents of the Decision

1. Contents of Article 36(1) of the Constitution.
2. Whether Article 61(1) of the Income Tax Act stipulating cumulative taxation of asset income of spouses is against Article 36(1) of the Constitution.
3. Decision of unconstitutionality rendered on ancillary provisions related to the provision on review.

Summary of the Decision

1. Article 36(1) of the Constitution stipulates that "Marriage and family life shall be entered into and sustained on the basis of individual dignity and equality of the sexes, and the State shall do everything in its power to achieve that goal." Article 36(1) guarantees the freedom to marry and lead family life on one's own initiative as one of the basic rights of citizens, and protects the institution of marriage and family. Article 36(1) contains a constitutional principle or a fundamental rule that affects all areas of public and private laws regarding marriage and family: On the one hand, the provision affirmatively imposes on the State the duty to support marriage and family through appropriate means as well as protecting marriage and family from intrusion by a third party; On the other hand, it levies on the State a duty not to discriminate against the institutions of marriage and family through restrictive regulations causing disadvantages. A ban on discriminatory measures against marriage and family, derived from the constitutional principle, is a more specific form of the principle of equality protected by Article 11(1) of the Constitution, and it aims to provide better protection of marriage and family life from unjustified discrimination. A statutory provision discriminating against a married person would not violate Article 36(1) of the Constitution only when there is an important and reasonable basis justifying such differential treatment.

2. Dispersion of titles to assets between spouses or other disguised acts could be prevented through application of the constructive donation provisions of the Inheritance Tax and Gift Tax Act.

It would not be justified to levy larger taxes on a married person assuming he can bear more tax because it is more likely that he can save more than a bachelor. It is unjustified to pursue income re-distribution by levying more tax on a married couple among all persons with asset income just because they are married. The private interest being neglected through cumulative taxation of asset income of married individuals, namely, increase in taxes, is greater than the public interest of the society achieved through such practice. Therefore, Article 61(1) of the Income Tax Act discriminating against a married couple subject to cumulative taxation for asset income from other unmarried couples or bachelors is not constitutionally justified, and hence, is against Article 36(1) of the Constitution.

3. If Article 61(1) of the Income Tax Act providing the foundation for the cumulative taxation for asset income by calculating the tax amount through adding asset income of a resident or spouse to the global income of the principal income earner is unconstitutional, independent existence of ancillary provisions to Article 61(1), Article 61(2), (3), and (4), will be meaningless since they form an inseparable entity along with Article 61(1). Although these provisions are not provisions on review, the Court hereby declares them unconstitutional.

Provisions on Review

Income Tax Act (Wholly Amended by Act No. 4803 on December 22, 1994)

Article 61 (Cumulative Taxation of Income from Assets)

(1) When a resident or the spouse of the resident earns interest income, dividend income, or real estate rental income (hereinafter referred to as "asset income"), one of them will be designated as the principal income earner by Presidential Decree (hereinafter referred to as "principal income earner"), and the principal income earner shall be considered to have earned asset income of the spouse (hereinafter referred to as "spouse subject to cumulative taxation of asset income") which would then be included in the global income of the principal income earner for tax calculation.

(2) - (4) [omitted]

Related Provisions

The Constitution

Articles 11(1), 36(1)

Income Tax Act (Before Being Amended by Act No. 6557, on December 31, 2001)

Article 55 (Tax Rates)

(1) The income tax on the global income of a resident shall be the amount calculated by applying the following tax rates to the tax base of global income in the current year (hereinafter referred to as the "calculated global income tax amount"):

(Tax Base of Global Income)	(Tax Rates)
Less than 10 million won	10/100 of the tax base
More than 10 million but less than 40 million won	1,000,000 won + 20/100 of the amount exceeding 10 million won
More than 40 million but less than 80 million won	7,000,000 won + 30/100 of the amount exceeding 40 million won
Over 80 million won	19,000,000 won + 40/100 of the amount exceeding 80 million won

(2) The income tax on any retirement income of a resident shall be the amount calculated by multiplying the number of years of work by the amount calculated by applying the tax rate as referred to in paragraph (1) to the amount obtained when dividing the tax base of retirement income in the current year by the number of years of work (hereinafter referred to as the "calculated retirement income tax amount").

(3) The income tax on any forest income of a resident shall be the amount calculated by applying *mutatis mutandis* the provisions of paragraph (1) to the tax base of forest income in the current year (hereinafter referred to as the "calculated forest income tax amount").

Enforcement Decree of the Income Tax Act (Amended by Presidential Decree No. 16682 on December 31, 1999)

Article 120 (Scope of principal income Earner)

The principal income earner by the Presidential Decree in Article 61(1) of the Act refer to an individual falling under any of the following subparagraphs:

(i) Among a resident and a spouse, a person with more global income except asset income;

(ii) If both spouses have no income except asset income or if amounts of global income except asset income are identical, the person with more asset income;

(iii) If amounts of asset income and global income except asset income are identical, the person designated as the principal

income earner on the final return on tax base of global income. If a principal income earner is not designated on the final return on tax base of global income or if the final return on tax base of global income is not submitted, the person designated by the director of the competent district tax office.

Related Precedents

3. 1 KCCR 329, 89Hun-Ka102, November 20, 1989
8-2 KCCR 808, 94Hun-Ba1, December 26, 1996
13-2 KCCR 77, 2000Hun-Ma91 · 112 · 134 (consolidated), July 19, 2001

Parties

Complainant

Choi O-hee
Counsel : Kang In-ae

Original Case

Seoul Administrative Court 2001Gu18496 Revocation of Refusal Disposition About Request to Rectify the Tax Base and Tax Amount

Holding

Article 61 of the Income Tax Act (Wholly Amended by Act No. 4803 on December 22, 1994) is unconstitutional.

Reasoning

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

A. Overview of the Case

(1) The complainant is a doctor from the AAA University Hospital. The global income of the complainant in 1999 consisted of employment income of 48,996,506 won and real estate rental income of 11,748,546 won. Her spouse, Kim O-kwon, is an entrepreneur running BBB Textile Factory, CCC Dying Factory, and DDD Bowling Alley whose global income in 1999 consisted of employment income of 2,400,000 won, real estate rental income of 214,137,845 won, and business income of △3,562,398,226 won.

(2) On May 30, 2000, the complainant filed a final return on tax base of global income for 1999 pursuant to Article 61(1) of the Income Tax Act (hereinafter referred to as the "Act") and Article 120 of the Enforcement Decree of the Income Tax Act (hereinafter referred to as the "Enforcement Decree of the Act") designating herself as the principal income earner. She calculated the numbers on the form based on the sum of her employment income of 48,996,506 won, real estate rental income of 11,748,546 won, and her husband's real estate rental income of 214,137,845 won. Based on these figures, her global income was calculated to be 274,882,897 won, tax base for global income 269,611,499 won, calculated tax amount 94,844,599 won and tax to be paid 94,406,597 won. After filing the return, she voluntarily paid the entire tax amount.

(3) On August 7, 2000, the complainant requested the Director of the Jongno District Tax Office to modify the tax base pursuant to Article 101(3) of the Enforcement Decree of the Act and Article 45(1) of the Act, arguing that the tax administration overlooked a part of Article 101(3) of the Enforcement Decree of the Act which stipulates that, in case when the real estate income of the spouse subject to cumulative taxation for asset income is added to the global income of the principal income earner, the principal income earner and the spouse subject to cumulative taxation for asset income should be deemed as "a single resident" for taxation on real estate rental income. She further argued that Article 45(1) and 45(2) of the Act, provisions concerning deductability of deficiencies should be applied in her case. Thus, she contended that the business income loss of her spouse, 3,562,398,226 won (hereinafter referred to as the "loss in the instant case") should be deducted from the real estate rental income of the complainant and her spouse, 225,886,391 won (214,137,845 won + 11,748,546 won). And she requested the tax office to modify the tax base for her global income to 55,973,654 won and the calculated tax amount to 11,792,096 won. On September 24, 2000, the Director of the Jongno District Tax Office refused to grant the complainant's request for modification based on Article 45-2 and 45-4 of the Act.

(4) The complainant instituted an administrative litigation seeking revocation of the refusal disposition on her request to rectify the tax base and tax amount at the Seoul Administrative Court (2001Gu18496). While the case was pending, the complainant requested constitutional review of Article 61(1) stipulating cumulative taxation for income from assets, alleging that it violated Article 11 and Article 36(1) of the Constitution (2001Ah960). The administrative court rejected this petition on October 11, 2001. After receiving the court ruling on October 26, 2001, the complainant filed the instant constitutional complaint on October 29, 2001.

B. Subject Matter of Review

The subject matter of review is the constitutionality of Article 61(1) (hereinafter referred to as the "instant statutory provision") of the Income Tax Act (Wholly Amended by Act No. 4803 on December 22, 1994). The provision and related provisions are as follows:

Income Tax Act (Wholly Amended by Act No. 4803 on December 22, 1994)

Article 61 (Cumulative Taxation of Income from Assets)

(1) When a resident or the spouse of the earn have interest income, dividend income, or real estate rental income (hereinafter referred to as "asset income"), one of them will be designated as the principal income earner by Presidential Decree (hereinafter referred to as "principal income earner"), and the principal income earner shall be considered to have earned asset income of the spouse (hereinafter referred to as "spouse subject to cumulative taxation of asset income") which would then be included in the global income of the principal income earner for tax calculation.

(2) Designation of the principal income earner will be made in accordance to the conditions at the end of the taxable period.

(3) If asset income of the spouse is added to the global income of the principal income earner to calculate the tax amount under paragraph (1), the income tax for the spouse subject to cumulative taxation for asset income shall be calculated for income except asset income.

(4) In calculating the tax amount for the global income of the principal income earner designated under paragraph (1), the sum of the global income of the principal income earner and asset income of the spouse subject to cumulative taxation of asset income shall be considered to be the global income of the principal income earner. The tax amount shall be obtained by deducting the prepaid tax amount (excluding the additional tax amount) for the global income of the principal income earner and asset income of the spouse subject to cumulative taxation for asset income from the amount calculated in accordance with the Presidential Decree.

Income Tax Act (Before Being Amended by Act No. 6557, on December 31, 2001)

Article 55 (Tax Rates)

(1) The income tax on the global income of a resident shall be the amount calculated by applying the following tax rates to the tax base of global income in the current year (hereinafter referred to as the "calculated global income tax amount"):

(Tax Base of Global Income)	(Tax Rates)
Less than 10 million won	10/100 of the tax base
More than 10 million but less than 40 million won	1,000,000 won + 20/100 of the amount exceeding 10 million won
More than 40 million but less than 80 million won	7,000,000 won + 30/100 of the amount exceeding 40 million won
Over 80 million won	19,000,000 won + 40/100 of the amount exceeding 80 million won

(2) The income tax on any retirement income of a resident shall be the amount calculated by multiplying the number of years of work by the amount calculated by applying the tax rate as referred to in paragraph (1) to the amount obtained by dividing the tax base of retirement income in the current year by the number of years of work (hereinafter referred to as the "calculated retirement income tax amount").

(3) The income tax on any forest income of a resident shall be the amount calculated by applying mutatis mutandis the provisions of paragraph (1) to the tax base of forest income in the current year (hereinafter referred to as the "calculated forest income tax amount").

Enforcement Decree of the Income Tax Act (Amended by Presidential Decree No. 16682 on December 31, 1999)

Article 120 (Scope of Principal Income Earner)

The principal income earner by the Presidential Decree in Article 61(1) of the Act refer to an individual falling under any of the following subparagraphs:

(i) Among a resident and a spouse, a person with more global income except asset income;

(ii) If both spouses have no income except asset income or if amounts of global income except asset income are identical, the person with more asset income;

(iii) If amounts of asset income and global income except asset income are identical, the person designated as the principal income earner on the final return on tax base of global income. If a principal income earner is not designated on the final return on tax base of global income or if the final return on tax base of global income is not submitted, the person designated by the director of the competent district tax office.

2. Complainants' Arguments and Opinion of the Minister of Justice

A. Complainants' Arguments

The current income tax system has adopted a progressive tax rate system. Under the current tax system, the tax burden on individuals will increase when the government, instead of levying taxes on each individual, chooses to employ a simple cumulative taxation scheme under which asset income for both spouses is considered to be asset income of the principal income earner and is included in the global income of the principal income earner to calculate the tax amount. Under the cumulative taxation system, a married couple will suffer significant disadvantage in terms of taxation compared to bachelors. This is discrimination of married individuals from unmarried persons without reasonable basis.

Therefore, the instant statutory provision is against Article 11 of the Constitution stipulating the principle of equality, Article 36(1) stipulating protection of marriage and family life, Article 23 stipulating protection of property rights, and Article 10 stipulating the right to pursue happiness.

B. Summary of Reasons for Rejecting the Request for Constitutional Review by Seoul Administrative Court

(1) The instant statutory provision has been adopted for the following reasons : (A) That, for taxation on the asset income of a married couple, to consider the couple's tax bearing capacity as that of single consuming entity would better reflect the reality than to calculate the tax amount of each spouse separately; (B) That it prevents tax evasion to consider a married couple as a single entity since it is more likely that family members would try to lessen the tax burden by distributing titles of asset income; (C) That fair taxation corresponding to tax bearing capacities of individuals could be achieved by applying progressive tax rate on the sum of asset income for a married couple; (D) That it contributes to strengthen the income redistribution effect as the income tax could be used to rectify income inequality directly caused by inequality of capital or property ownership.

(2) It is clear that a married couple subject to cumulative taxation of asset income are placed in a more disadvantageous position than an unmarried individual under the present income tax scheme adopting progressive tax rates. However, considering the realities of everyday life of citizens and the reasons for adopting such a tax scheme, it

cannot be said that such differential treatment is without a reasonable basis since it aims to achieve fair taxation in accordance with the tax-bearing capacity of individuals. Therefore, the instant statutory provision is not out of the limit of legislative discretion, and hence, is in harmony with Article 11 of the Constitution.

(3) Article 36(1) of the Constitution stipulating the duty of the State to protect marriage and family life should be read to mean that the State should protect the institution of marriage based on individual dignity and equality of the sexes: It does not mean that the State should uniformly treat all individuals in terms of taxation, ignoring different tax-bearing capacity and different living conditions of citizens. Therefore, the instant statutory provision is not in violation of Article 36(1) of the Constitution

C. Opinion of the Minister of Finance and Economy and the Commissioner of the National Tax Service

Mostly in agreement with the opinion of the Administrative Court.

3. Review

A. Legislative History of the Instant Statutory Provision and Summary of Contents of Cumulative Taxation for Income from Assets

(1) Under cumulative taxation for income from assets system, the State levies tax on the sum of asset income of a prescribed scope of family members and the global income of the principal income earner. It was adopted in the Income Tax Act and went into effect on January 1, 1975 through the former Income Tax Act (wholly amended by Act No. 2705 on December 24, 1974) to levy heavy tax amount on individuals in high-income groups.

(2) In general, the head of the household oversees and controls income from assets such as interest income, dividend income, and real estate rental income. Because it is fairly easy to distribute titles to assets, a title trust could be used for tax evasion purpose. The cumulative taxation for income from assets is adopted to prevent tax evasion, thereby achieving fair taxation in accordance with the tax-bearing capacity of each individual.

(3) Asset income subject to cumulative taxation for income from assets include interest income, dividend income, and real estate rental income (Article 61(1) of the Act).

(4) According to Article 61(1) of the Act, individuals subject to cumulative asset income taxation are a principal income earner and the spouse (hereinafter referred to as the "spouse subject to cumulative taxation for asset income"). Here, a "principal income earner" refers to the person with more global income except asset income among a resident and his or her spouse, the person with more asset income if both spouses have no income except asset income or the person designated as principal income earner on the final return on tax base of global income if amounts of asset income and global income except asset income are identical (Article 120 of the Enforcement Decree of the Act).

(5) In calculating the tax amount for the global income of the principal income earner, the sum of the global income of the principal income earner and asset income of the spouse subject to cumulative taxation for asset income shall be considered to be the global income of the principal income earner. The determined gross tax amount on the global income of the principal income earner shall be calculated through application of various tax calculation procedures based on the global income of the principal income earner thus obtained. The tax amount shall be obtained by deducting the prepaid tax amount (excluding the additional tax amount) for the global income of the principal income earner and the asset income of the spouse subject to cumulative taxation for asset income from the determined gross tax amount on the global income.(Article 61(4) of the Act)

(6) The income tax amount for the spouse subject to cumulative taxation for asset income shall be calculated for global income except asset income (Article 61(3) of the Act).

B. Examples of Foreign Legislation

(1) Germany

The Federal Income Tax Act enacted in 1920 adopted the system of cumulative taxation on a family, by which income of a juvenile child was added to income of the parents. The Act was revised in 1921, and income of the wife earned from independent labor or from employment in the business unrelated to her husband was subject to independent taxation apart from income by the husband. Another revision of the Income Tax Act in 1934, under the Nazi regime, discarded such practice, and cumulative taxation on a family was revived to discourage wives from entering the labor market. As the war intensified, demand for female labor was on the rise, and once again, employment income from business unrelated to her husband was made exempt from cumulative taxation in December 1941. Thus, parts

of the provisions of the Income Tax Act in 1921 came back to life.

