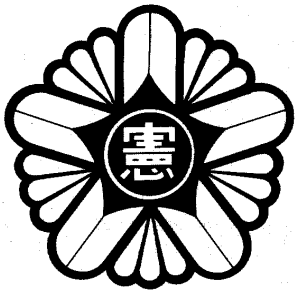
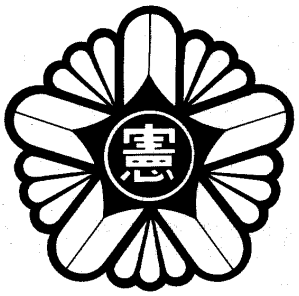
DECISIONS
OF
THE KOREAN CONSTITUTIONAL COURT
(2003)



THE CONSTITUTIONAL COURT OF KOREA

DECISIONS
OF
THE KOREAN CONSTITUTIONAL COURT
(2003)



THE CONSTITUTIONAL COURT OF KOREA
2005

PREFACE

The publication of this volume is aimed at introducing to foreign readers important cases decided from January 1, 2003 to December 31, 2003 by the Korean Constitutional Court.

This volume contains 22 cases, six full opinions and sixteen summaries.

The Impeachment of the President case is included in the volume even though it was decided in 2004 due to its critical importance to Korean constitutional jurisprudence and in order to timely share the case with foreign readers.

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

Professor Rhee Woo-young, Seoul National University (Assistant Professor), translated the original. Constitutional Researcher Kim Sung-jin proofread the manuscript. The Research Officers of the Constitutional Court provided much needed support. I thank them all.

May 31, 2005

Lee Bum-joo
Secretary General
The Constitutional Court of the Republic of Korea

EXPLANATION OF ABBREVIATIONS & CODES

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

* 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.

TABLE OF CONTENTS

Ⅰ. Full Opinions

Ⅱ. Summaries of Opinions

I. Full Opinions

1. *Prohibition of Statements of Party Affiliation of Candidates for Election to a Local Council*

(15-1 KCCR 7, 2001Hun-Ka4, January 30, 2003)

Contents of the Decision

1. Whether the constitutionality of Article 47(1) of the Act on the Election of Public Officials and the Prevention of Election Malpractices, which prohibits the political party from recommending a candidate for election to a local legislature of an autonomous local council is at issue as a precondition of the trial in the underlying litigation where a candidate for election to an autonomous local council was charged on the ground that the candidate had expressly stated the endorsement and recommendation of a particular political party in violation of Article 84 of the Act (negative).
2. Whether the provision in Article 84 of the Act on the Election of Public Officials and the Prevention of Election Malpractices that prohibits "candidates for election to an autonomous *Ku/Shi/Kun*[1] council" from expressly stating the endorsement or recommendation of a particular political party infringes upon the freedom of political expression (affirmative).
3. Whether prohibiting the expression of political party endorsement or recommendation by the candidates for election to an autonomous local council and not by the candidates in other local elections violates the principle of equality (affirmative).

Summary of the Decision

1. In a case where a candidate for election to an autonomous local council was charged on the ground that the candidate had expressly stated the endorsement and recommendation of a particular political party in violation of Article 84 of the Act on the Election of Public Officials and the Prevention of Election Malpractices (hereinafter referred to as the "Public Officials Election Act"), Article 47(1) that prohibits

1) Types of autonomous local governments. (translator's note)

the political party from recommending a candidate for election to a local legislature of an autonomous *Ku/Shi/Kun* council is not applicable to the underlying case, and, further, the constitutionality of Article 47(1) of the Public Official Election Act is systematically not inseverably related to the constitutionality of Article 84 of the Act as the two provisions differ in their applicability and content. Therefore, the part of the instant constitutional adjudication in which the petitioner challenges the constitutionality of Article 47(1) of the Public Officials Election Act is not appropriately before the Court as it is not at issue as a precondition of the trial in the underlying litigation.

2. The choice of whether to vote for a political party or to vote based on the judgment of particular candidates facing an election ultimately lies with the citizens as the bearer of the sovereignty, and it is not desirable in light of the principles of democracy that the legislators replace for their own or interfere with such choice of the citizens as the guardians of the people through legislation. Therefore, the specific legislative intent to remove the influence of the political parties and to encourage instead a vote based on the judgment of particular candidates at the election for the members of an autonomous council may hardly be justified.