The Income Tax Act legislated in 1951 after the Second World War continued the tradition of cumulative taxation for a married couple, and income of both spouses were added and made subject to cumulative taxation (Article 26 of the Income Tax Act of Germany). However, employment income from business unrelated to her husband was made exempt from cumulative taxation (Article 43 of the Enforcement Decree of the Income Tax Act of Germany). Under such a taxation scheme, income tax for a married couple was calculated on the sum of income of both spouses even if both spouses had separate income sources. The income tax levied on a married couple was more than what would have been if they were unmarried individuals, and a new term of "disciplinary marital tax" was coined.

On January 17, 1957, the Federal Constitutional Court of Germany ruled that the statutory provision resulting in an increase in the tax amount after marriage by cumulative taxation of income of the couple was against Article 6(1) of the Basic Law of Germany because Article 6(1) of the Basic Law did not only stipulate protection of marriage and family life, but it mandated the State not to do harm to the institution of marriage and family. Following the ruling of the Court, the German government revised the Income Tax Act, and made it possible for a married couple to choose between a new cumulative taxation system and taxation on individual income of spouses. Under the newly introduced cumulative taxation system, income of both spouses are added together, and the sum is then divided by two. Unlike the previous cumulative taxation, progressive tax rate is applied only to half of the sum of income, and double of the tax amount calculated would become the tax amount for the married couple. In essence, the married couple are treated as two separate individuals with common income and common consumption under the present tax law of Germany.

(2) Japan

The Income Tax Act legislated in the 20th year of Meiji (1887) adopted the cumulative taxation scheme for the entire family by taxing the sum of income of the head of the household and other family members. The institution of family under the Civil Act and taxation on total income of the household under the Income Tax Act seemed to be in harmony. Then, there was a revision of the Civil Act in the 22nd year of Showa (1947), and the former household system was discarded. Taxation of the total income of the household under the Income Tax Act lost its legal basis. In the 25th year of Showa (1950), the Income Tax Act was revised, and previous taxation on

income of household was repealed. Instead, the individual income earner taxation system was adopted. Under the system, each individual liable to pay income tax filed an independent tax return and paid tax accordingly. In the 26th year of Showa (1951), cumulative taxation for asset income was discarded after taxation on interest income was repealed in an effort to simplify the tax administration procedure.

In the 32nd year of Showa (1957), "Ad Hoc Research Committee on Tax System" argued for adoption of the cumulative taxation scheme for asset income on household because of the following reasons: that it prevents tax evasion by distributing titles of asset to family members to consider a married couple as a single entity; and that fair taxation corresponding to tax bearing capacities could be achieved by applying progressive tax rates on the sum of asset income for a married couple. Based on such argument, the cumulative taxation scheme for asset income on household basis has been revived as an exception to the individual income earner taxation system in the 32nd year of Showa (1957).

In 1988, the cumulative taxation for asset income was discarded once again because it is too complicated to calculate the tax amount under the system, and now, tax is being levied purely on an individual basis.

C. Constitutionality of the Instant Statutory Provision

(1) Legal Effect and Legal Issues of the Instant Statutory Provision

The instant statutory provision stipulates that the tax amount should be calculated for the sum of asset income of the spouse subject to cumulative taxation for asset income and the global income of the principal income earner if a resident or spouse of the resident has asset income.

A progressive tax rate employed for the global income of an individual tax payer is applied for asset income of the spouse subject to cumulative taxation for asset income when it is added to the global income of the principal income earner pursuant to the instant statutory provision. According to Article 55 of the former Income Tax Act (before being revised by Act No. 6557 on December 31, 2001), the tax rate for the tax base of global income less than 10 million won was 10%; tax rate for the tax base of global income more than 10 million won but less than 40 million won was 20%; the tax rate for the tax base of global income more than 40 million won but less than 80 million won was 30%; and the tax rate for the tax

base of global income more than 80 million won was 40%.

If the asset income of the spouse subject to cumulative taxation for asset income is added to the annual global income of the principal income earner, the sum of such income would be subject to a higher tax rate in general under the progressive tax system. As a result, the total tax amount would increase, and a married couple with income subject to cumulative taxation would pay more tax than bachelors or an unmarried couple who would not be subject to cumulative taxation.

Therefore, the central legal issue of the instant case is whether it is against the Constitution to levy more tax on a married couple based on the instant statutory provision.

(2) Whether the instant statutory provision is against Article 36(1) of the Constitution

Since the instant statutory provision limits the subject of cumulative taxation for asset income to married couples, we will examine whether it is against Article 36(1) of the Constitution stipulating protection of marriage and family life.

(A) Contents of Article 36(1) of the Constitution

1) Article 36(1) of the Constitution stipulates that "Marriage and family life shall be entered into and sustained on the basis of individual dignity and equality of the sexes, and the State shall do everything in its power to achieve that goal." Article 36(1) guarantees freedom to marry and lead family life on one's own initiative as one of the basic rights of citizens, and protects the institution of marriage and family. Article 36(1) contains fundamental rule that affects all areas of public and private laws a constitutional principle or a regarding marriage and family: On the one hand, the provision affirmatively imposes on the State the duty to support marriage and family through appropriate means as well as protecting marriage and family from intrusion by a third party; On the other hand, it levies on the State a duty not to discriminate against the institution of marriage and family through restrictive regulations causing disadvantages. A ban on discriminatory measures against marriage and family, derived from the constitutional principle, is a more specific form of the principle of equality protected by Article 11(1) of the Constitution, and it aims to provide better protection of marriage and family life from unjustified discrimination. A statutory provision discriminating against a married person would not violate Article 36(1) of the Constitution only when there is an important and reasonable basis justifying such differential treatment.

2) Tax statutes do not directly order or ban a certain action in disfavor of marriage except for the fact that they are applied to levy tax on married individuals. Protection of basic rights about marriage and family life and protection of the institution of marriage and family by Article 36(1) of the Constitution do not have any legal effect on tax statutes. However, the order for the ban on discrimination provided by Article 36(1) prohibit discrimination against marriage and family through such economic disadvantages as an increase in the tax burden through tax legislation. Therefore, if tax statutes were to bring certain legal effects using marriage as a precondition for their application, a married individual should not suffer any economic disadvantage.

(B) Differential Treatment of Married Couple by the Instant Statutory Provision

The instant statutory provision, stipulating that the tax amount for the couple would be calculated for the sum of asset income of a resident or the spouse and global income of the principal income earner designated by the Presidential Decree, discriminates against married couples when compared to unmarried couples or bachelors by levying more tax on a married couple based on the fact that they are married.

(C) Whether Differential Treatment of Married Couple by the Instant Statutory Provision is Constitutionally Justified

Let us examine whether discrimination against married couples when compared an to unmarried couple or bachelors by the instant statutory provision is constitutionally justified.

1) While the cumulative taxation of asset income aims to prevent tax evasion by fictitious income dispersion, tax evasion by title trust of assets between spouses or other disguised acts could be prevented through application of the provisions of the Inheritance Tax Act and Gift Tax Act concerning legal fiction of donation (Article 44).

Income from peculiar property consisting of inherent property belonging to either husband or wife from the time before the marriage or property acquired by either spouse during the marriage through inheritance or other means is not income acquired as a result of fictitious income diversion to lessen or evade the burden of tax. Therefore cumulative taxation for asset income that would levy tax on asset income from peculiar property of either spouse by adding it to the global income of the other spouse (the principal income earner) is unjustified.

A technical reason to promote administrative efficiency such as "the prevention of tax evasion through income dispersion among spouses," a legislative goal of cumulative taxation for asset income,

is inadequate as a legal argument for the constitutionality of the statutory provision in relation to Article 36(1) of the Constitution since the value of Article 36(1) of the Constitution is superior to administrative efficiency and legislators cannot enact a certain statue to promote the latter without reflecting the former.

Therefore, adoption of the cumulative taxation for asset income of a married couple in order to prevent tax evasion by fictitious income dispersion is inappropriate and unreasonable.

2) Since the consumption pattern of each individual varies, it would not be justified to levy different tax amounts on individuals by linking the likelihood of more savings for a married couple living together with the capacity to bear taxes. Moreover, the likelihood of savings for a married couple is not a factor to be considered to assess the tax-bearing capacities of individuals.

3) A progressive tax rate is applied to the income tax system to rectify income inequality directly caused by inequality in capital and property ownership, and this contributes to the achievement of income redistribution. Strengthening of income redistribution by application of a progressive tax on all individuals with asset income in order to relieve inequality between those with asset income and those without regardless of their marital status is legitimate. However, it is unjustified to force income redistribution by levying more tax on a married couple with asset income just because they are married.

4) Unlike the Civil Act that contain provisions regulating marital relations, it is improper for a pure tax statute to link taxation with marriage status of an individual. An increase in the income tax amount caused by cumulative taxation of asset income is not appropriate since it is based on the marital status of an individual.

5) Cumulative taxation for asset income brings about disadvantage of increase of tax burden on a married couple whose marital life is protected under Article 36(1) of the Constitution. This disadvantage does not only concern those in the high-income group but also widely affects those in middle-income groups with asset income. The scope of disadvantage suffered by a married couple with asset income is rather large. The public interest of the society achieved through cumulative taxation for asset income, namely, prevention of tax evasion through fictitious income dispersion, realization of fair taxation in accordance with individual tax-bearing capacity, and achievement of an income redistribution effect is not as large as expected. When comparing these two competing interests, the private interest being neglected through cumulative taxation for asset income of married couples, is greater than the public interest of the society achieved through such a practice, and cumulative taxation for asset income fails

the balance of interest test.

(D) As seen above, the statutory provision discriminating against a married couple with asset income subject to cumulative taxation in taxation for income lacks a reasonable basis, and therefore, is constitutionally unjustified. The instant statutory provision stipulating cumulative taxation for asset income of a married couple is against Article 36(1) of the Constitution prohibiting discrimination against a married person. Therefore, we need not further examine whether the instant statutory provision violates any other provisions of the Constitution.

(3) Sub-conclusion

The instant statutory provision, Article 61(1) of the Income Tax Act, is against the Constitution.

D. Declaration of Unconstitutionality of Ancillary Provisions

(1) Generally, when certain parts of an article of a statute is declared unconstitutional after constitutional review, the remaining provisions of the same act remain in force. However, the Court can declare the remaining provisions unconstitutional along with the unconstitutional part under such exceptional conditions as follows: if the remaining provisions do not have any legal significance by themselves; if the unconstitutional part is so closely related to the remaining provisions as to form an inseparable entity on the whole so that the entire provision would lose significance and legitimacy when only the unconstitutional part is declared unconstitutional(1 KCCR 329, 342, 89Hun-Ka102, November 20, 1989; 8-2 KCCR 808, 829, 94Hun-Ba1, December 26, 1996; 13-2 KCCR, 77, 100, 2000Hun-Ma91 · 112 · 134 (consolidated), July 19, 2001).

(2) Article 61(1) of the Income Tax Act provides the foundation for the cumulative taxation of asset income by calculating the tax amount through adding asset income of a resident or spouse to the global income of the principal income earner.

Article 61(2) of the Act stipulates that designation of the principal income earner would be made in accordance with the conditions at the end of the taxable period. Article 61(3) of the Act stipulates that if asset income of the spouse is added to the global income of the principal income earner, the income tax for the spouse subject to cumulative taxation for asset income should be calculated for income except asset income. Article 61(4) of the Act stipulates that

in calculating the tax amount for the global income of the principal income earner, the sum of the global income of the principal income earner and asset income of the spouse subject to cumulative taxation for asset income should be considered to be the global income of the principal income earner and the tax amount should be obtained by deducting the prepaid tax amount for the global income of the principal income earner and asset income of the spouse subject to cumulative taxation for asset income.

If Article 61(1) of the Act providing the foundation for the cumulative taxation for asset income is unconstitutional, the independent existence of the ancillary provisions to Article 61(1), namely, Article 61(2), (3), and (4), will be meaningless since they form an inseparable entity along with Article 61(1).

Then, it would be proper to declare them unconstitutional to achieve legal clarity although these provisions are not provisions on review. Thus, the Court hereby declares them unconstitutional.

4. Conclusion

All Justices unanimously decide that Article 61(1), (2), (3), and (4) of the Income Tax Act are unconstitutional.

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

5. Disgorgement of Short-Swing Profits Case

[14-2 KCCR 774, 99Hun-Ba105, etc., (consolidated), December 18, 2002]

Contents of the Decision

1. Whether Article 188(2) of the Securities and Exchange Act not requiring use of undisclosed insider information to the public as a condition for return of profits violates the rule of the least restrictive means in case of infringement on basic rights.
2. Whether Article 188(2) of the Securities and Exchange Act mandating return of profits as long as there is no such exceptional circumstance as listed in Article 188(8) violates the rule of the least restrictive means in case of infringement on basic rights.
3. Whether there is a balance of interests between property rights being restricted and the public interest being achieved by Article 188(2) of the Securities and Exchange Act.
4. Whether Article 188(8) of the Securities and Exchange Act violates the rule against blanket delegation.

Summary of the Decision

1. If Article 188(2) of the Securities and Exchange Act stipulating disgorgement of profits from short-term stock sales is literally interpreted, as long as i) an insider, ii) within six months after the initial transaction, iii) makes another transaction of stock certificates, etc. of his company iv) and makes profits, the person is liable to return the profits, regardless of whether he actually has made usee of undisclosed inside information. The statutory provision imposes strict responsibility on the insider, and he is not allowed to prove that he has made a transaction without using undisclosed inside information. If use of undisclosed insider information to the public is required as a positive condition for return of profits or non-use of undisclosed information is required as a negative condition for return of profits, it would be very difficult to actually prove that there was use or non-use of inside information. Such requirement would also prevent the speedy and effective exercise of the right to request return of the short-term sales margin, and would hamper achievement of the legislative purpose. This was based on an inevitable legislative decision to improve the trust of general investors in the stock market.

2. Article 188(2) of the Securities and Exchange Act provides

objective conditions to make an insider return profits from stock transactions. Article 188(8) of the Act and Article 86-6 of the Enforcement Decree of the Securities and Exchange Act based on Article 188(8) enumerate exceptions to requirements of return of profits exhaustively, and no other exception is recognized. Even though considering the legislative purpose of the statutory provision, the nature of Article 86-6 of the Enforcement Decree of the Securities and Exchange Act listing exception to disgorgement of short-swing profits, and the meaning of Article 23 of the Constitution protecting property rights, it can be said that stock transactions without any possibility of the use of inside information is not subject to regulation under the instant statutory provision to begin with. Therefore, Article 188(8) does not violate the rule of the least restrictive means in the case of infringement on basic rights.

3. Article 188(2) of the Securities and Exchange Act is enacted to protect the interest of general investors by forcing the return of short-swing profits as well as to improve trust by the general investors in the stock market by ensuring fairness and impartiality in the market. There is no comprehensive ban on insider trading: The provision only stipulates a return of profits if such transaction was made within a short period of six months. Moreover, even if the insider used inside information undisclosed to the public in the initial stock transaction, he is free to trade stocks without any restriction after six months and retain the profits from the transaction. Therefore, restriction on the property rights of the insiders such as the complainants by the instant statutory provision is not greater than the public interest being achieved by the provision.

4. Let us next examine whether Article 188(8) of the Securities and Exchange Act violates the rule against blanket delegation. Since there are many forms of transaction in the stock market, and the financial system and environment change rapidly, it is impossible to exhaustively list details of all exceptions to the general rule in the statute. Timely and flexible rule-making is necessary to make adequate changes for proper regulation. Moreover, considering the legislative purpose of Article 188(2) of the Securities and Exchange Act and the meaning of the phrase "taking into consideration of the nature etc." in Article 188(8) of the Act, people can infer from the statute that what is being delegated by Article 188(8) of the Act to the presidential decree contains such contents as "a transaction that would not seem unfair or a transaction that was made without using undisclosed information." Therefore, the statutory provision is not in violation of the rule against blanket delegation.

Provisions on Review

Securities and Exchange Act (Amended by Act No. 5254 on January 13, 1997, Before Being Amended by Act No. 5539 on May 25, 1998)

Article 188 (Disgorgement of Short-Swing Profits of Insider, etc.)

(1) [omitted]

(2) Where officers, employees or major stockholders of a listed corporation gain any profit by selling stock certificates, etc. of the corporation concerned within six months after purchasing them, or by purchasing such stock certificates within six months after selling them, the corporation concerned may request such officers, employees or major stockholders to relinquish the profits to the corporation. In this case, necessary matters relating to standards for calculation of such profits shall be determined by the Presidential Decree, and procedures for return as well as other necessary details shall be determined by the Committee.

Securities and Exchange Act (Amended by Act No. 4469 on December 31, 1991)

Article 188 (Disgorgement of Short-Swing Profits of Insider, etc.)

(1) - (7) [omitted]

(8) The provisions of paragraph (2) shall not apply in such case as prescribed by the Presidential Decree taking into consideration of affairs including the nature of selling or purchasing which was carried out in the capacity as an officer, employee or major stockholder, and in such case where a major stockholder does not hold such capacity at a time when he sells or purchases stocks.

(9) [omitted]

Related Provisions

Securities and Exchange Act

Article 188 (Disgorgement of Short-Swing Profits of Insider, etc.)

(1) Officers, employees or major stockholders (referring to those who hold stocks or contribution certificates of 10/100 or more of the total number of voting stocks issued or of the total amount of contributions for their own account regardless of the title thereof, and those who are prescribed by the Presidential Decree; hereinafter the same shall apply) of a listed corporation shall not sell certificates of stocks (including contribution certificates), convertible bonds, bonds

with warrants, warrants and securities as prescribed by the Ordinance of the Ministry of Finance and Economy (hereinafter referred to as "stock certificates, etc.") of the listed corporation concerned, unless they own the stock certificates, etc.

(2) - (5) [omitted]

(6) Any officer or major stockholder of a listed corporation shall report the situation of such stocks of the corporation concerned, held by him for his own account regardless of the title thereof to the Securities and Futures Commission, and the Stock Exchange under the conditions designated by the Ordinance of the Prime Minister within ten days after he becomes an officer or major stockholder; and if the number of stocks held has changed, he shall report such fact to the Securities and Futures Commission and the Stock Exchange or the Association under conditions as prescribed by the Ordinance of the Prime Minister by the 10th day of the month following the month in which the date on which such change occurs is included.

(7) - (9) [omitted]

Article 188-2 (Prohibition of Using Undisclosed Information)

(1) Any person who is informed of material information which is undisclosed to the public in relation with affairs, etc. of a listed corporation or Association-registered corporation (including corporations listed or registered with the Association within six months) in the course of performing his duties, among those who fall under any of the following subparagraphs (including those for whom one year has not passed after not falling under any of subparagraphs 1 through 5 of this paragraph), and those who are informed of such information from him, shall not use or have another person use the information in connection with sale and purchase or any other transaction of securities issued by the corporation concerned:

(i) The officers, employees, and agents of the corporation concerned;

(ii) Major stockholders of the corporation concerned;

(iii) A person who has the authority of license, authorization, direction, supervision, or other authorities with respect to the corporation concerned according to the Acts and Regulations;

(iv) A person who entered into a contract with the corporation concerned; and

(v) An agent, employee, and other staff personnel of a person who falls under any of subparagraphs 2 through 4 (in case where a person who falls under any of subparagraphs 2 through 4 is a corporation, the officers, employees and agents of such corporation).

(2) The term "material information which is undisclosed to the public" in paragraph (1) means information which may have important effect on investors' judgment on investment and is undisclosed to the public by the corporation concerned under conditions as prescribed by the Ordinance of the Prime Minister from among any information on fact, etc. falling under any subparagraph of Article 186 (1).

(3) The provisions of paragraphs (1) and (2) shall apply mutatis mutandis to the case of performing tender offers pursuant to Article 21. In this case, the term "the corporation concerned" in the main sentence of paragraph (1) shall be considered as the term "issuer of securities which are subject to tender offer"; the term "material information", as the term "information on carrying out or stopping tender offer"; and the term "the corporation concerned" in each subparagraph of paragraph (1), as the term "tender offerer".

Article 188-3 (Liability for Damages against Using Undisclosed Information)

(1) Any person who violates the provisions of Article 188-2, shall be liable for damages which a person who has made a purchase or sale of securities or other transaction suffers from that transaction.

(2) The claim for damages pursuant to paragraph (1) shall be extinguished by prescription, unless a claimant exercises such claim for damages for one year after the claimant is informed of the fact that an act in violation of the provisions of Article 188-2 is committed or for three years after the offense takes place.

Article 207-2 (Penal Provisions)

A person who falls under any of the following subparagraphs shall be punished by imprisonment for not more than ten years or by a fine not exceeding twenty million won: Provided, That if the amount equivalent to three times of the profit gained or loss evaded by the offense exceeds twenty million won, he shall be punished by a fine of the amount equivalent to or less than three times of such profit or loss amount evaded:

(i) A person who violates the provisions of Article 188-2(1) or (3);

(ii) [omitted]

Enforcement Decree of the Securities and Exchange Act

Article 83-6 (Exception to Disgorgement of Short-Swing Profits)

The term "such case as prescribed by the Presidential Decree" in Article 188(8) of the Act means any of the following cases:

(i) Where the transaction is made inevitably under Acts and Regulations;

(ii) Where an enterprise which is designated as an object of industrial rationalization under the Regulation of Tax Reduction and Exemption Act, makes the transaction in conformity with the criteria for industrial rationalization;

(iii) Where the transaction is made according to permission, authorization, approval, etc. of the Government, or pursuant to a direction, recommendation, etc. in writing by the Government;

(iv) Where the transaction is made for stabilization or market making under Article 83-8;

(v) Where stocks acquired by the exercise of stock option are sold; and

(vi) Where it is a transaction under the minimum transaction unit admitted in the securities market or the Association-brokerage market, a transaction by employees securities savings, or a direct acquisition, etc. from an issuer or seller, which is deemed by the Securities and Futures Commission as a transaction not using material information which is not disclosed to the public.

Rule on Report of Status of Stockholdings by the officers or major stockholders and Disgorgement of Short-Swing Profits (Rule of the Securities Management Committee, March 26, 1997)

Article 15(viii)

(A) Acquisition of new stocks by exercise of rights contained in the certificates of stocks, convertible bonds, bonds with warrants (in case of separable bonds, certificate of warrants), or certificates expressing subscription rights (hereinafter referred to as "stock certificates, etc.") that the stockholder already owns;

(B) Offering of stock certificates, etc. offered and sold in accordance with Article 8 of the Act;

(C) Offering of preferentially allocated stocks to members of the employee stock ownership association in accordance with Article 191-7 of the Act;

(D) Offering of preferentially allocated stocks to the worker's stock savings programs under provisions of the securities underwriting business regulation;

(E) Acquisition of forfeited shares or odd-lot shares generated during issuance of new shares for value; and

(F) Underwriting of stock certificates, etc. for business prescribed in Article 28(2)(iii) of the Act.

Related Precedents

12-1 KCCR 62, 99Hun-Ba23, January 27, 2000

Parties

Complainants

1. Lee O-ho (99Hun-Ba105)
   Counsel: Jipyong Legal Corporation
   Counsel-in-charge: Bae Sung-jin
2. Kwon O-sup (2001Hun-Ba48)
   Counsel : Choi Soo-young

Original Case

South Branch of Seoul District Court 99KaHap7825 : Disgorement of Short-swing Profits (99Hun-Ba105)

Seoul High Court 2000Na22272 : Disgorement of Short-swing Profits (2001Hun-Ba48)

Holding

Article 188(2) of the Securities and Exchange Act (amended by Act No. 5254 on January 13, 1997, before being amended by Act No. 5539 on May 25, 1998) and Article 188(8) of the Securities and Exchange Act (amended by Act No. 4469 on December 31, 1991) are constitutional.

Reasoning

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

A. Overview of the Case

(1) 99Hun-Ba105

Complainant Lee O-ho worked as a director or chief executive officer of the AAA Inc. from October 23, 1997 to February 12, 1998. During his tenure, Lee-O-ho purchased 365,570 shares (average value of the share assessed at 4,861 won) of the company on his own

account under the names of Kim O-woong and 16 other individuals who were former and present employees of the company. Before 6 months had elapsed since his initial purchase of the company stocks, he sold 4,610 shares on November 3, 1997, 390 shares on November 6, 1997, 5,000 shares on January 24, 1998, and another 335,951 shares on February 16, 1998, respectively. During this period, he sold a total of 345,951 shares at the average price of 9,284 won, and earned 1,691,464,381 won after the fees.

Upon learning that the complainant earned profits through such transaction, the Securities and Futures Commission requested the company to take action, such as a law suit, that would effectively force the return of the short-swing profits gained by the complainant on March 11, 1999. Following the request of the Commission, the above company filed a civil law suit against the complainant seeking return of the short-swing profits on May 15, 1999 (South Branch of Seoul District Court 99Ka-Hap7825). During the law suit, the complainant petitioned the Court to request a constitutional review on Article 188(2) and 188(8) of the Securities and Exchange Act which formed the basis for the original civil law suit, but the presiding court rejected the request. Then, on November 24, 1999, the complainant filed the instant constitutional complaint.

(2) 2001Hun-Ba48

Complainant Kwon O-sup owns 30.09% of common stocks issued by BB Chemical Engineering, Inc., and has served as the chief executive officer from March 12, 1992 to present. Between August 12, 1997 and January 10, 1998, the complainant sold 1,844,290 shares of the company. Then, between November 21, 1997 and June 3, 1998, before 6 months had elapsed after his initial stock sales, he acquired 1,624,250 shares of the company identical to shares he originally sold through subscription of new shares by a third party and trading in the stock market.

Upon learning that the complainant earned profits through such transaction, the Securities and Futures Commission requested the company to take an action, such as a law suit, that would effectively force the return of short-swing profits gained by the complainant on October 2, 1998. Following the request of the Commission, reorganized BB Chemical Engineering, Inc. filed a civil law suit against the complainant seeking return of the short-swing profits 9,774,839,087 won (Seoul District Court 98Ka-Hap114133) and won. The complainant appealed the decision (Seoul High Court 2000Na22272), and during the appeal, petitioned the Court to request a constitutional review on Article 188(2) and 188(8) of the Securities and Exchange Act, but the

presiding court rejected the request. Then, on May 18, 2001, the complainant filed the instant constitutional complaint.

B. Subject Matter of Review

Complainant Kwon O-sup argues that the part of Article 188(2) of the Securities and Exchange Act designating the juristic person as the party requesting the return of the short-swing profits and that failure of the Securities and Futures Commission to judge whether the complainant's transaction would not qualify as one of the exceptions for the return of the short-swing profits in accordance with Article 188(8) of the Securities and Exchange Act and Article 83-6 of the Enforcement Decree of the Securities and Exchange Act are unconstitutional. First, the constitutionality of failure of the Securities and Futures Commission to make necessary judgments is not subject of a constitutional complaint against a statutory provision based on Article 68(2) of the Constitutional Court Act. Therefore, it needs not be reviewed. In light of the reasons for a constitutional complaint submitted by the complainant, the complaint against the part of Article 188(2) of the Securities and Exchange Act designating the juristic person as the party requesting the return of the short-swing profits could be interpreted as a complaint against the entire statutory provision.

Then, the subject matter of review in the instant case is the constitutionality of Article 188(2) (hereinafter referred to as "the instant statutory provision") of the Securities and Exchange Act (amended by Act No. 5254 on January 13, 1997, before being amended by Act No. 5539 on May 25, 1998, hereinafter referred to as the "Act") and Article 188(8) of the Securities and Exchange Act (amended by Act No. 4469 on December 31, 1991). The provisions and related provisions are as follows:

Act

Article 188 (Disgorgement of Short-Swing Profits of Insider, etc.)

(2) Where officers, employees or major stockholders of a listed corporation gain any profit by selling stock certificates, etc. of the corporation concerned within six months after purchasing them, or by purchasing such stock certificates within six months after selling them, the corporation concerned may request such officers, employees or major stockholders to relinquish the profit to the corporation. In this case, necessary matters relating to standards for calculation of such profit shall be determined by the Presidential Decree, and procedures for return as well as other necessary details shall be determined by the Commission.

(8) The provisions of paragraph (2) shall not apply in such case as prescribed by the Presidential Decree taking into consideration of affairs including the nature of selling or purchasing which was carried out in the capacity of an officer, employee or major stockholder, and in such case where a major stockholder does not hold such capacity at a time when either he sells or purchases stocks.

Enforcement Decree of the Securities and Exchange Act (Amended by Presidential Decree No. 15312 on March 22, 1997, Before Being Amended by Presidential Decree No. 15687 on February 24, 1998)

Article 83-6 (Exception to Disgorgement of Short-Swing Profits)

The term "such case as prescribed by the Presidential Decree" in Article 188 (8) of the Act means any of the following cases:

(i) Where the transaction is made inevitably under Acts and Regulations;

(ii) Where an enterprise which is designated as an object of industrial rationalization under the Regulation of Tax Reduction and Exemption Act, makes the transaction in conformity with the criteria for industrial rationalization;

(iii) Where the transaction is made according to permission, authorization, approval, etc. of the Government, or pursuant to a direction, recommendation, etc. in writing by the Government;

(iv) Where the transaction is made for stabilization or market making under Article 83-8;

(v) Where stocks acquired by the exercise of stock option are sold; and

(vi) Where it is a transaction under the minimum transaction unit admitted in the securities market or the Association-brokerage market, a transaction by employees securities savings, or a direct acquisition, etc. from an issuer or seller, which is deemed by the Securities and Futures Commission as a transaction not using material information which is not disclosed to the public.

Rule on Report of Status of Stockholdings by the officers or major stockholders and Disgorgement of Short-Swing Profits (Rule of the Securities Management Committee, March 26, 1997)

Article 15(viii)

(A) Acquisition of new stocks by exercise of rights contained in the certificates of stocks, convertible bonds, bonds with warrants (in case of separable bonds, certificate of warrants), or certificates expressing subscription rights (hereinafter referred to as "stock certificates, etc.") that the stockholder already owns;

(B) Offering of stock certificates, etc. offered and sold in accordance with Article 8 of the Act;

(C) Offering of preferentially allocated stocks to members of the employee stock ownership association in accordance with Article 191-7 of the Act;

(D) Offering of preferentially allocated stocks to the worker's stock savings programs under provisions of the securities underwriting business regulation;

(E) Acquisition of forfeited shares or odd-lot shares generated during issuance of new shares for value; and

(F) Underwriting of stock certificates, etc. for business prescribed in Article 28(2)(iii) of the Act.

2. Complainants' Arguments and Opinion of the Administrative Agencies and Other Interested Parties

A. Complainants' Arguments

(1) 99Hun-Ba105

(A) The instant statutory provision forcing the return of profits gained from transactions of in stock certificates, etc. by insiders of an incorporated company to the issuing company restricts the property right protected by Article 23(1) of the Constitution. It also violates the right of equality protected under Article 11 of the Constitution by discriminating against insiders of a company in the economic sphere based on their social status. Furthermore, it infringes on the freedom of contract derived from the general freedom of action contained in the right to pursue happiness of Article 10 of the Constitution. Restriction on these rights is against Article 37(2) of the Constitution since the means of restriction is excessive: Other lesser means of restriction, such as selective application of the provision requiring the return of the short-swing profits by giving the insiders a chance to prove that they did not use undisclosed important information, could be used to minimize the restriction of the basic rights.

(B) Article 188(8) of the Act provides exceptions to the application of the instant statutory provision. However, the phrase of "case as prescribed by the Presidential Decree taking into consideration of affairs including the nature of selling or purchasing" dose not provide a substantial criterion but only formal one to decide what would be exceptions to the rule. The provision is against the principle of the rule against blanket delegation set forth by Article 75 of the Consti-

tution since it delegates the detailed rule making about the scope of exceptions in applying the provision stipulating the return of the short-swing profits to a presidential decree comprehensively without specifying the criterion, the scope, and the content of the subject matter to be regulated by the presidential decree.

(C) If part of the instant statutory provision, namely, when profit is gained "by selling stock certificates, etc. of the corporation concerned within six months after purchasing them, or by purchasing such stock certificates within six months after selling them", is interpreted to include such case when the controlling share-holder gains profits by selling his stocks outside the stock market at a negotiated price with due consideration to premiums for management rights following a decision to transfer the management rights as a way out of worsening business performance after purchasing the stocks of the company without any intent nor knowledge about a transfer of the management rights during the initial transaction, it is against the Constitution.

(2) 2001Hun-Ba48

(A) The instant statutory provision is legislated to protect general stockholders who have suffered a loss from a short-term share transaction by an insider. The provision names the juristic person, or the incorporated company, as the requisitioning party for the return of the profit. The juristic person should remain neutral in a dispute between general stockholders and insiders such as officers. However, the provision forces the juristic person to request the insider to return the short-swing profits made by use of inside information on behalf of the general stockholders. Thus, designating the juristic person as the party requesting the return of the short-swing profits would result in differential treatment of insiders by the juristic person, and hence, violates the right of equality of the complainant.

(B) The judge should make a final decision on the scope of the return of the profits with due consideration to the type of transaction and the circumstance under which the short-term transaction was made in case when the short-swing profits need to be returned. It is against the right to trial of the complainant if the complainant is ordered to return the entire short-swing profits without consideration of special circumstances.

B. Summary of Ordinary Courts' Reason for Rejecting the Request for Constitutional Review

(1) The instant statutory provision aims to protect the soundness

of the stock market, prevent loss of general investors from insider trading, protect the issuing company, and improve the effectiveness of the stock market through encouraging early notice of important information. It aims to achieve these goals by preventing unfair gains from transactions in stock certificates, etc. by insiders such as officers, employees or major stockholders of a listed corporation who may have easy access to inside information that could influence the stock price: Insiders could buy or sell company stocks using such undisclosed information before such information is publicly known, and gain profits in the process as the stock price rises or falls, reflecting the newly publicized information. While the instant provision of the Securities and Exchange Act could restrict the property rights of officers, employees or major stockholders of a stock-listed corporation, it cannot be concluded that such restriction would make discrimination of insiders based on their social status without reasonable basis if the legislative objectives of the provision are duly considered. Article 188(8) of the Act providing exceptions to the regulation under the instant statutory provision stipulates that the "[instant statutory provision] shall not apply in such case as prescribed by the Presidential Decree, taking into consideration affairs including the nature of selling or purchasing", making it possible for insiders to keep the short-swing profits in some cases, depending on the nature of the transaction. Therefore, the provision restricts the property right of the insiders in a minimal fashion, and does not infringe on essential aspect of the basic right.