The content of Article 84 of the Public Officials Election Act may also lack efficacy in terms of securing the decentralization of powers and the autonomy of the local government as the causation is much too attenuated between the knowledge of the voters as to the political party endorsement and recommendation of a particular candidate and the impediments upon the decentralization of powers and the autonomy of the local government.

Furthermore, whereas the impact of Article 84 of the Public Officials Election Act in terms of its contribution to the legislative purpose of achieving the original goals of local self-government is highly uncertain or immaterial, the degree of the infringement upon the basic right by Article 84 is conspicuous. For example, Article 84 mandates a candidate to remain silent even toward the voters specifically asking the existence of political party endorsement or recommendation. This is excessively severe for the candidates in an autonomous local council election who intend to enter politics by way of a political party. Further, an excessive ban on the expression of political party endorsement or recommendation may lead to a vote while the voters are ignorant of the candidates or their political tendencies or an outright forfeiture of the voting right out of a lack of interest in the election because the information as to the political party endorsement or recommendation inevitably serves as a practically important factor the voters consider in exercising their voting right as it is practically very difficult for the voters to analyze and assess

the qualifications and the capabilities of individual candidates due to the scarcity of opportunities for the voters to actually contact the candidates for the autonomous local councils under such various restrictions to guarantee the fairness of the election as the fourteen(14)-day limitation for the electoral campaign for a local legislature election and the ban on the electoral campaign activity prior to the designated campaign period, and, further, due to the fact that the so-called four local elections take place all at the same time. Considering the above factors in the entirety, the provision on review here conspicuously lacks a balance between the conflicting legal interests, as there is no reasonable proportionate relations between the benefit of the public interest resulting from the prohibition of the political party endorsement or recommendation and the loss therefrom.

In addition, the proviso of Article 84 of the Public Officials Election Act permits a candidate's statement of the present or past political party membership. Such statement of political party membership is conventionally made as a way of practically expressing the political party's endorsement or recommendation, thus the main provision and the proviso of Article 84 have an overlapping field that they regulate respectively. Thus, Article 84 of the Public Officials Election Act causes unpredictability on the part of the candidates in an election for the members of the autonomous local council as to how much they are allowed to express information concerning the political party of their membership and affiliation in their electoral campaign process and even provides an excuse for the arbitrary exercise of the state's authority to penalize particular conducts in violation of the rule of clarity.

Therefore, Article 84 of the Public Officials Election Act excessively infringes upon the freedom of political expression on the part of the candidates in violation of the principle of proportionality, for an uncertain legislative purpose, in a method that lacks both efficacy and clarity.

3. Should the meaning and the purpose of Article 84 of the Public Officials Election Act be to secure the decentralization of powers and the autonomy of the local government through elimination of political party's influence thus an election based on the qualification of the individual candidates, the same may be commonly applicable to the elections for the members of the regional local legislature, for the head of the regional local government, and the head of the autonomous local government, and not only to the election for the members of the autonomous local legislatures or councils. In consideration of any fundamental differences between the election of the members of autonomous local councils and the rest of the local elections, there is no ground found to treat these elections differently. Therefore, Article 84 of

the Public Officials Election Act is in violation of the principle of equality as this provision disfavors candidates for election to the autonomous local councils compared with candidates in other local elections with no reasonable ground for discrimination.

Dissenting opinion of Justices Han Dae-hyun, Ha Kyung-chull, and Kim Kyung-il

Harmony is crucial in the question of how to vertically allocate powers between the central and the local governments. Under no circumstances should any impairment of the essence of the local self-government, either by the legislation or the central government, be permitted, in the process of promoting such harmony.

If we permit the participation of the candidates recommended by a particular political party in the election for the members of the autonomous local council just like the other elections for public officials, not considering, particularly, the political reality of the nation that has not yet been able to overcome the problem of regionalism, the undemocratic nature of the political party administration, the electoral climate dominated by the regional relations, blood ties, and school connections, and, further, the lack of experience of local self-government, the political party will directly and indirectly influence the political activities of the elected candidates as well as the outcome of the election for such particular candidate. This might destroy the autonomous local legislature that should operate autonomously depending upon the particular nature and aspect of the autonomous local government unit.