(2) Considering the legislative intent of the provision stipulating the return of the short-swing profits and the fact that Article 188(2) and 188(8) are adopted along with Article 188-2 and Article 188-3 prohibiting use of undisclosed important information as well as Article 188-4 prohibiting unfair transaction such as market manipulation, Article 188(8) of the Act is not against the rule against blanket delegation because it could be inferred that the contents of exceptions whose legislation is delegated to the presidential decree would include transaction that would not seem unfair or transaction that was made without using important undisclosed information.

C. Opinion of the Minister of Finance and Economy

(1) Requirement of the return of the short-swing profits has been adopted to mitigate the difficulty of regulating insider trading. Since it is very difficult to prove that the suspect was aware of the fact that the information was indeed very important and undisclosed to the public, the provision allows the confiscation of profits from stock transaction without further proof for certain insiders as long as their

selling or purchasing is classified as a short-term transaction. The requirement is a preventive measure prohibiting use of undisclosed information by insiders, and its contribution to maintenance of fairness in the market is significant.

(2) Let us examine whether the statutory provision violates the principle against excessive restriction in restriction of basic rights. First, persons required to return short-swing profits are limited to insiders of the company (officers, employees or major stockholders). Second, the provision does not prohibit transaction by insiders altogether; It only regulates a transactions made within a relatively short period of six months, and only regulates transactions of stocks of the company where the insider either works or is a major shareholder. Third, the insider only needs to return the profits of transaction, not the entire value of the transaction, to the concerned company so that the profits would benefit every shareholder. Fourth, Article 188(8) of the Act providing exceptions to the regulation under the instant statutory provision makes it possible for insiders to keep the short-swing profits in some cases, depending on the nature of the transaction. Therefore, restriction of property rights of the insiders by the instant statutory provision is minimal, and it is not unconstitutional.

(3) Let us examine whether Article 188(8) of the Act violates the principle of the rule against blanket delegation. Since there are many forms of transactions in the stock market, and the financial system and environment changes rapidly, it would be impossible to effectively reflect market changes and thus cause inconvenience for stock traders if a statute were to contain details of all exceptions to the rule. The Securities and Futures Commission close to the market could make timely and appropriate adjustment to the exceptions to return the short-swing profits with due consideration of diverse cases. Second, the delegated part of the statutory provision dose not restrict the basic rights of citizens. Detailed rules delegated to a presidential decree is to remove the imposed restriction by recognizing exceptions. Article 1 of the Act providing the legislative objective and a comprehensive overview of Article 188 would make it possible for the people to predict that what is being delegated by Article 188(8) of the Act to the presidential decree contains such contents as "a transaction that would not seem unfair or a transaction made without using undisclosed information." Therefore, the statutory provision is not in violation of the rule against blanket delegation.

(4) The requirement to return the short-swing profits has been adopted to achieve the legislative objectives of promoting the soundness of the stock market and preventing losses by general investors from insider trading. It does not aim to resolve conflicts between shareholders. No matter who the party requesting the return of the

profits is, the profits would be reverted to the concerned juristic person. Accordingly, the juristic person would be most earnest in seeking the return, and it would be most likely to succeed in gathering information to prove that the insider indeed made a short-term transaction regulated by the statute. Thus, the statute designates the juristic person as the party requesting the return of the short-swing profits, and it is similar in the case of legislation in the United States of America and Japan.

D. Opinion of the Commissioner of the Financial Supervisory Commission, the President of the Korea Securities Dealers Association, and the President of the Korea Listed Companies Association

Opinions of the Commissioner of the Financial Supervisory Commission, the President of the Korea Securities Dealers Association, and the President of the Korea Listed Companies Association are mostly in agreement with the ordinary courts' reasons for rejecting the request for constitutional review and the opinions of the Minister of Finance and Economy.

3. Review on Merits

A. Regulation of Insider Trading and the Means of Regulation

(1) Insider trading refers to transactions of stocks of the company by insiders such as officers, employees, or major stockholders of the company, using undisclosed insider information that they obtained through their work or position. The reason that such transaction becomes subject to regulation is that insiders are likely to obtain confidential information before everyone else that would influence the market value of the company stocks such as increase in paid-in capital or capital increase without compensation, plans for assets revaluation, merger, development of new products, and bankruptcy. Thus, they are in a very favorable position for stock trading compared to general investors, and general investors are likely to suffer loss in return.

Generally, the risk associated with stock investment results mainly from the imperfectness of investors' judgments about earnings of the company as well as market or economic trends. Therefore, when an investor suffers a loss because he did not use information that others had or because he did not make a accurate analysis, it is pursuant to

the nature of stock trading, and no legal problem would arise in such case. However, a loss suffered from insider trading is not a result of a lack of adequate skill or the negligence of the trader: it arises because an insider used undisclosed insider information of the company to his advantage. Such misconduct should not be overlooked lightly. If such conduct is ignored, the general public would be doubtful of the soundness of the stock market, and thus, hesitate to make investments. This would make it very difficult for companies to raise necessary capital from the stock market. As a result, the sound development of the stock market would be impossible, and effective management of capital by citizens would in turn be hampered.

In conclusion, the objective of the regulation of insider trading is to enable investors to trust the stock market by protecting the investors and securing fairness in the stock market. This could be achieved by ensuring equality of information in stock transaction which could promote fair and free competition for all individuals participating in the stock market under similar positions and with similar possibilities for profits (9-1 KCCR 274, 283-284, 97Hun-Ba24, March 27, 1997).

(2) In order to regulate insider trading, the Act directly prohibits use of undisclosed information by insiders: The Act prohibits an insider's use of undisclosed information that he gained from his work (Article 188-2); If the insider breaches the law, he should be liable for damages for the loss of the other party to the transaction (Article 188-3), and should be subject to criminal punishment (Article 207-2(i)). In order to secure the effectiveness of the regulation of insider trading, the Act has adopted several preventive and indirect means of regulation: Any officer or major stockholder of a corporation is required to report the number of stocks owned by him or the change of ownership of stocks (Article 188(6)); and insiders are prohibited from making a short sale (Article 188(1)). The instant statutory provision makes the insider return the profits gained from a short-term transaction, made within a six-month period, to the company.

B. Legislative Objective of Requirement of the Disgorgement of Short-Swing Profits

The instant statutory provision enables the company to request the return of the profits made by insiders through purchasing or selling company stocks within six months after the initial selling or purchasing. Whether the insider indeed used undisclosed insider information of the company in making the transaction is not a factor for consideration, and all profits made from such short-term transaction needs to be returned to the company.

In order to regulate the insider trading, the Act, as seen above, makes the insider subject to civil and criminal sanctions when he made transaction of stocks using undisclosed company information. However, considering the relationship between the company and the insider and the fact that the insider has ready access to such evidential documents as the company records, it would be very difficult to prove that the insider indeed has made use of undisclosed information.

Accordingly, the instant statutory provision, in order to function effectively as preventive and indirect means of regulation of insider trading, requires the return of all profits made by an insider if he made stock transactions within six months after the initial transaction, regardless of whether the insider indeed made use of undisclosed information or not.

C. Review on Violation of the Property Rights

The instant statutory provision requires the return of all profits made by an insider if he made stock transaction within six months after the initial transaction, regardless of whether the insider indeed made use of undisclosed insider information or not, as long as the profits are made under the prescribed conditions. The insider is not allowed to prove that he has made a transaction without using undisclosed inside information. However, if the instant statutory provision requires disgorgement of short-swing profits in cases when it is objectively evident that the insider had not made use of undisclosed company information, when it was not possible to make use of such information to begin with, or when the insider proves that he had not made use of undisclosed company information, it would result in a deprivation of legitimate profits that the insider is entitled to. This would be beyond the legislative objective of the provision stipulating disgorgement of short-swing profits.

Let us then examine whether the statutory provision requiring the return of all profits to the company if they are made from short-term sales infringes on the property rights of the complainants against the rule against excessive restriction.

(1) Legitimacy of Legislative Purpose and Appropriateness of the Means

The legislative purpose of the instant statutory provision is to protect the interests of general investors, secure the trust of the general investors in the stock market by ensuring fairness and impartiality in the stock market, and thus, promote the development of the national economy. It is apparent that the statutory provision

has a legitimate legislative purpose.

In order to achieve such legislative purpose, the instant statutory provision requires the return of profits made from a short-term stock transaction by insiders which is likely to have been made using undisclosed insider information, thereby making such transaction unprofitable. This would have a considerable deterrent effect on insider trading, and therefore, the means employed to achieve the end is appropriate.

(2) Doctrine of the Least Restrictive Means

(A) Let us look at the legislative history of the instant statutory provision. In 1976, when the provision was first introduced, Article 188(2) read as "Where an officer, an employee, or a major stockholder of a stock-listed corporation gains profits by selling stock certificates, etc. of the corporation concerned within six months after purchasing them, or by purchasing such stock certificates within six months after selling them, using information that he obtained from his work or position, the corporation concerned or the shareholders of the corporation may request such officer, employee, or major stockholder to give such profits to the corporation." Thus, the insider was required to return the profits only when the company proved that he indeed made use of insider information. The provision was revised in 1987, and read as "Where an officer, an employee, or a major stockholder of a stock-listed corporation or Association-registered corporation gain profits by selling stock certificates, etc. of the corporation concerned within six months after purchasing them, or by purchasing such stock certificates within six months after selling them, the corporation concerned or the Commission may request such officer, employee, or major stockholder to give such profits to the corporation: Provided, That the insider would not be required to return the profits from such transaction if he successfully proves that he has not made profits using information that he obtained from his work or position." Thus, the burden of proof was shifted to the insider in order to enhance the effectiveness of the provision stipulating disgorgement of short-swing profits.

In spite of the transfer of the burden of proof, the insider could easily prove that he had not made use of insider information since he had exclusive access to the evidential documents to prove use of insider information. At times, he argued, without any basis, that his transaction was made without insider information, thus delaying the return of profits. As a result, disgorgement of short-swing profits was not effective. Then in 1991, the provision was again revised. This time, the proviso was deleted, and the insider was required to

return all profits made by an insider if he made stock transactions within six months after the initial transaction, regardless of whether the insider indeed used the undisclosed insider information or not.

Thus, under the instant statutory provision stipulating disgorgement of a short-swing profits, as long as i) an insider, ii) within six months after the initial transaction, iii) makes another transaction of stock certificates, etc. of his company iv) and makes profits, the person is liable to return the profits, regardless of whether he actually has made usee of undisclosed insider information. The statutory provision imposes strict responsibility on the insider, and he is not allowed to prove that he has made a transaction without using undisclosed insider information.

Article 188(8) of the Act stipulates that "The provisions of paragraph (2) shall not apply in such case as prescribed by the Presidential Decree taking into consideration affairs including the nature of selling or purchasing which was carried out in the capacity of an officer, employee or major stockholder, and in such case where a major stockholder does not hold such capacity at a time when he sells or purchases stocks," thus providing some relief on strict liability of the insider in some cases prescribed by a presidential decree. However, such exceptions are limited to certain types of stock transaction prescribed in a presidential decree. The insider is still not allowed to prove that he has made a transaction without using undisclosed insider information, and the exceptions to the rule do not apply in cases unprescribed by the presidential decree. Therefore, let us next see whether imposition of such strict liability excessively restricts the property rights of the complainants.

(B) Whether it violates the rule of the least restrictive means not to require use of undisclosed insider information as a positive condition for return of profits or non-use of undisclosed insider information as a negative condition for return of profits

Considering the relationship between the insider and the company, it would be hard to expect the company to actively prove that the insider actually made use of the undisclosed company information. Also, it would be impossible for a regulatory agency or general shareholders to prove this since all evidence is being maintained by the company which the insider manages or oversees. Even if the burden of proof is shifted to the insider, it would be fairly easy for him to prove his point, and in some cases, there is a high risk that he would manipulate evidence since he has easy access to evidential documents. This would make the statutory provision requiring disgorgement of short-swing profits ineffective and void.

Even when there is evidence that the insider has made use of

undisclosed insider information, in most cases, such insider information would be mixed along with information known to outsider. It would be difficult to make judgments which had influenced the rise or fall of the stock price in such case. Moreover, insider information is not only limited to singular significant information but also that formed by accumulation of numerous insignificant information. In such case, it would be difficult to designate what would be the specific insider information at issue.

Under such circumstance, if use of undisclosed information to the public is required as a positive condition for return of profits or non-use of undisclosed information is required as a negative condition for return of profits, it would make the instant statutory provision unable to require the return of short-swing profits, thereby making regulation of insider trading ineffective. Therefore, the instant statutory provision requires disgorgement of all profits made by an insider regardless of whether the insider indeed made use of undisclosed company information or not.

Furthermore, if the insider gains profits from short-term transaction, general investors would suspect that it is a result of use of undisclosed insider information gained from his position in the company even if the insider had not made use of insider information. Such distrust would arise if the insider gains short-swing profits, and the stock market would languish if such distrust is rampant in the market.

Thus, the legislators came to the conclusion that it would be unable to achieve the legislative objective of regulating insider trading if the provision were to make the insider disgorge the short-swing profits only when he actually made use of insider information. It was an inevitable legislative decision to achieve the legislative purpose of promoting trust in the stock market that the statutory provision, to prohibit short-term transactions altogether because they are likely to be based on insider information, requires the insider to disgorge all profits made from short-term stock transaction regardless of whether he indeed used undisclosed company information or not.

(C) Whether it is against the Rule of the Least Restrictive Means to Make an Insider Disgorge All Profits if Transaction is not One of the Exceptions Prescribed by Article 188(8)

As seen above, there might be a necessity and reasonable basis to force the insider to disgorge all profits made from short-term stock transaction regardless of whether he indeed used undisclosed company information or not. However, it might be against the rule of the least restrictive means to force the insider to return the profits made from short-term transaction when it is objectively clear that the reason for short-swing profits is not from use of the undisclosed

information, just because the transaction, while it may be basically identical to the exceptions stipulated by the law, is not an exception prescribed by Article 188(8) of the Act, Article 83-6 of the Enforcement Decree of the Act based on Article 188(8), or Article 9-2 of the Rule on Report of Status of Stockholdings by the Officers or Major Stockholders and Disgorgement of Short-Swing Profits based on Article 83-6(vi) of the Enforcement Decree.

Unlike the provisions in the legislation of the United States of America or Japan requiring the disgorgement of the short-swing profits, the instant statutory provision does not include the phrase in order "prevent the insider from using undisclosed insider information." Therefore, it may be interpreted that as long as the transaction meets the objective condition prescribed by the act, the insider would be required to return the profits from the transaction, even if there is no possibility that the insider had made use of undisclosed company information.

While the instant statutory provision may not have explicitly stipulated the legislative objective of regulating insider trading, requirement of disgorement of the short-swing profits is to regulate the insider trading of the company shares using undisclosed insider information. Since a short-term stock transaction by insiders is likely to have been made using undisclosed insider information, the insider is required to disgorge all profits from stock transactions regardless of whether he actually made use of undisclosed company information or not. Therefore, the legislative purpose of regulating insider trading shall be duly considered in interpreting and applying the instant statutory provision even if the provision does not contain the phrase stipulating the legislative objective, unlike the legislation in the United States of America or Japan. In this light, the instant statutory provision would not apply in such cases when it is objectively clear that the transaction is not a form of insider trading, that the reason of short-swing profits is not from use of undisclosed information, even if such transaction is not listed as an exception to the rule under Article 188(8) of the Act or Article 83-6 of the Enforcement Decree of the Act based on Article 188(8).

Such problem also arises in the United States of America and Japan which have similar legislation requiring disgorgement of short-swing profits. The U.S. Supreme Court and the Supreme Court of Japan rendered similar decisions in their rulings on *Kern County Land Co. v. Occidental Petroleum Corp.,* 411 U.S. 582 (1973) and Heisei12(Oh) 1965, 1703, March 13, 2002, respectively.

Considering the legislative purpose of the statutory provision, nature of Article 86-6 of the Enforcement Decree of the Securities and Exchange Act, listing exception to disgorgement of the short-

swing profits, and the meaning of Article 23 of the Constitution protecting property rights, it can be said that stock transaction without any possibility of insider trading is not subject to regulation under the instant statutory provision to begin with, even if the instant statutory provision prescribes objective conditions for disgorgement of profits by the insider and Article 188(8) of the Act and Article 86-6 of the Enforcement Decree of the Securities and Exchange Act based on Article 188(8) enumerate exceptions exhaustively. Therefore, levying strict liability on the insider for the return of profits from short-term stock transaction if such transaction is not listed as an exception to the rule under Article 188(8) and Article 86-6 of the Enforcement Decree does not violate the rule of the least restrictive means.

(3) Balance of Legal Interests

The instant statutory provision is enacted to protect the interest of general investors by forcing the return of short-swing profits as well as to improve the trust of general investors in the stock market by ensuring fairness and impartiality in the market. There is no comprehensive ban on insider trading: The provision only stipulates return of profits if such transaction was made within the short period of six months.

Moreover, even if the insider used insider information undisclosed to the public in the initial stock transaction, he is free to trade stocks without any restriction after six months and retain the profits from the transaction. Therefore, restriction on the property rights of the insiders such as complainants by the instant statutory provision is not greater than the public interest being achieved by the provision.

(4) Sub-conclusion

Restriction by the instant statutory provision is inevitable to achieve the legislative objective of protecting the interest of general investors by forcing short-swing profits as well as improving the trust of general investors in the stock market by ensuring fairness and impartiality in the market. It is a reasonable restriction necessary for the public welfare, and is allowed by the Constitution. The statutory provision does not infringe on the essential aspect of the property rights in violation of the rule against excessive restriction.

D. Review of Remaining Arguments of the Complainants

(1) The complainants argue that the instant statutory provision would result in differential treatment of insiders and others without

a reasonable basis by requiring only insiders to disgorge short-swing profits.

The instant statutory provision restricts insider trading in order to ensure fairness in the stock market and protect general investors' trust in the market. In order to achieve such legislative objective, the instant statutory provision only requires disgorgement of profits from short-term stock transactions made by insiders since a short-term stock transaction by insiders is likely to have been made using undisclosed insider information. Such differential treatment is by a reasonable basis, and does not violate the principle of equality.

(2) The complainants also argue that it violates the right of equality of complainants to designate the juristic person, or the incorporated company, who should remain neutral in a dispute between general stockholders and insiders such as officers, as the requisitioning party for the return of the profit. This could be understood as an argument that it violates the complainants' right to a fair trial to name the juristic person as the requisitioning party in the case.

The instant statutory provision names the juristic person, or the incorporated company, as the requisitioning party for the return of profits. The Securities and Futures Commission can request the corporation to requisition the insider to disgorge short-swing profits, and if the corporation does not obey such request within a certain period, shareholders of the corporation or the Securities and Futures Commission could request the return of profits subrogating the corporation (Article 188(3) of the Act).

Since the instant statutory provision aims to protect the interests of general investors by regulating insider trading, general investors who suffered a financial loss from the short-term stock transaction by the insider has the biggest interest in principle. However, it is reasonable to give the right to request the return of the profits to the company considering the following facts: that the profits from the insider trading is reverted to the company; that while the legislative purpose of requiring disgorgement of the short-swing profits includes the resolution of a dispute between some officers and shareholders, it is largely to achieve policy goals of protecting fairness in the stock market and the trust of general investors; and that it is more likely that the company would be able to attain information to prove that there was indeed short-term transactions by insiders.

(3) In addition, the complainants argue that the instant statutory provision infringes on the freedom of contract derived from the general freedom of action implied in the right to pursue happiness of Article 10 of the Constitution. However, the statutory provision does not directly restrict freedom of contract. Even if it indirectly constrains

the freedom of contract, such restriction is imposed with a reasonable basis within the permitted boundary of limitation of the basic rights. Therefore, complainant's argument is without basis.

E. Constitutionality of Article 188(8) of the Act

(1) Article 75 of the Constitution provides that "the President may issue presidential decrees concerning matters delegated to him in a concrete, limited scope by statute, and also the matters necessary to enforce statutes." It forms the basis for delegation of rule-making, and at the same time, limits the scope of delegation by stipulating that the delegation must be within "a concrete, limited scope."

It not only provides a basis for delegation of rule-making, but requires such delegation to limit its scope concretely. Article 75 aims at carrying out the rule of law and the principle of legislative law-making by requiring the parental statutes to specify the scope and the content of the subject matter to be regulated by presidential decrees, thereby precluding the arbitrary interpretation or enforcement of law. In light of this constitutional-legislative intent, 'concrete in scope' means that the enabling statute must specify the subject matter delegated to presidential decrees as well as other inferior laws so clearly and concretely as to allow people to infer from the statute itself the basic outlines of the presidential decrees. Here, inferability is not to be measured by each statutory provision but evaluated through a comprehensive and systemic analysis of the entire set of related provisions as a whole, and also in light of the concrete nature of the individual statute at issue (12-1 KCCR 62-74, 99Hun-Ba23, January 27, 2000).

(2) Let us next examine whether Article 188(8) of the Securities and Exchange Act violates the rule against blanket delegation. Since there are many forms of transactions in the stock market, and the financial system and environment change rapidly, it is impossible to exhaustively list the details of all exceptions to the rule on a statute. The Securities and Futures Commission close to market should make timely and appropriate adjustment to the exceptions to requirement to return the short-swing profits with due consideration to diverse cases. Second, the delegated part of the statutory provision dose not restrict the basic rights of citizens. Instead, detailed rule delegated to a presidential decree is to remove the imposed restriction by recognizing exceptions. Since the instant statutory provision stipulates the subject and conditions of regulation, the contents and scope of exceptions are predictable to a certain degree. Third, considering the legislative intent of the provision stipulating the return of the short-swing profits and the fact that Article 188(2)

and 188(8) are adopted along with Article 188-2 and Article 188-3 prohibiting use of undisclosed information as well as Article 188-4 prohibiting unfair transaction such as market manipulation, Article 188(8) of the Act is not against the principle of the rule against blanket delegation because people can infer from the statute that what is being delegated by Article 188(8) of the Act to a presidential decree contains such contents as "transaction that would not seem unfair or transaction made without using undisclosed information."

4. Conclusion

All Justices unanimously decide that the instant statutory provision and Article 188(8) of the Act are constitutional.

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

II. Summaries of Opinions

1. *Coercion of Publication of Violation* Case (14-1 KCCR 49, 2001Hun-Ba43, January 31, 2002)

In this case, the Constitutional Court declared that the provision of the Monopoly Regulation and Fair trade Act (hereinafter referred to as "Fair Trade Act") forcing the violator of the Fair Trade Act to publish the fact that violation occurred violated the Constitution.

A. Background of the Case

The complainant is the Korean Hospital Association, an business operators association under the Fair Trade Act. The complainant organized two large demonstrations of doctors in opposition to an administrative disposition issued by the Minister of Health and Welfare. The Fair Trade Commission reported to the investigative agency and issued an administrative disposition ordering the complainant to publish the fact that the complainant violated the Fair Trade Act in four central daily newspapers when it reached the conclusion that activity by the complainant encouraging suspension of medical service constituted unreasonable restriction of business or activities of member business operators.

The complainant then petitioned the Court to request the constitutional review of Article 27 of the Fair Trade Act allowing the Fair Trade Commission to issue an order to publish the violation of the law. The Court did not grant the request, and the complainant filed the instant constitutional complaint.

B. Summary of the Decision

The Constitutional Court unanimously concluded that the provision allowing the order to publish the violation of the law is unconstitutional because it infringes on the general freedom of action excessively and the right to dignity excessively and is against the principle of the presumption of innocence. Summary of the decision is as follows:

(1) The legislative purpose of the provision allowing the Fair Trade Commission to issue an order to publish the violation of the law is legitimate since it is necessary to put an end to public damage and prevent the recurrence of such violation by widely cautioning

the general public or related businesses operators through such means as disclosure of important information related to the violation of the Fair Trade Act. Diverse means could be considered as such protective ordering the violator to "acknowledge and publish the fact that he violated the Fair Trade Act," the Fair Trade Commission could opt to take a lighter punitive measure such as "publish the fact that an administrative disposition ordering corrective measures was issued against his action in violation of the Act."

Even if the legislators had chosen the alternative and ordered the violator to "publish the fact that an administrative disposition ordering corrective measures was issued against his action in violation of the Act," it would still be possible to achieve the legislative objective while reducing the degree of infringement of basic rights of the violator and minimizing such negative effect as chaos resulting from judgment of not-guilty by the Court. To order the perpetrator of the Fair Trade Act to "acknowledge and publish the fact that he violated the Fair Trade Act" would be to jump to the conclusion that there was a violation of the law and to force publication of facts of a suspected crime based on an administrative disposition of the Fair Trade Commission before the criminal procedure even begins. This may not be the most appropriate means to achieve the legislative objective, and it excessively infringes on general freedom of action and right to reputation.

(2) The violator of the Fair Trade Act would be required to make statements in the criminal procedure reports him to the investigative agency. To force him to publish that he violated the Fair Trade Act before initiation of the criminal procedure would put him in an awkward position as he would want to deny violation of the Act in the criminal procedure, and would be (psychologically detrimental to his trial preparation. Moreover, it would lead the Court to reach an unreasonable conclusion about the trustworthiness of the results of investigations by the Fair Trade Commission, and this may in turn influence the forthcoming criminal procedure. In conclusion, the order to publish the violation of the Fair Trade Act leads to a presumption of guilt before the final adjudication on the violation by the Court at an initial stage of investigation when the suspect has only been reported to the investigative agency and there has ant yet been an institution of prosecution. The order is an administrative disposition based on the presumption of guilt, and therefore, is against the presumption of innocence.

C. Aftermath of the Case

The part of Article 27 of the Fair Trade Act allowing the Fair

Trade Commission to issue an order to publish the violation of the law lost effect upon the ruling of unconstitutionality by the Constitutional Court.

Following the decision of unconstitutionality, a revision to the Act replacing publication of the "fact that he violated the Fair Trade Act" with publication of the "fact that an administrative disposition ordering corrective measures was issued against his action in violation of the Act" has been submitted to the National Assembly.

2. *Manslaughter of a Lineal Ascendant of the Offender or His Spouse Resulting from Bodily Injury* Case
(14-1 KCCR 159, 2000Hun-Ba53, March 28, 2002)

In this case, the Constitutional Court upheld the provision of the Criminal Act stipulating heavier sentence for crime causing death of a lineal ascendant of the offender or his spouse resulting from bodily injury than that for crime causing death of other person resulting from bodily injury.

A. Background of the Case

The Criminal Act provides that a person who inflicts bodily injury upon another, thereby causing his death, should be punished by limited imprisonment for not less than three years. The instant statutory provision stipulates that a person inflicting bodily injury upon "a lineal ascendant of the offender or his spouse", thereby causing death, should be punished by imprisonment for life or not less than five years. The complainant charged with the crime of causing death of a lineal ascendant of the offender or his spouse resulting from bodily injury petitioned the Court to request the constitutional review of the instant statutory provision, but the Court did not grant the request. The complainant then filed the instant constitutional complaint.

B. Summary of the Decision

The Constitutional Court unanimously upheld the instant statutory provision, and ruled as follows:

(1) The principle of equality stipulated by Article 11(1) of the Constitution does not imply imposition of absolute equality without any differential treatment. Rather, it stipulates a relative equality

prohibiting differential treatment without reasonable basis in legislation and enforcement of the law. Therefore, differential treatment or inequality with reasonable basis does not violate the principle of equality.

The instant statutory provision does not impose a heavier sentence on crime against a lineal descendent by a lineal ascendant, but imposes a heavier sentence on a crime against "a lineal ascendant of the offender or his spouse," thereby discriminating against the lineal descendent.

Respect and love are the pillars of relationship between relatives formed by marriage or blood. A lineal ascendent rears his descendent to become a successful member of the society, and takes upon legal and moral responsibilities for the descendent's action. A descendent, on the other hand, shares the responsibilities of the lineal ascendent as a family member, pays respect and strives to requite for the ascendent's sacrifice. Such is the natural and overarching morality dominant in the historically and socially confirmed family relationships. Such morality should be protected by the Criminal Act because it forms a basic order that maintains and develops each family and the society. A crime of causing death of a lineal ascendant of the offender or his spouse resulting from bodily injury, then, is contrary to the universal social order, and morality, and there are ample reasons for more social censure of the immorality of this crime than that of a crime of causing death resulting from bodily injury of an ordinary person.

(2) While a crime of causing death resulting from bodily injury of an ordinary person is punishable by limited imprisonment for not less than three years, the crime of causing death of a lineal ascendant of the offender or his spouse resulting from bodily injury is punishable by imprisonment for life or not less than five years. Considering the original purpose, role, or function of punishment as well as the difference between the instant crime and a crime of causing death resulting from bodily injury of an ordinary person, it cannot be said that the sentence prescribed by the Criminal Act for the instant crime is too severe. Moreover, a single statutory mitigation or a discretionary mitigation under extenuating circumstance would enable the judge to suspend the sentence. In light of these facts, the heavy sentence for the instant crime prescribed by the Act is not to severe as to destroy the balance of the entire scheme of criminal punishment system, and it does not deviate from the original purpose and function of the punishment.

(3) Some argue that the instant statutory provision forces compliance with a moral principle by reflecting the principle in law. While the law and morality could be distinguished, moral components could not be overlooked altogether when making assessment for

criminal liability. The instant statutory provision does not force compliance with a moral principle: Punishment of the instant crime is severe since the degree of criminal liability for the instant crime is greater because of its greater immoral nature. While the law cannot force observation of morality, it cannot be denied that the Criminal Act does play some role in maintaining social morals and good customs. Since the fact that the victim is a lineal ascendent of the offender can be taken into consideration for specific sentencing procedures as one of the more important factors in the circumstance of the crime, incorporation of such consideration into the statutory provision, thereby making it a requirement to aggravate the sentence would not be forbidden, and it cannot be said that resulting differential treatment is without a reasonable basis.

(4) Considering the reasons for the aggravated sentence and the appropriateness of the degree of severity of such punishment for a descendent who committed the crime of causing death of a lineal ascendant of the offender or his spouse resulting from bodily injury, it can be concluded that there is a reasonable basis for differential treatment. Thus, the instant statutory provision does not violate the principle of equality stipulated by Article 11(1) of the Constitution.

C. Aftermath of the Case

The Court ruled that the criminal punishment provision stipulating aggravated sentence for a crime whose victim is a lineal ascendent of the offender is not unconstitutional. It would be an important precedent when constitutionality of other statutory provision stipulating aggravated sentence for crimes against a lineal ascendent, such as murder of an ascendent, is challenged. The instant adjudication, however, did not comprehensively recognize the constitutionality of all statutory provisions stipulating aggravated sentence for crimes against a lineal ascendent. Therefore, if this Court were to review the constitutionality of such provisions, the Court would need to make individual and detailed review of the legislative purpose, specific sentence prescribed by the provision, degree of illegality and blame- worthiness.

3. *Monopoly on Proxy Business for Cadastral Surveying* Case
(14-1 KCCR 528, 2000Hun-Ma81, May 30, 2002)

In this case, the Constitutional Court declared that the provision of the Cadastral Act allowing only non-profit corporation to manage

cadastral surveying business as proxy violated the Constitution because it infringes on the freedom of occupation.

A. Background of the Case

Cadastral surveying refers to the surveying by which the competent authority determines the boundary or coordinates as well as the area of each parcel of land, in order to register a land in the cadastral record or to restore the boundary points registered in the cadastral record on the ground. Cadastral surveying has been designated as the administrative affair of the state since 1976. Under the law, only non-profit corporations established with cadastral surveying as its main business could act as proxy conducting cadastral surveying on behalf of the state, and individuals or profit-making corporation cannot act as a proxy conducting cadastral surveying.

The complainant is an individual who acquired the license of cadastral surveying engineer. He filed the instant constitutional complaint arguing that the provision of the Cadastral Act (hereinafter referred to as the "instant statutory provision") stipulating that only non-profit corporations established with cadastral surveying as its main business can act as proxy conducting cadastral surveying on behalf of the state violates the freedom of occupation and the right to equality of individuals who have licenses of cadastral surveying engineer or a profit-making organization formed by a group of such individuals, and hence, unconstitutional.

B. Summary of the Decision

The Constitutional Court issued a decision of nonconformity to the Constitution against the instant statutory provision on a majority vote of six Justices as follows:

(1) Majority Opinion

(A) An individual who would like to work as a proxy conducting cadastral surveying upon request of the land owner needs to acquire a license of cadastral surveying engineer under the Cadastral Act. Furthermore, the instant statutory provision requires him to receive permission from the Minister of Government Administration and Home Affairs, the competent authority, to establish a non-profit corporation that has cadastral surveying as its main line of business. Accordingly, under the instant statutory provision, an individual such as the complainant who has acquired the license of cadastral surveying engineer may not work in the field of cadastral surveying unless he

establishes a non-profit corporation. Then, it is clear that the instant statutory provision restricts the freedom of occupation.

(B) The legislative purpose of the instant statutory provision is to protect the public nature of cadastral surveying, secure the legal stability in land-related legal affairs, and protect the interest of citizens by ensuring "accuracy of results of cadastral surveying" and stabilization of cadastral surveying fees and speedy processing of civil petitions. Therefore, it has a legitimate legislative objective.

Since the main line of business of the non-profit corporation established in accordance with the instant statutory provision, cadastral surveying, is to earn profits by doing cadastral surveying in exchange for fee, it could not be the main objective of such non-profit corporation. Furthermore, cadastral surveying by a non-profit corporation does not necessarily ensure accuracy of results. In light of these facts, the preconditions prescribed by the statute are inadequate as a means to achieve the legislative objective of ensuring accuracy of results of cadastral surveying.

In addition, the legislative objective could be achieved through means that would not restrict the people's basic rights as much: The line of business could be divided between individuals and corporations, between corporations according to the basic capital or the number of cadastral surveying engineer, or between individuals according to differences in licenses. To confer the right to conduct cadastral surveying only to a non-profit corporation, thus, is against the principle of least restrictive means.