The provision at issue here is both necessary and crucial to the implementation of the local self-government appropriate for the reality of the specific autonomous local government unit that is not diluted by the influence of the political party in the formation and the activities of an autonomous local legislature. This provision is not in violation of the principle of proportionality or the prohibition of excessive legislation, as the same provision leaves room for the candidates to at least indirectly state their political ideologies and the information as to their political party affiliation through the statement of their present or past political party membership (the proviso of Article 84 of the Public Official Election Act) although the same provision prohibits candidates from directly informing the voters of the political ideologies that they pursue or their political party affiliation, and the advantage of the institutional guarantee of local self-government through prohibition on the candidates' expression of political party affiliation outweighs any loss caused by limiting the candidates' right to serve in public office and freedom of election campaign.

Furthermore, this provision is not in violation of the principle of equality, in that, while the provision treats candidates for the autonomous local council election differently in the political area of life by prohibiting only such candidates from expressing their political party endorsement or recommendation, this provision is indispensable for the legislative purpose of institutionally guaranteeing the local self-government that the Constitution pursues and, further, in that the method employed for such legislative purpose is also necessary and the least restrictive for such purpose.

Parties

Requesting Court

Daejeon High Court

Original Case

Daejeon High Court, 2000No297, Violation of the Act on the Election of Public Officials and the Prevention of Election Malpractices

Holding

1. The "candidate for election to an autonomous *Ku/Shi/Kun council*" part of Article 84 of the Act on the Election of Public Officials and the Prevention of Election Malpractices (Amended by Act No. 4947 on April 1, 1995, Prior to Amendment by Act No. 6265 on February 16, 2000) is unconstitutional.
2. The remainder of the request for constitutional review of the statute is dismissed.

Reasoning

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

A. Overview of the Case

(1) Choi Woon-yong was a candidate for membership in the autonomous council of the city of Gong-Ju in the second simultaneous nationwide local election that took place on June 4, 1998. Choi Woon-

yong was charged with allegedly violating Article 84 of the Act on the Election of Public Officials and the Prevention of Election Malpractices by expressly stating the endorsement or the recommendation of a political party. Specifically, Choi Woon-yong was alleged to have set up on the outer wall of his election campaign office located in Joong-Dong, Gong-Ju, for the period of 09:30 on May 19. 1998 through 16:55 on May 20, 1998, two banners wherein the emblem of the United Liberal Democrats was painted and the statement of the "office of Choi Woon-yong, member of the city council of Gong-Ju, the United Liberal Democrats, 54-7000, 52-1661~2" was printed, and to have disseminated his name cards that contained the emblem of the United Liberal Democrats and stated "Vice Chair, the United Liberal Democrats City of Gong-Ju Office" on the street in front of Ji-Yeon car-wash center located in Joong-Dong on May 20, 1998.

(2) In the above case, the court of first instance, Daejeon District Court, imposed a fine of ₩3,000,000 against Choi Woon-yong. However, the court of first appeal, Daejeon High Court, found Choi Woon-yong not guilty, on the ground that the expression as such was a mere statement of his present and past political party membership (99No516). Yet, the court of second appeal, the Supreme Court reversed such decision of the Daejeon High Court and remanded the case on the ground that the alleged conduct was practically an expression of party endorsement or recommendation (2000Do734).

(3) The Daejeon High Court, in thereby re-adjudicating the above remanded case, requested *sua sponte* the constitutional review of the part of Articles 47(1) and 84 of the Act on the Election of Public Officials and the Prevention of Election Malpractices, on the ground that the "(excluding the election for the members of an autonomous *Ku/Shi/Kun* council)" part of Article 47(1) and the "candidate for election to an autonomous *Ku/Shi/Kun* council" part of Article 84 of the Act infringe upon the freedom of expression and violate the principle of equality.

B. Subject Matter of Review

The subject matter of review in the instant case is the constitutionality of "(excluding the election for the members of an autonomous *Ku/Shi/Kun* council)" part of Article 47(1) of *the Act on the Election of Public Officials and the Prevention of Election Malpractices* (Amended by Act No. 4947 on April 1, 1995, Prior to Amendment by Act No. 6265 on February 16, 2000; hereinafter referred to as the "Public Officials Election Act") and the "candidate for election to an autonomous *Ku/Shi/Kun* council" part of Article 84 of the Public Officials Election Act. The contents of the above provisions and the relevant provisions

is as follows:

Article 47 (Recommendation of Candidates by Political Parties)

(1) A political party may recommend its member as a candidate (hereinafter referred to as a "party-recommended candidate") within the limit of the full number to be elected for each constituency in an election (excluding the election for an autonomous Ku/Shi/Kun council member).

(2) [omitted]

Article 84 (Independent Candidates, etc. Prohibited from Professing Political Party)

A candidate for an election to an autonomous Ku/Shi/Kun council or an independent candidate shall not expressly state that he or she is endorsed or recommended by a specific political party: Provided, That this shall not apply to an indication that he was a political party member during his career.

Act on the Election of Public Officials and the Prevention of Election Malpractices (Amended by Act No. 4947 on April 1, 1995, Prior to Amendment by Act No. 6265 on February 16, 2000)

Article 256 (Violation of Various Restrictive Provisions)

(1) Any person who falls under any of the following subparagraphs shall be punished by

(i) A person who falls under any of the following items in connection with an election campaign:

(A)~(C) [omitted]

(D) A person who professes to be endorsed or recommended by a specific political party in contravention of the provisions of Article 84;

(E) [omitted]

2. Opinions of the Requesting Court and the Related Parties

A. Grounds for Requesting Constitutional Review

(1) The act of recommending a particular candidate in an election for a public official is by its nature an act of expressing a political opinion, and a statute limiting such political expression should be subject to a stricter constitutional scrutiny than a statute regulating basic rights of economic nature.

The legislative purpose of the provisions on review lacks legitimacy as it does not surpass abstract and ideological slogans of "grass-

root democracy, decentralization of powers, and self-government by the residents." Further, the above provisions violate the principle of the least restrictive means as the alternate means that are both more appropriate for the constitutional principles and less restrictive are available such as a mandate of decision of a political-party endorsed candidate exclusively by the poll among the members of the local branch of the political party and the residents as in the preliminaries at the elections in the U.S. Furthermore, in Article 84, the boundary between the conduct permitted under the proviso and the conduct prohibited under the main provision is blurred. Therefore, the above provisions are unconstitutional as they impede the essence of the freedom of expression of the political parties.

(2) Independence from the influence of the political parties is even more urgently requested for the heads of the local governments. However, the above provisions single out only the candidates for election to the autonomous *Ku/Shi/Kun* council (hereinafter referred to as the 'autonomous local council') and prohibit them from stating any political party endorsement or recommendation, whereas such provisions do not prohibit candidates for election to the local government heads from stating such endorsement or recommendation, thereby discriminating against the former with no reasonable ground.

(3) The proviso of Article 87 of the Act on the Election of Public Officials and the Prevention of Election Malpractices (Amended by Act No. 5537 on April 20, 1998) permits the labor unions to support or object to a particular candidate, whereas it prohibits the political party, which is under special constitutional protection and whose original purpose lies with political activities, from recommending a particular candidate for election to the local autonomous council, thereby discriminating against the political party with no reasonable ground.

B. Opinion of the Chief Prosecutor of the Daejeon District Prosecutors' Office

The legislative purpose of the provisions on review is to realize undiluted local self-government suitable for the reality of the region by eliminating the influence of the political party in the formation and the activities of the local autonomous council. The prohibition of the express statement of political party endorsement or recommendation on the part of the candidates for the local autonomous council membership satisfies the requirement of the least restrictive means as it is an effective and appropriate means for achieving such purpose and also leaves room to provide information as to the candidates' political ideologies or political party affiliation through the statement

of the candidates' present or past political party membership. Furthermore, two of the conflicting interests are well balanced as the advantage of the institutional guarantee of the local self-government through the prohibition of stating political party endorsement or recommendation outweighs the loss caused by the infringement upon the political party's freedom of political expression. Therefore, the provisions on review are indispensable to the legislative purpose of institutional guarantee of the local self-government pursued by the Constitution, and neither infringe upon the constitutionally protected freedom of expression nor violate the principle of equality.

C. Opinion of the Commissioner of the National Election Commission

Largely identical to the opinion of the Chief Prosecutor of the Daejeon District Prosecutors' Office.

3. Review on the legal prerequisites

There is a required relationship of Article 84 of the Public Officials Election Act to the underlying trial, as Article 84 is a legal provision to be applicable to the underlying trial and the constitutionality of Article 84 will materially affect the outcome of the court's decision in the underlying trial.