The public interest to be achieved by limiting only a non-profit corporation to perform cadastral surveying as proxy is not clearly urgent when compared to the private interest of the cadastral surveying engineer including the complainant. Moreover, the instant statutory provision does not contribute to the achievement of a legislative objective while it clearly infringes on the basic rights. Thus, the instant statutory provision fails the balance of interest test.

(C) In the case of the instant statutory provision, what is unconstitutional is that only a non-profit corporation could perform non-profit corporation should not perform cadastral surveying as a proxy. The legislators could adopt a competitive system allowing all cadastral surveying engineer to perform cadastral surveying as a proxy. Under such system, the scope of cadastral surveying for each proxy could be limited using a reasonable criterion. One way of dividing the line of business, for proxy, would be classification between individuals and corporations, between corporations according to the basic capital or the number of cadastral surveyors, or between individuals according to differences in licenses. The legislators have

discretion on how to approach the subject. For these reasons, the Court should allow the instant statutory provision to remain effective temporarily until the legislature revises the law (by December 31, 2003).

(2) Concurring Opinion of One Justice

Korea Cadastral Survey Corp., a non-profit incorporated foundation, which currently has a *de facto* monopoly on the cadastral surveying business, has a number of high-skilled professionals and expensive surveying tools. In light of this fact, cadastral surveying by a non-profit corporation would contribute to the achievement of the legislative objectives of the instant statutory provision to a degree. However, the instant statutory provision is unconstitutional in that only some cadastral surveyors in a specific non-profit organization are allowed to work as a proxy for cadastral surveying. There is an unbalance between the legislative objective to be achieved through differential treatment and degree of restriction on basic rights. The instant statutory provision is unconstitutional since it violates the complainant's right to equality against the principle of proportionality.

(3) Dissenting Opinion of Three Justices

Considering the public nature and requirement of technological and systematic uniformity of cadastral surveying as well as the degree of completeness of cadastral surveying, it cannot be denied that the instant statutory provision does contribute to achievement of the legislative objectives. If the entire or parts of cadastral surveying business were to be opened to free competition, more administrative manpower would be required for administrative management and inspection *ex post facto*. Considering the fact that individuals such as the complainant could conduct the business of cadastral surveying after establishing a non-profit corporation and receiving permission from the administrative agency, it would be difficult to conclude that it is unreasonable to exclude an individual or a profit-seeking corporation from acting as a proxy in cadastral surveying. Furthermore, it is not an unreasonable discrimination to exclude an individual or a profit-seeking corporation from acting as proxy in cadastral surveying despite certain problems innate in the non-profit corporation system, and therefore, the instant statutory provision does not violate the complainant's right to equality.

4. *Indecent Sexual Acts under the Military Criminal Act* Case
(14-1 KCCR 601, 2001Hun-Ba70, June 27, 2002)

In this case, the Constitutional Court upheld the statutory provision of the Military Criminal Act, stipulating punishment of individuals who committed "sodomy or other acts of indecent sexual acts" because it did not violate the principle of clarity nor the rule against excessive restriction.

A. Background of the Case

Article 92 of the Military Criminal Act stipulates that "A person committing sodomy or other acts of sexual harassment shall be punished by imprisonment for not more than one year." The complainant, an army corporal, was indicted for twice touching the sexual organ of his subordinate in the barracks during bedtime, and stood trial at the ordinary military court. The complainant petitioned the Court to request constitutional review of the instant statutory provision, arguing that the proscription of "other acts of indecent sexual acts" was against the principle of clarity because the scope of regulation was too wide and that punishment of such minor sexual harassments as the instant case would violate the principle of proportionality. When the Court did not grant the request, the complainant filed the instant constitutional complaint.

B. Summary of the Decision

The Constitutional Court upheld the part stipulating "other acts of indecent sexual acts" on a majority vote of seven Justices as follows:

(1) Majority Opinion

(A) The principle of *nulla poena sine lege* stipulated by the Constitution requires that elements of regulation by the law be clearly defined in order to inform individuals being subject to the law what actions would be regulated under the law so that they can determine the course of their action accordingly. While the statute must be sufficiently clear about what the prohibited conduct is, it does not mean that the legislators need to describe every detail literally. As long as a person with common sense and ordinary sensibilities could predict who would be subject to the statute and what conduct would be prohibited under the law, it is not against the principle of

clarity derived from the principle of *nulla poena sine lege.*

(B) The legal interest to be protected by the instant statutory provision is not "sexual freedom of an individual", but rather, "sound living conditions and morale with the community of the armed forces." Ordinarily, "indecent sexual acts" refers to diverse activities that may not be termed as ordinary sexual satisfaction. The specific scope of application changes with social changes. Therefore, it would be impossible, or at the least, very difficult to observe the principle of clarity by predicting all types of abnormal sexual activities and specifically and descriptively listing acts falling under the category of "indecent sexual acts". Therefore, the Court should examine whether it is possible to make reasonable interpretation of the general term of "indecent sexual acts" with due consideration to the legislative objective of the provision and its relationship with other provisions in order to make final judgments on whether the instant statutory provision violates the principle of clarity. In its previous ruling, the Supreme Court suggested a reasonable criterion on the matter: It ruled that in order to conclude that there was a breach of the law, the Court should examine whether there was violation of the legal interest that the provision seeks to protect.

According to such criterion, "indecent sexual acts" prohibited by the instant statutory provision is an act that violates the legal interest of "sound living conditions and morale with the community of the armed forces" and that would be seen as an offensive act of sexual nature by an ordinary citizen. Since an individual with common sense and ordinary sensibilities subject to application of the Military Criminal Act could easily predict what conduct would be prohibited under the law, and since arbitrary interpretation of the law is not probable, the instant statutory provision does not violate the principle of clarity.

(C) It cannot be said that legislators abused their legislative discretion by enacting the statute punishing all acts of indecent sexual acts by imprisonment for not more than one year without subdividing the prohibited acts into specific types of indecent sexual acts or without considering the victim's status. Therefore, the instant statutory provision does not violate the rule against excessive restriction.

(2) Dissenting Opinion of Two Justices

As the majority of Justices ruled, a person with ordinary sensibilities could understand what "indecent sexual acts" means, and the principle of clarity concerning the meaning of the terms used in the provision would not pose a problem. However, it is unclear whether the instant statutory provision requires "coerced" indecent sexual acts

for its application. The instant statutory provision does not clearly state who the actor or the victim of the crime would be. Therefore, it would be difficult to confirm the scope of activities that would fall into the category of "indecent sexual acts", and hence, it violates the principle of clarity. Furthermore, if "indecent sexual acts" of the instant statutory provision includes acts between two individuals committed voluntarily and secretly so as to be inoffensive to others, it would violate the rule against excessive restriction to punish such acts by imprisonment for not more than one year.

5. *Excessive Bodily Search* Case
(14-2 KCCR 54, 2000Hun-Ma327, July 18, 2002)

In this case, the Constitutional Court declared that excessive bodily search conducted during the process of detaining complainants in police detention facilities violated 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.

According to the Criminal Administration Act, the warden of confinement facilities could inspect body and clothes of a newcomer and have his fingerprints and photo taken. The Act also allows the warden to conduct bodily search or take other necessary measures to confined inmates if he deems necessary

The complainants are women who were arrested as flagrant offenders for distributing printed materials which was prohibited by the election law before the general election for the National Assembly. After going through a preliminary investigation in a police station and receiving a quick bodily search, they were confined in the police detention facilities.

A female police officer demanded a comprehensive bodily search to make sure that the complainants did not carry nor hide dangerous materials such as deadly weapons or other disallowed goods when the complainants returned to the police detention facilities after a meeting with their attorneys. The complainants then turned their back on the police officer, pulled up their shirts to their armpits, pulled down their pants, along with their underwears, to their knees, and repeated the process of squatting down and standing up three times.

The complainants filed the instant constitutional complaint, arguing

that such excessive bodily search using such insulting and humiliating means infringed on the right to personality and the right to personal freedom protected by the Constitution.

B. Summary of the Decision

The Constitutional Court, on a unanimous vote, declared that the above bodily search was unconstitutional, and ruled as follows:

(1) Bodily search of the complainants was conducted following the procedure stipulated by related statutes. Bodily search of inmates in confinement facilities are conducted to prevent threats against life and the health of inmates and to ensure safety and order within the facilities by making sure that an inmate does not carry nor hide dangerous materials such as deadly weapons or other disallowed goods. Considering such legislative objective, the necessity and legitimacy of certain types of bodily search is recognized.

However, not all bodily search to achieve such administrative objective is legal. In other words, only bodily search within the minimal permissible boundary necessary to achieve the objective is allowed, and even in such cases, appropriate means of inspection with due attention should be employed so as not to infringe on the basic rights of inmates by insulting or humiliating them.

A detailed bodily search for an inmate confined at a police detention facility should only be allowed when it is likely that the inmate would hide and carry dangerous materials such as deadly weapons or other disallowed goods in their inner body and when there are reasons to believe that it is not possible to find these goods using other means of inspection. Even then, such search should employ the least restrictive means to minimize infringement on the basic rights of an inmate.

(2) The complainants are females arrested as flagrant offenders in violation of the election laws. It was unlikely that the complainants were in possession of dangerous materials such as deadly weapons at the time of their arrest, and it was clear that they did not possess any dangerous materials or disallowed goods upon completion of the initial bodily search conducted after their arrival at the detention facility. Since a police officer observed the meeting between the complainants and their attorneys held at the conference room, the possibility that the complainants were hiding and carrying dangerous materials or disallowed goods when they returned to the detention facility after the meeting was very low.

Forcing the complainants to repeat the process of squatting down and standing up with their clothes off damaged the sense of honor

and self-respect of the complainants. Such bodily search is obviously out of the limits permitted under the Constitution, and it brought insult and humiliation to the complainants

(3) Therefore, the instant bodily search against the complainants was not the least restrictive means to achieve the legislative objective, and it brought about unbearable insult and humiliation upon the complainants. Therefore, it violated the right to personality derived from human dignity and value stipulated by Article 10 of the Constitution as well as the right to personal freedom protected by Article 12 of the Constitution.

C. Aftermath of the Case

The National Police Agency revised related provisions after the ruling, and now strictly regulates the subject and method of detailed bodily search for inmates confined in the police detention facilities in an attempt to minimize the infringement on basic rights.

6. *Omission of Administrative Rule-making About Average Income* Case
(14-2 KCCR 65, 2000Hun-Ma707, July 18, 2002)

In this case, the Constitutional Court declared that omission of administrative rule-making by the Minister of Labor about average income in spite of delegation of legislation by a statute violated the Constitution.

A. Background of the Case

Husbands of the complainants were sailors, and disappeared as the ship they were aboard sank in a storm on their first day of work. Since there was no record of salary for the missing people after they were hired by the ship owner, it was impossible to calculate their average wages (the amount calculated by dividing the total amount of wages paid to a relevant worker during three calendar months immediately before the day on which a cause for calculating his average wages occurred by the total number of calendar days during those three months) that would be used as the basis for calculation of the compensation to be paid to the surviving families under the Industrial Accident Compensation Insurance Act. Then the Korea Labor Welfare Corporation only paid compensation amount using the minimum standard of compensation. The complainants instituted an

administrative litigation for compensation, and filed the instant constitutional complaint, arguing that omission of administrative rule-making by the Minster of Labor infringed on the basic rights of the complainants because such omission is against the law delegating the Minister of Labor to determine and publicly announce the average wage if it is not possible to determine the average wage using the provisions of the related statutes.

B. Summary of the Decision

The Constitutional Court declared that omission of administrative rule-making to determine and publicly announce the average wage by the Minster of Labor against the delegation of the related statutes is against the Constitution, by a majority vote of eight Justices, and ruled as follows:

(1) Majority Opinion

A constitutional complaint against omission of administrative rule-making could be filed when the following conditions are met: First, the administrative agency should be under an obligation derived from the Constitution to make necessary administrative rule-making; Second, the administrative agency must not have made necessary legislation after the elapse of a considerable period of time.

The labor laws delegate to the Minister of Labor the duty to determine and publicly announce the average wage in order to provide a detailed criterion appropriate for a specific case when it is impossible to determine the average wage, which is the basis to calculate retirement allowance under the Labor Standards Act and compensation under the Industrial Accident Compensation Insurance Act, using the provisions of the Labor Standards Act, or when inappropriate to employ such average wage. Thus, the Minister of Labor is under an obligation to make necessary administrative rule-making in accordance with the above statutes. It would result in an infringement on the legislative power by the executive power if the administrative agency, contrary to delegation of legislation by the parental acts, does not make necessary administrative rule-making, thus leaving a vacuum in law. Therefore, while the Constitution does not directly impose on the Minister of Labor to enact administrative legislation, it is a constitutional duty to enact necessary administrative rules and regulations. It has been 30 years since the related statutes have delegated rule-making to the administrative agency, and yet, the agency still has not performed its duty. Thus, omission of necessary rule-making by the Minister of Labor infringes on the complainant's property

rights and right to humane livelihoods.

(2) Dissenting Opinion of One Justice

The majority of Justices conclude that failure of the Minister of Labor to prepare a standard to determine the average wage for a long time is unconstitutional on the premise that it is an administrative rule-making to decide the average wage. However, determination of the average wage by the Minister of Labor is not an administrative rule-making, but is an administrative disposition in that it is a determination of an individual and specific standard for a specific case. Therefore, the constitutional complaint filed on the premise that omission of the Minister of Labor is an omission of rule-making should be dismissed.

C. Aftermath of the Case

It is expected that the Minister of Labor will finally take action to make administrative rule-making on the method to calculate the average wage after decades of a vacuum in law following the decision. Legal relations that have been largely dependent on the precedents of the Supreme Court (i.e. calculation of average wage on the first day of employment or during the probationary period, calculation of average wage for full-time officer of a trade union who just retired, etc.) for resolution of individual legal disputes would now be regulated by administrative rule-making, and legal relations surrounding average wage would become more clear.

7. *Regulation for Fair Trade Practices in Newspaper Business* Case (14-2 KCCR 84, 2001Hun-Ma605, July 18, 2002)

In this case, the Constitutional Court upheld the provision of the public notification limiting the total value of free papers and gifts distributed by a newspaper corporation to a maximum of 20% of the total amount of circulations.

A. Background of the Case

In January, 1997, the Fair Trade Commission (hereinafter referred to as the "FTC") enacted and enforced a new public notification classifying and regulating some of the existing practices of the

newspaper business as unfair trade practices. Then, the newspaper business association made a resolution to voluntarily clean up their business practices contrary to the provisions of the above public notification, and the public notification lost effect in January of 1999. The FTC found the self-cleansing efforts of the newspaper businesses far from satisfactory, and enacted a new public notification which entered into force on July 1, 2001. One of the provisions (hereinafter referred to as the "instant provision") in the public notification prohibited the papers from providing free papers and gifts exceeding 20 percent of the total amount of paid circulations.

The complainant, who is in the newspaper sales business, filed the instant constitutional complaint, arguing that the instant provision was in violation of the rule against blanket delegation and excessively restricts property rights.

B. Summary of the Decision

The Constitutional Court unanimously upheld the instant provision, and rejected the complaint as follows:

(1) Rule against Blanket Delegation

The Monopoly Regulation and Fair Trade Act provides specific examples of unfair trade practices, and delegates to a presidential decree the duty to decide "categories of and standards for identifying unfair trade acts." The Enforcement Decree of the Act based on the Act, then, provides more specific "categories of and standards for identifying unfair trade acts," and further delegates to the FTC the duty to enact a public notification providing more detailed regulations to be applied to a specific area or business practice when necessary. The instant provision is a part of the public notification enacted thus.

Unfair trade practices occur in complicated and diverse forms during business competition, and they constantly evolve. Then, regulations concerning types and standards of unfair trade practices should make appropriate adaptation to such changes in a timely manner. The National Assembly would not be able to predict nor investigate every unfair business practice distorting conditions for normal competition in all areas, and it would be very difficult to make revisions to existing statutes to adapt to the changes in the environment. Therefore, it is inevitable that detailed rule-making about the types of and standards for identifying unfair trade practices is delegated to a presidential decree.

It is possible to predict what would be the contents of "the types of and standards for identifying unfair trade practices" to be specified by presidential decree in light of examples of unfair trade practices provided by the statute itself. Therefore, the enabling clause did not go beyond the limit for delegation of legislation.

In the instant case, the presidential decree first provides more specific "categories of and standards for identifying unfair trade acts," and then further delegates to the public notification of the FTC to provide more detailed regulations to be applied to a specific area or business practice. Then, it is apparent that the instant provision of the public notification has observed the constitutional limits to the re-delegation of rule-making.

(2) Rule against Excessive Restriction

(A) The legislative purpose of the instant provision is to reduce overzealous competition in the newspaper business by preventing unfair practices of allowing free papers and distributing gifts by newspaper distributors who have the backing of newspaper publishers who have deeper pockets in order to take away consumers who subscribe to other newspapers. It thus aims to normalize the competition in the newspaper sales and subscription market, thereby, maintaining the public functions of the newspaper in a democratic society, namely, to provide speedy and accurate information and to lead the formation of public opinion in a proper manner. The provision also aims to deter infringement on the basic rights of the newspaper subscribers, general citizens, to make his own choice of newspapers since it is likely that allowing free paper and distributing gifts would lead to coercion to subscribe to a particular newspaper. In light of these factors, the legitimacy of the legislative purpose is recognized.