However, there is no required relationship of Article 47(1) of the Public Officials Election Act to the underlying trial as a matter of principle, as Article 47(1) is not applicable in the underlying trial. Furthermore, whereas Article 84 prohibits candidates from expressly stating an endorsement or recommendation of a political party, Article 47(1) prohibits the political party from officially recommending a candidate, and, as such, the two provisions differ in their respective applicability and content. Also, there is hardly any structural inseverability between the constitutionality of Article 47(1) and Article 84, as the language of Article 47(1) does not expressly prohibits a political party's informal nomination of a candidate (so-called 'internal nomination') or expression of support for or opposition to a particular candidate. Therefore, the subject matter of the review should not be expanded to include Article 47(1) of the Public Officials Election Act.

Therefore, the request for constitutional review concerning Article 47(1) of the Public Officials Election Act is unjusticiable as it lacks the required relationship to the underlying trial. Thus, the Court reviews in the following paragraphs only the merits of the part

concerning Article 84 of the Public Officials Election Act.

4. Review on the merits

A. Legislative history with respect to the political party's participation in the local election

(1) Local elections were revived after approximately thirty years of absence of local elections by the enactment of the Election of Local Council Members Act in 1988. However, there was a division for and against the political party's participation in the local election between the ruling party and the opposition parties at the election of the members to the local legislatures in 1990. The ruling party at that time argued for an elimination of the political parties on the ground that the political party's participation in the local election would hinder an autonomous development of the local self-government as a result of the subordination of local government to the central government, disorder caused by political disputes, and exacerbation of dissolution and antagonism in the local community. On the contrary, the opposition parties at that time objected on the grounds that the political party's participation in the local election should be permitted as a matter of course in order for the local self-government to substantively settle, and that the propriety of such should be decided by the residents in the electoral process. Eventually, a compromise was reached at the conclusion of the dispute to permit the political party's nomination in the city("*Shi*") and province("*Do*") unit elections and to prohibit the political party's nomination in the elections of the autonomous local units of *Shi*, *Kun* and *Ku*, in the form of respective legislations and subsequent revisions of the Election of Local Council Members Act (Act No. 4311) and the Election of the Heads of Local Governments Act (Act No. 4312).

(2) On March 16, 1994, the Act on the Election of the Public Officials and the Prevention of Election Malpractices (Act No. 4739) was enacted as a uniform law integrating the Presidential Election Act, the Election of National Assembly Members Act, the Election of Local Council Members Act, and the Election of the Heads of Local Governments Act, which had previously been a separate part of the election law system. The above uniform law permitted the political party's participation not only in the election for the regional government elections, but also in the local autonomous unit elections.

(3) However, immediately preceding the local elections of June 27, 1995, the ruling party at that time once again argued for an elimination of the political parties from the autonomous local elections

on the ground of apoliticization of the local administration, and, as a result of the compromise with the opposing parties, an agreement was reached to revise relevant legislations to permit the political party's participation in the election of the head of the local autonomous government yet prohibit the political party's participation in the election of the members of the local autonomous council. Article 47(1) and Article 84 were revised accordingly, and remain largely unchanged today with only partial and minor changes to the language.

B. Legislative purpose and content of Article 84 of the Public Officials Election Act

(1) Legislative purpose

In light of the above legislative history, Article 84 of the Public Officials Election Act seems to have been adopted under the basic understanding that the political party's interference with the autonomous local council member election would transform such election to a surrogate battle among the political parties thereby causing hardships in the selection of qualified individuals demanded in a particular district, and would also hinder autonomous operations of the autonomous local council by affecting the overall legislative activities of local council members as well as the election of particular candidates itself. Therefore, the legislative purpose of the above provision is to substantively realize the original goals of the local self-government of decentralization of powers and protection of regional autonomy, by eliminating the political party's influence and inducing an election based on the qualification of individual candidates.

(2) Specific content

The subject of conduct under Article 84 of the Public Officials Election Act is the individual candidate. The political party is not the subject of conduct under the provision, therefore the provision does not apply where a political party expresses on its own initiative its support for or opposition to a particular candidate.

The conduct regulated by the above provision is the candidate's express statement of the endorsement or the recommendation by a political party. The literal meaning of the term "express statement" is to publicly express and profess an idea or opinion, or an ideology or argument. Therefore, the conduct prohibited by the above provision is all acts professing and expressly stating to the voters the fact that a candidate is supported by a particular political party or has been recommended by a particular political party as a candidate

(*See* Supreme Court Decision 99Do556 delivered on May 11, 1999 (Gong 1999, 1206); Supreme Court Decision 99Do279 delivered on May 25, 1999 (Gong 1999, 1314), etc.).

However, what is prohibited is the expression of the endorsement and recommendation of a candidate by the political party only and does not include the candidate's expression that the candidate supports a particular political party (*See* 1999 Supreme Court Reporter 1314, 99Do3648, issued on January 15, 1999, etc.).

On the other hand, the proviso of Article 84 of the Public Officials Election Act permits the candidate's expression of the information relating to his or her political party affiliation or membership such as his or her present or past position within a particular political party.

C. Constitutionality of Article 84 of the Public Officials Election Act

(1) Whether Article 84 infringes upon the freedom of political expression

(A) The expression by a candidate of the fact that he or she is endorsed and recommended by the political party of his or her membership is to inform the voters that his or her qualifications and abilities are verified by such political party and that his or her political beliefs and policy directions pursued, etc., are in line with those of the political party of his or her membership, and to expressly plead to the voters for their support. Therefore, the prohibition under Article 84 of the Public Officials Election Act of the autonomous local council candidate's expression of such political party endorsement or recommendation limits the candidate's freedom of political expression.

Also, the above provision restricts the voters' right to know by withholding the flow of information to the voters as to whether a particular candidate is endorsed or recommended by a political party.

(B) A free exchange of various information concerning the candidates is indispensably required in order for the citizens to properly exercise their right to vote as the bearers of the sovereignty. Therefore, it is a matter of course that the freedom of expression of Article 21 of the Constitution should be protected to a maximum degree. That is, a candidate should be able to inform the voters of his or her political identity including his or her political views and ideologies, and the voters should be able to access various information concerning the candidate (*See* 8-1 KCCR 289, 305, 96Hun-Ma9, etc., March 28, 1996). Put it differently, as a matter of principle, in an election, the freedom of political expression should be protected to a

maximum degree, to the extent that it does not harm fairness of the election, and the principle of proportionality and the least restrictive means derived from Article 37(2) of the Constitution should be maintained in inevitably limiting such freedom for the sake of the fairness of the election (*See* 6-2 KCCR 15, 29, 93Hun-Ka4 and others, July 29, 1994).

In light of the legislative purpose of Article 84 of the Public Officials Election Act, there is no room for any denial of legitimacy as to the guarantee of decentralization of powers and regional autonomy itself, but a reasonable suspicion exists as to the specific legislative purpose of eliminating the political party's influence and inducing votes based on the qualifications of individual candidates in an election to an autonomous local council for the sake of the above stated purpose. The choice of whether to vote for a political party or to vote based on the judgment of particular candidates facing an election ultimately lies with the citizens as the bearer of the sovereignty, and it is not desirable in light of the principles of democracy that the legislators replace for their own or interfere with such choice of the citizens as the guardians of the people through legislation.

In addition, it is highly doubtful that the regulations under Article 84 of the Public Officials Election Act would have any effect in achieving the legislative purpose of securing the decentralization of powers and the regional autonomy. That is, the causation is much too attenuated between the voters' knowledge of the political party endorsement or recommendation of a candidate and the hindrance upon the decentralization of powers and the regional autonomy. On the other hand, the proviso of the above provision leaves open a detour for the voters to find out about the political party's endorsement or recommendation of a candidate by allowing the candidate to state his or her present or past political party membership and affiliation, and, there is no means to regulate such conducts as the candidate's express statement in support of a particular political party, the political party's express statement in support of a candidate on its own initiative, or the candidate's political and legislative activities for the political party of his or her membership and affiliation after being elected. Under such legal circumstances as above, it is highly uncertain as well whether a mere prohibition of the candidate's informing the voters of the political party endorsement or recommendation could effectively eliminate the influence of the political party. Therefore, the appropriateness as a means of the above provision can hardly be affirmed.