(B) Certain restriction on allowing free paper and distribution of gifts would be an appropriate means to achieve such legislative objectives. The public notification of the FTC regulating practices of other business sectors classifies the act of providing gifts exceeding 10% of total value of transaction of goods or services as unfair inducement of consumers. The instant provision applies a relatively more relaxed standard to the newspaper business. In light of such facts, the degree of restriction on the basic rights of citizens in the instant case is minimal level necessary to achieve the legislative objectives.

(C) The private interests being infringed by the instant provision are freedom of occupation and property rights of individuals in the newspaper sales business. The public interest to be protected by the instant provision, on the other hand, is restoration of normal price and competition in the newspaper business by reducing overzealous

competition. Since the public interest being protected by the instant provision is larger than the private interest it infringes, the instant provision does not violate the rule against excessive restriction.

8. *Joint and Several Liability of Executive Officers and Oligopolistic Stockholders* Case [14-2 KCCR 106, 2000Hun-Ka5 etc., (consolidated), August 29, 2002]

In this case, the Constitutional Court rendered a decision of limited unconstitutionality against the provision of the Mutual Savings and Finance Company Act holding the executive officers and oligopolistic stockholders jointly and severally liable for the debts of the mutual savings banks.

A. Background of the Case

The Mutual Savings and Finance Company Act stipulates that executive officers except the auditors and oligopolistic stockholders (stockholders and those individuals who have special relationship with the stockholders specified by a presidential decree. The total number of shares owned by these individuals need to be over 51% of the total number of issued shares) are jointly and severally liable for debts of mutual savings banks.

The provision stipulating joint and several liabilities was adopted with the legislative objective of "protection of customers through responsible management of executive officers" after numerous cases of bad management by executive officers of savings banks led to monetary loss by many bank customers.

The petitioners in the instant case are directors or oligopolistic stockholders of mutual savings banks that went bankrupt because of improper management. They petitioned the Court to request the constitutional review of the instant statutory provision when creditors of the mutual savings banks filed lawsuits against petitioners under the instant provision, arguing that the instant statutory provision violated the right of equality and property rights protected under the Constitution. The Court granted the motion, and requested the constitutional review of the instant statutory provision to the Constitutional Court.

B. Summary of the Decision

The Constitutional Court rendered a decision of limited unconstitutionality against the instant statutory provision on a majority vote of six Justices (five voting for limited unconstitutionality, one voting for nonconformity to the Constitution) as follows:

(1) Opinion of Limited Unconstitutionality by Five Justices

(A) Executive officers are held jointly and severally liable for the debts of the mutual savings banks under the instant statutory provision on the premise that they took active parts in unsound or evasive lending, or that they either cooperated or overlooked unreasonable demands of the oligopolistic stockholders. Oligopolistic stockholders, on the other hand, are held jointly and severally liable for the debts of mutual savings banks on the premise that they, using their influence as oligopolistic stockholders, directed or demanded officers to make decisions, thus taking part in improper management of the banks. If the legislative objective of the instant statutory provision is to prevent the bankruptcy of mutual savings banks from improper management or privatization of the savings, thus protect the bank customers, individuals subject to the regulation by the provision should be limited to "persons who took part in improper management of the banks."

(B) There might be some executive officers who may be registered as directors of the company in the register but who had not taken any part in management of the savings banks or who were excluded from the decision making process in making decisions. These officers should not be held liable for improper management of the banks. It would be excessive to hold these officers jointly and severally liable during their tenure as well as for three years after their retirement. It would effectively prevent corporate governance by professional managers who may be equipped with the expertise and efficiency but do not have special ties with the oligopolistic stockholders. This would not promote separation of management and ownership, but instead, would promote unification of management and ownership against the legislative objectives of the above statute.

(C) In case of oligopolistic stockholders, too, only those "individual stockholders who directly caused an undesirable result either through exercise of shareholders' rights or through use of his influence on the bank management by ordering or demanding officers to take certain actions" should be burdened with joint and several liabilities for the company debts. It would only be justified to burden oligopolistic stockholders with almost unlimited liability equal to that borne by members in a partnership or partners with unlimited liability in limited

partnership company when there is no separation of management and ownership or when such stockholders wielded influence on management. Not all oligopolistic stockholders take part in management of the savings bank. Some may be formally oligopolistic stockholders because they are relatives of other stockholders, but they may not take any part in the management of the banks. It would be against the legislative spirit of the instant statutory provision as well as that of the entire Mutual Savings and Finance Act to hold such oligopolistic stockholders liable for improper management of the banks.

(D) Considering its legislative purpose, the scope of application of the instant statutory provision should be limited to only those "executive officers responsible for mismanagement of the bank" and "oligopolistic stockholders who wielded their influence on the management." Since every executive officer and oligopolistic stockholders, without exception, are jointly and severally liable for the debts of the savings bank under the instant provision, the provision violates the freedom of association, property rights, and the principle of equality.

(E) It is not unconstitutional to hold executive officers and oligopolistic stockholders jointly and severally liable for the debts of the banks. However, it is unconstitutional to hold those officers and oligopolistic stockholders who had no part in improper management of the banks liable for the debts of the banks. The unconstitutionality of the statute could be removed by limiting the scope of executive officers and oligopolistic stockholders to be jointly and severally liable. If the Court were to declare the statutory provision simply unconstitutional, all of the executive officers and oligopolistic stockholders of the savings banks will only bear responsibilities stipulated under the Commercial Act, and this would not protect the interests of bank customers, creditors of the banks. Therefore, the Court should interpret the law maintaining its effect if at all possible. Considering the legislative objective of the instant statutory provision, the scope of executive officers to be held jointly and severally liable for bank debts should be limited to those officers directly responsible for mismanagement of the bank, and the scope of oligopolistic stockholders to bear the financial responsibilities should be limited to those stockholders who wielded their influence on the management, thereby causing the financial crisis. It would be against the Constitution to hold jointly and severally liable for the company debts, those officers who are not responsible for improper management or those oligopolistic stockholders who did not cause improper management of the bank using their influence.

(2) Opinion of Nonconformity by One Justice

To interpret the instant statutory provision in a limited manner as done by the majority of Justices would exceed the limits of interpretation of law, and it would be tantamount to legislation by the Constitutional Court, ignoring the opinion of the legislators objectively expressed in the written statute. In such case, it would be constitutionally more desirable if the Constitutional Court were to render a decision of nonconformity to the Constitution and let the legislators enact a new law reflecting the opinion of this Court within a short period of time.

(3) Dissenting Opinion of Three Justices

Considering the facts that there is not complete separation between ownership and management of the banks and that the oligopolistic stockholders exert dominant power in management of the banks, it is constitutional to hold oligopolistic stockholders jointly and severally liable for the debts of the banks in order to protect the customers. However, it would be excessive to hold all executive officers of the savings banks jointly and severally liable, and hence, unconstitutional.

9. *Ban on Establishment of Pharmacy by Juristic Person* Case
(14-2 KCCR 268, 2000Hun-Ba84, September 19, 2002)

In this case, the Constitutional Court rendered a decision of nonconformity to the Constitution against the provision allowing only a natural person to open up a pharmacy and prohibiting establishment and management of a pharmacy by a juristic person formed by pharmacists.

A. Background of the Case

The complainant is a corporation whose stockholders include pharmacists. The complainant, a juristic person, has established and managed a pharmacy. The Commissioner of the Food and Drug Administration, however, issued a warning that he would order suspension of business for three months against any pharmaceutical company or wholesaler of medicine who provides a pharmacy managed by a juristic person with medicines because management of a pharmacy by a juristic person is against the statutory provision stipulating that "No person other than a pharmacist or Korean traditional medicine pharmacist shall

establish a pharmacy."

When pharmaceutical companies warned of suspension of business stopped supplying medicines to the complainant, the complainant instituted an administrative litigation to revoke the administrative disposition warning suspension of business, and then petitioned the Court to request the constitutional review of Article 16(1) of the Pharmaceutical Affairs Act. The Court did not grant the request, and the complainant filed the instant constitutional complaint, arguing that the instant statutory provision violated the freedom of occupation as well as the right to equality.

B. Summary of the Decision

The Constitutional Court rendered a decision of nonconformity to the Constitution against the instant statutory provision on a majority vote of six Justices (four voting for nonconformity to the Constitution, two voting for unconstitutionality) as follows:

(1) Opinion of Nonconformity to the Constitution by Four Justices

(A) The instant statutory provision stipulates that only a pharmacist, a natural person, can open a pharmacy and prohibits establishment and management of a pharmacy by a juristic person that consists of pharmacists and individuals who are not pharmacists or that comprises only pharmacists.

The legislative purpose of the instant statutory provision is to generally prohibit sales of medicines because it would be inappropriate to leave sales of medicines to the market system considering the effect that medicine sales has on public health. Therefore, the provision only allows pharmacists who obtained a license by passing an examination to sell medicines. However, such legislative objective could be obtained by requiring that the individual who treats and sells medicines at a pharmacy be a pharmacist. There is no legitimate reason to limit the establishment and management of a pharmacy to pharmacists who are natural persons. Since legislators have legislative discretion to prohibit the establishment of a pharmacy by ordinary individuals or a juristic person made up of ordinary individuals after due consideration of the positive and the negative effects that would be caused by allowing such persons to sell medicines by establishing pharmacies, it is not unconstitutional to prohibit establishment of a pharmacy by such ordinary persons.

However, it is not appropriate as a means to achieve the legis-

lative objective to prohibit the establishment of a pharmacy by a juristic person composed only of pharmacists. It is an excessive restriction of the freedom of occupation without a reasonable basis for the juristic person as well as for the individual pharmacists who constitute the juristic person. It also improperly infringes on the freedom of association of such individuals and juristic persons.

It is also against the right of equality of the pharmacists to prohibit only pharmacists from forming a juristic person to establish a pharmacy while allowing other professionals such as attorneys, certified public accountants, or manufacturers of medicines who are subject to regulation under the Pharmaceutical Affairs Act to form a juristic person to run their business.

If the Court were to simply invalidate the instant statutory provision by a decision of unconstitutionality, there would be no restriction on the establishment of the pharmacy, and anybody, who may not be a pharmacist, could establish and manage a pharmacy. A simple decision of unconstitutionality would make the limits set by the legislators under their legislative discretion ineffective, and it would cause more confusion legally to issue a decision of unconstitutionality than to render a decision to maintain the effectiveness of the instant statutory provision with some unconstitutional elements. Furthermore, the legislators have discretion on how to rid the provision of unconstitutional aspects of the provision, and one of its many options would be to allow only a specific form of a juristic persons to establish and operate a pharmacy. For these reasons, the Court hereby issues a decision of nonconformity to the Constitution to allow the instant statutory provision to remain effective and continue temporarily until the legislature enacts a new law to replace the existing one

(2) Opinion of Unconstitutionality by Two Justices

As far as the public health is concerned, it would not matter who established the pharmacy, as long as the person dealing and selling the medicine at the pharmacy is a pharmacist. Therefore, there is no legitimate reason to allow only a pharmacist to establish a drug store. There is an exaggeration of disorderliness or health hazard that may be caused once anyone is permitted to establish a pharmacy, and that is not even the central issue of the problem. If the instant statutory provision were to be declared unconstitutional, there needs to be an additional revision to allow only a pharmacist to prepare and sell medicines. There might be additional advantage of providing new business opportunities, encouraging competition, and promoting more research opportunities with official corporation of knowledge and capital if ordinary individuals who are not pharmacists were allowed to open

drug stores.

Even if the instant statutory provision were to lose its effect by a decision of unconstitutionality, other provisions of the Pharmaceutical Affairs Act could be applied to prohibit individuals who are not pharmacists from preparing or selling medicines. Since it is not necessary to allow the provision to sustain its effect temporarily through a decision of nonconformity to the Constitution, the Court should render a decision of simple unconstitutionality.

(3) Dissenting Opinion of Three Justices

To allow business operation by establishment of a juristic person does not mean that a juristic person formed by natural persons who, as individuals, will be allowed to perform the job, will be guaranteed the same freedom of occupation given to individual natural persons. The instant statutory provision does not restrict pharmacists to form an organization to promote their interests or to assist their professional activities: It restricts only establishment of a pharmacy by such juristic person. Therefore, the provision does not infringe on the freedom of occupation to manage their work by forming a juristic person, nor encroach on their freedom of association. The existing law clearly distinguishes a juristic person and individual natural persons making up such juristic person. A juristic person consisting only of pharmacists does not have a pharmaceutical license issued under its name, and therefore, it is perfectly natural to prohibit the establishment of a pharmacy by such juristic person. Here, the activities of the juristic person, not those of individual members of the juristic person, are being restricted.

The legislative objective of the instant statutory provision is not limited to allowing only a pharmacist to prepare and sell medicines but to entrust the same pharmacist with operation and management of the pharmacy to ensure safety of sales of medicine. Such legislative objective may not be achieved by allowing anyone to establish a pharmacy but limiting only a pharmacist to dispense medicines.

Other occupations listed on the Pharmaceutical Affairs Act such as manufacturer of medicines do not directly contact consumers, and therefore, the effect that they have on the public health is relatively small compared to that of pharmacists. Since there is a need to amass human capital for attorneys and other professionals, differential treatment of other professionals and pharmacists does not violate the right of equality of pharmacists without a reasonable basis.

Therefore, the instant statutory provision does not infringe on the freedom of occupation, freedom of association, or the right of equality

of pharmacists or juristic persons composed only of pharmacists.

C. Aftermath of the Case

If the Pharmaceutical Affairs Act were to be revised in accordance with the instant decision of nonconformity, pharmacists, like other professionals, would be allowed to open up and manage drug stores by forming a juristic person. This would provide more business operation options, and it would allow the formation of bigger, more specialized pharmacies by amassing capital.

10. *Confiscation of Illegal Video Game Software* Case
(14-2 KCCR 345, 2000Hun-Ka12, October 31, 2002)

In this case, the Constitutional Court upheld the statutory provision of the former Sound Records, Video Products, and Game Software Act allowing a competent authority to confiscate and destroy illegal game software.

A. Background of the Case

The former Sound Records, Video Products, and Game Software Act requires prior rating of the contents before distribution or offering to the public for viewing or amusement. If a competent authority discovers video game software that has not been rated or contains different contents than what has been rated (hereinafter referred to as "illegal game software), it could confiscate and destroy such software.

The petitioner operates a video game arcade, and a competent authority confiscated his arcade machines because they contained illegal game software. The petitioner instituted an administrative litigation to repeal the administrative disposition of confiscation, and petitioned the Court to request the constitutional review of the instant statutory provision. The Court granted the motion, and requested the constitutional review of the instant statutory provision to the Constitutional Court.

B. Summary of the Decision

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

(1) Majority Opinion

(A) The instant statutory provision provides a basis for immediate administrative enforcement, an administrative disposition issued directly against bodies or properties of citizens to achieve administratively desirable conditions when there is an urgent need to remove an administrative obstacle but not enough time to order citizens to perform certain actions to achieve the end.

In light of predictability and legal stability required by the principle of the rule of law, immediate administrative enforcement should only be allowed under exceptional circumstance because of its likelihood of infringing on the basic rights of citizens. Therefore, there should be a strict legal basis to issue such administrative dispositions. In addition, the following conditions act as limits in the disposition in a specific case: there should be an urgent necessity to remove the administrative impediment at hand; immediate administrative enforcement should be the only policy option that could achieve the administrative objective; even then, the disposition should observe the minimum restriction rule.

(B) The instant statutory provision aims to preserve the rating system of video game software and prevent the encouragement of speculative activities, thereby promoting sound social morals and good customs, by prohibiting circulation of illegal game software. Such a legislative objective is legitimate. To allow a competent authority to instantly confiscate and destroy illegal game software is appropriate as a means to achieve such legislative objective.

If illegal game software were not confiscated on the spot, there is a possibility of destruction of evidence, and it would be hard to prevent injurious influence of such speculative activities. Furthermore, such game software could be duplicated and circulated in mass. It is difficult to achieve the legislative objective by issuing an enforcement disposition after the party disobeys the order to collect and destroy illegal video game software. Therefore, necessity and legitimacy of the enforcement disposition is recognized.

While the instant statutory provision does not stop at confiscation but further allows destruction of confiscated illegal video game software, that part of the provision is only applied when there is a need for destruction of such software. It would violate the proportionality rule if destruction was ordered when confiscation would be enough to achieve the administrative objective. In this light, it would be hard to classify that such restrictive legislation is excessive.

Therefore, the instant statutory provision does not violate the minimum restriction requirement. Since the private interest being ne-

glected by allowing instantaneous confiscating and destruction of illegal video game software is lesser than the public interest protected by allowing such administrative disposition, there is a balance of interests. In conclusion, the instant statutory provision does not infringe on the property right of the petitioner in violation of the rule against excessive restriction.

(2) Dissenting Opinion of Two Justices

The scope of application of the statutory provision providing the basis for issuance of an immediate administrative enforcement should be strictly limited. In order for the provision allowing confiscation as well as destruction of illegal game software to be legitimate, there should be an independent urgency for destruction of illegal game software. In the case of the instant statutory provision, the legislative objective permitting issuance of immediate administrative enforcement could be achieved through confiscation of illegal video game software. Then, it would be an excessive restriction of basic rights to allow destruction of such software, and hence unconstitutional.

11. *Compulsory Designation of Medical Care Institutions* Case

[14-2 KCCR 410, 99Hun-Ba76, etc., (consolidated) October 31, 2002]

In this case, the Constitutional Court upheld the statutory provision of the National Health Insurance Act designating all medical facilities as "medical care institutions" required to provide medical care benefits stipulated by the Act.

A. Background of the Case

According to the provisions of the National Health Insurance Act, all medical care facilities are designated by law as "medical care institutions" required to provide medical care benefits stipulated by the Act. The complainant, medical doctors, filed a constitutional complaint against the instant statutory provision, arguing that it violates freedom of occupation and the right of equality.

B. Summary of the Decision

The Constitutional Court upheld the instant statutory provision on

a majority vote of seven Justices as follows:

(1) Majority Opinion

(A) "The compulsory designation system," under which all hospital facilities are designated as medical care institutions, restricts the freedom of occupation of doctors by restricting the manners of rendering professional service. The permitted scope of restriction is relatively broader for freedom to conduct occupations in specific manners than for freedom to choose occupations. Even in such case, restriction on individual freedom should be at a minimum level necessary to achieve certain public interests. In other words, the principle of proportionality (Article 37(2) of the Constitution) requiring that rights of citizens may be restricted only for a minimal necessary degree when such restriction is inevitable to achieve a certain policy objective must be observed.

(B) The legislative objective of the "compulsory designation for medical care institutions" system is to secure enough hospital facilities necessary to provide medical care benefits, thereby guaranteeing the rights for all citizens to receive medical care benefits. The legislative objective is legitimate. Since designating every hospital facility as a medical care institution responsible for providing insurance benefits would indubitably contribute to the achievement of the above legislative objective, the appropriateness of the means is recognized.

(C) The problem, then, would be whether the "compulsory designation for medical care institutions" system is the option that infringes on the basic rights of citizens minimally among other alternatives to achieve the legislative objectives. One could argue that the legislators could have chosen the voluntary designation system, under which a medical care institution could enter into a private contract with an insurance company, and that such system would function to guarantee the right to receive medical care benefits by the insured, the citizens.

Unlike the cases when the legislators enact statutes infringing on individual's essential freedoms (i.e. right to life, bodily freedom, freedom of selection of occupation, etc.), the legislators have a broader legislative formative power in enacting socio-economic law. In such case, the Court should only review whether predictive judgment or assessment of the legislators is clearly erroneous.

The compulsory designation system may comprehensively restrict professional service of medical doctors. However, the basic rights restricted by such system is freedom to conduct occupations in specific manners, not freedom to choose occupations, and there is no infringement on the essential freedom. Medical professionals provide medical

service, and the right to life and health of consumers of the medical service, the citizens, is dependent on medical service provided by the medical care institutions. So medical services have a very important function in our society.

In this light, judgement regarding whether it violates the minimum restriction rule to adopt the compulsory designation system should be made by reviewing whether there is a clear misjudgment on the part of the legislators.

(D) In the instant case, the legislators have adopted the compulsory designation system for the following reasons: First, the legislators have realized that it is one of the constitutional duties required of the state to provide citizens with medical insurance in order to achieve human dignity and guarantee a humane livelihood, and the state cannot delay comprehensive coverage of medical insurance until all practical conditions are ripe for its institution; Second, since the public hospital facilities make up but 10% of the entire hospital facilities, it would be inevitable to mobilize private hospital institutions to provide medical insurance benefits for adequate functioning of the national health insurance system. Moreover, the state previously experienced a failure when it temporarily adopted the contractual designation system in 1977: There was a large vacuum in medical services in particular regions and particular areas of specialization; Many doctors opposed the predetermined fee system, and refused designation of their hospitals as medical care institutions. In light of these facts, it is difficult to conclude that the assessment of the legislators that it would be impossible to guarantee medical service for citizens by adopting the contractual designation system is clearly erroneous. Therefore, selection of the compulsory designation system is not against the minimum restriction rule.

(E) Next, one could argue that "while the state could select the compulsory designation system, it would still be able to achieve the legislative objective of guaranteeing medical service benefits even if it recognizes some exceptions."

However, if a percentage of hospital facilities were allowed to provide medical service without being subject to medical insurance regulations, those hospital facilities that would not be able to survive free competition would desire to be included under the medical insurance system while other hospitals that have competitive advantage and can provide better medical service would not want to be included in the system. In such case, medical services covered by the national medical insurance system would become second-rate, and most citizens would prefer to receive "ordinary" medical service that would cost them dearly. Combined with demands of individuals in the upper-middle class or upper class to be excluded from the national medical insur-

ance system, this could threaten the existing medical insurance system. In light of these facts, the legislators may have concluded that proper functioning of the medical service sector may not be possible if exceptions to compulsory designation were to be allowed. Since such prediction of the legislators is not clearly erroneous, it does not violate the minimum restriction rule not to allow exception to the compulsory designation system.

(F) Let us examine whether the instant compulsory designations system violates the principle of equality. While the compulsory designation system designate every hospital facility as a medical care institution regardless of its facility conditions, equipment, personnel, or capabilities, it reflects substantial difference between individual hospital facilities by differentiating medical care benefit costs and allowing certain areas of medical service that would not be covered by the insurance. In this light, the compulsory designation system essentially treats different hospitals differently, and therefore, it does not violate the principle of equality.

(2) Dissenting Opinion

The compulsory designation of medical care institution is against the constitutional spirit based on respect for the freedom and creative initiative as well as cultural development. Most uniform control systems are inherently inefficient, and the long-term effectiveness of the system is questionable. Such doubt leads to the conclusion that the compulsory designation system lacks the appropriateness of the means requirement necessary for legislation restricting basic rights. Thus, the compulsory designation system infringes on the freedom of occupation of medical doctors in violation of the rule against excessive restriction, and hence, is unconstitutional.

12. *Competence Dispute between Local Autonomous Government and President* Case (14-2 KCCR 362, 2001Hun-Ra1, October 31, 2002)

In this case, the Constitutional Court ruled that the Rule about Allowances for Local Public Officials made by the President to provide a criterion for overtime pay of local public officials did not infringe on the power of the local government.

A. Background of the Case

Administrative rule-making, or rule-making by the Executive Branch, is a part of the national law put into effect based on the delegation of legislation by statutes. It can be subdivided into the administrative regulations and the administrative guidelines. All citizens are bound by the former, while the latter has effects of regulating relations within an administrative organization or between those in special positions subject to application of the public law. Presidential decree, ordinance of the Prime Minister, and ordinance of the Minister are examples of the administrative regulations while some forms of administrative guidelines include public notification, directive, and established rule.

On January 29, 2001, the President of the Republic of Korea issued the Rule about Allowances for Local Public Officials containing a provision (hereinafter referred to as the "instant provision") stipulating that "matters concerning criterion and method of payment for overtime work should be determined by the head of local governments within the scope predetermined by the Minister of Government Administration and Home Affairs." Under the rule, the Gangnam-Gu Office was required to obey the scope predetermined by the Minister of Government Administration and Home Affairs in setting up the criterion and method of payment for overtime work of its local public officials.

The Head of Gangnam-Gu filed a competence dispute and sought revocation or confirmation of voidness of the provision arguing that the instant provision, a mere administrative guidelines issued as instruction of the Minister of Government Administration and Home Affairs, restricts power of the head of the local government, and hence infringed on the constitutional legislative power of the local government against Article 117(1) of the Constitution stipulating that "Local governments ... may enact provisions relating to local autonomy, within the limit of Acts and subordinate statutes."

B. Summary of the Decision

The Constitutional Court unanimously ruled that administrative rule-making of the instant provision by the President did not infringe on the power of the plaintiff as follows:

(1) Article 117(1) of the Constitution stipulates that "Local governments shall deal with administrative matters pertaining to the welfare of local residents, manage properties, and may enact provisions relating to local autonomy, within the limit of Acts and subordinate statutes," thereby, guaranteeing the local autonomous system and providing a

basis for the autonomous powers of the local government. The autonomous powers guaranteed by the Constitution include legislative power of the local government to enact rules concerning autonomous governance, power to determine personnel management as well as remuneration and benefits for the public officials of the local government, and power to compile and execute related budgets. These autonomous powers, however, are formed and restricted by Acts passed by the Legislative Branch. Article 117(1) of the constitution clearly mentions that local governments can make rules within the limit of Acts and subordinate statutes, and Article 118(2) of the Constitution stipulates that matters pertaining to the organization and operation of local governments are to be determined by Act.

(2) "Act and subordinate statutes" in Article 117(1) of the Constitution include not only Acts, presidential decrees, ordinances of the Prime Minister, and ordinances of the Ministers but also administrative guidelines that function as administrative regulations. The Constitutional Court ruled that "an administrative guidelines such as public notifice, directive, or established rule will function as a administrative regulations in conjunction with the enabling statutes that delegated the detailed rule-making to the administrative guidelines as long as the established rule contains contents within the limits of delegation by the enabling statutes (4 KCCR 444, 449, 91Hun-Ma25, June 26, 1992)."

"The scope predetermined by the Minister of Government Administration and Home Affairs" under the instant provision refers to "the scope determined by the administrative guidelines that functions as administrative regulations," and not to the scope determined by the administrative guidelines that does not function as administrative regulations. Therefore, the instant provision does not violate Article 117(1) of the Constitution allowing legislation of provisions relating to local autonomy within the limit of Acts and subordinate statutes.

(3) The Local Public Officials Act stipulates that matters concerning remuneration of local public officials should be determined by presidential decree. Let us examine whether the instant provision delegating to the Minister of Government Administration and Home Affairs the detailed rule-making of matters that should be determined by presidential decree violates the legislative power of the Gangnam-Gu Government.

When a statute has delegated detailed rule-making to a lower rule, the delegated rule cannot delegate again determination of details of the rules to lower rules without specifying the scope of delegation. Further re-delegation of rule-making, however, will be allowed if the delegated rule determines the framework of regulation and then delegates specific rule-making about certain aspects of contents thus

determined.

In the case of the instant provision, it does not comprehensively delegate detailed rule-making of what it has been delegated. It has determined basic contents of delegated rule-making, and further delegated rule-making of details of a specific part. Therefore, it did not breach the limits of legislative delegation.

(4) The instant provision determines the basic matters concerning overtime pay of public officials, and delegates the detailed rule-making about the scope of criterion and methods of payment for overtime work to the Minister of Government Administration and Home Affairs. The Gangnam-Gu Government could exercise the legislative power within the limits provided thus, decide specific details concerning overtime pay through its own rules, compile and execute related budgets, and decide personnel management issues during the process. Therefore, the instant provision does not infringe on the essential aspects of the autonomous power of the Gangnam-Gu Government guaranteed by the Constitution.

13. *Retirement Age for Judges* Case
(14-2 KCCR 541, 2001Hun-Ma557, October 31, 2002)

In this case, the Constitutional Court upheld the provision of the Court Organization Act stipulating the retirement age limit of 63 for judges.

A. Background of the Case

The instant statutory provision stipulates that "The retirement age of the Chief Justice of the Supreme Court shall be seventy years of age; the Justices of the Supreme Court, sixty-five years of age; and the judges, sixty-three years of age." The complainant, a former judge, retired at the age of 63. The complainant filed the instant constitutional complaint, arguing that the instant statutory provision to force a judge to retire against his wish would be against the Constitution stipulating job security for judges and that it would be against the principle of equality to apply different retirement age for judges holding different positions.

B. Summary of the Decision

The Constitutional Court unanimously upheld the instant statutory provision as follows:

(1) Article 105(4) of the Constitution stipulates that "The retirement age of judges shall be determined by Act." Judges are state agencies entrusted with the judicial power, one of three basic powers of the Government along with legislative power and administrative power, and they rule independently according to their conscience and in conformity with the Constitution and other Acts (Article 103 of the Constitution). Judges are heavily protected by the Constitution in order to ensure the independence of the Judicial Branch (Article 106 of the Constitution). Therefore, the legislators need to consider the special characteristics of judges' work in determining the retirement age of judges.

(2) The instant statutory provision stipulates different retirement ages for judges in different positions. However, age, unlike sex, religion, or social status, is not enumerated under Article 11 of the Constitution as a factor not to be used as a basis for differential treatment. No privileged caste is established by such differential treatment of judges. Different retirement age for judges in different positions were set upon with due consideration to the nature and special characteristics of their work, average life span, and order of the organization. Differential treatment of judges by the instant statutory provision, then, has a legitimate basis, and does not violate the complainant's right of equality.

(3) The reasons for setting on the retirement age for judges are to prevent improper performance of court work which may be caused by deterioration of mental and physical abilities of a judge as he gets old, and to promote efficiency of court process through the replacement of judges. Such a legislative objective is legitimate. While there may be some difference in degree among different individuals, it is a scientifically proven fact that mental and physical abilities of an individual generally deteriorates as an individual ages. It would be impossible to achieve the aforementioned legislative objective if it is left to each judge to determine for himself whether he is fit to handle judical work. Furthermore, it is difficult to make objective observation of deterioration of individual and subjective capacities of each judge. Then, it is appropriate as the means to achieve the legislative objectives to set a certain retirement age for retirement of judges with due consideration to special characteristics of the judge's work and other objective conditions. The retirement age for judges set by the instant statutory provision is relatively high when compared to that for other public officials, and it is not too low compared to that of judges in other countries which have adopted a retirement age limit system. Then, the instant statutory provision does not infringe on the freedom of occupation or the right to hold public office.

(4) This Court does not recognize order between constitutional provisions nor allow review for unconstitutionality of a constitutional

provision. Therefore, Article 106 of the Constitution stipulating job protection of judges should be harmonious interpreted with Article 105(4) of the Constitution stipulating the retirement age of judges. In light of this, Article 106 should be interpreted to prohibit removal of a judge from office except by impeachment or a sentence of imprisonment without prison labor or heavier punishment as well as suspension from office, reduction of salary, or any other unfavorable treatment except by disciplinary action under the premise that each judge would retire upon reaching a certain retirement age. Under such interpretation, as long as the legislators do not abuse the legislative discretion and infringe on the basic rights of an individual, legislation of a statutory provision setting an retirement age for judges under Article 105(4) of the Constitution would not violate the Constitution. Since the instant statutory provision does not violate any basic rights of the complainant including the right to equality, freedom of occupation, and the right to hold public office, it does not violate Article 106 stipulating job protection for judges.

14. *Refusal of Collective Bargaining* Case
(14-2 KCCR 824, 2002Hun-Ba12, December 18, 2002)

In this case, the Constitutional Court upheld the provision of the Trade Union and Labor Relations Adjustment Act prohibiting refusal of collective bargaining without any justifiable reason by an employer.

A. Background of the Case

The Trade Union and Labor Relations Adjustment Act prohibits "refusal or delay of the execution of a collective agreement or other collective bargaining, without any justifiable reason, with the representative of a trade union or with a person authorized by the trade union," citing it as an unfair labor practice.

The complainant, a chief executive officer of an incorporated company, was charged with refusal to engage in collective bargaining with the labor union without a justifiable reason. The complainant petitioned the Court to request constitutional review of above provision, and when the Court did not grant the request, he filed the instant constitutional complaint.

B. Summary of the Decision

The Constitutional Court unanimously upheld the instant statutory

provision, and ruled as follows:

Article 33(1) of the Constitution stipulates that "To enhance working conditions, workers shall have the right to independent association, collective bargaining, and collective action."

The instant statutory provision prohibiting the employer's refusal to engage in collective bargaining with the labor union without justifiable reason is legislated to make the above constitutional provision effective. It thus has a legitimate legislative purpose. Since the provision leads the employer to make a sincere approach toward the collective bargaining, it is appropriate as a means to achieve the legislative objective. The instant provision, however, does not unilaterally force the employer to agree to collective bargaining or enforce collective agreement: It only prohibits "refusal or delay without any justifiable reason." The Constitution stipulates the duty to make a collective agreement between the employer and the employees, and the instant provision is legislated to enforce such a constitutional duty properly. Therefore, it cannot be asserted that the instant provision violates the minimum restriction rule. The public interest to be achieved by the instant provision is promotion of interests and improvement of status of laborers as well as protection of three labor rights stipulated by the Constitution by encouraging peaceful talks between an employer and his employees as equal partners on the bargaining table. The private freedom of employer being restricted, on the other hand, is prohibition of insincere collective bargaining or refusal of collective agreement without justifiable reasons. Thus, there is a balance of interests. In this light, the instant provision does not violate the freedom of contract and freedom of entrepreneurial activities of the complainant in violation of the principle of proportionality.

The instant statutory provision prohibits only the employer's refusal to engage in collective bargaining. This is because the Constitution only provides a basis for labor rights of workers, and because the instant provision is legislated to prevent weakening of such labor rights of workers following insincere attitudes of the employer during collective bargaining. Then, there is a reasonable basis for differential treatment, and there is no violation of the right of equality.