Furthermore, the above provision does not limit its prohibition to specific means or method of expression with a higher pervasive effect such as a large-size wall banner, a printed election bulletin, a

small-size publication, or a hanging banner; instead, the above provision outright prohibits the conduct of expression entirely. Therefore, there is room to deem that the above provision fails to satisfy the requirement of the least restrictive means when limiting basic rights.

Most of all, it cannot be denied that Article 84 of the Public Officials Election Act encompasses multiple problems in light of the balancing between and among the conflicting legal interests. First, as reviewed previously, the above provision's contribution to the legislative purpose of realizing the original goal of local self-government is either highly uncertain or immaterial. Also, although the above provision seems to have been designed out of consideration of the operation of political parties excessively centered towards the parties' headquarters and of the regional structure and balance of the nation, it still cannot be discerned that the elimination of the influence of the political parties will contribute to the development of local self-government. The local self-government not only functions to implement a mere neighborhood administration, but also to form politics in autonomously formulating various policies in the pertinent region concerning the allocation of values and resources within the district. In relation to such political formulating function, the political party may assume positive functions of, for example, regimenting public opinions, unearthing human resources, connecting the center and the regional district, and implementing politics of responsibility. This very aspect probably explains why a prevailing majority of those advanced democratic nations with a long tradition of local self-government such as the United Kingdom, France, Germany, and Japan allow the participation of the political parties in the local elections. On the other hand, the negative effects derived from the participation of the political parties in the local elections rather result from the insufficient decentralization or democratization within the political parties. Yet, the participation of the political party in the local elections may promote the decentralization and the democratization of the political party by providing qualified human resources from local areas for the political party and activating the local organization of the political party. Further yet, in light of the tendency of the political environment in the nation toward rapid developmental changes exemplified by the relatively lessened regionalism, the entry of a reform party into institutional politics, the adoption of the party-enlisted proportional representation system of one-person two-votes, and the upward bottom-to-top nomination of the party candidates by way of the poll-based competitive nomination, it is predicted that the loss from the elimination of the political parties will outweigh the benefits therefrom in the future. Therefore, it is not desirable from the perspective of the development of the local self-government to adopt an *ad hoc* solution of eliminating the political parties thereby blocking the

positive functions as well as the negative functions of the participation of the political parties.

On the other hand, the restriction upon the basic rights caused by the above provision is conspicuous. That is, as the above provision prohibits any and all expression of the party endorsement or recommendation entirely, a candidate should remain silent even toward the voters who specifically inquire into the information as to the political party endorsement or recommendation. An imprisonment for two years or less or a fine of or under ₩4,000,000 may be imposed for violation of the above provision (Article 256(1) of the Public Officials Election Act), and, further, an imposition of an imprisonment or a fine of or under ₩1,000,000 nullifies the election itself (Article 264 of the Public Officials Election Act). However, in light of the fact that most of the candidates for election to an the autonomous local council are aspiring prospective politicians wishing to enter the politics through the political party, the outright ban on the expression of political party endorsement or recommendation and the various ensuing disadvantages are undeniably and excessively severe.

In addition, various regulations that are intended to guarantee fairness of the election such as the limitation of the electoral campaign period for a local council election to fourteen(14) days (Article 33(1)(iii) of the Public Officials Election Act), the prohibition of the electoral campaign prior to the designated election campaign period (Articles 59 and 254(2) and (3) of the Public Officials Election Act), the prohibition of the house-to-house solicitation and visit (Articles 106(1) and (3) and 255(1)(xvii) of the Public Officials Election Act), and the restriction on the election campaign through printed or painted materials (Articles 64 through 66 and 255(2)(i) of the Public Officials Election Act), cut down the opportunities of the voters to actually contact the candidates for an election of the autonomous local council members. Further, the voters have much difficulty analyzing and assessing the qualifications and abilities of the individual candidates, as the so-called four local elections all simultaneously take place. Thus, practically, the information as to the political party's endorsement or recommendation of a particular candidate inevitably serves as an important factor to refer to as the voters exercise their voting right. The prohibition of the political party's endorsement or recommendation all together, notwithstanding the above, may mandate a blind vote while the voters are deprived of the information as to who is who and which candidate has which political tendencies, or may even have the voters give up their votes entirely. This result, from the voters' perspective, may significantly impede the voters' right to know demanded for an informed vote fully aware of the

precise political identity of the candidates.

Considering the above factors in the entirety, the provision on review here conspicuously lacks a balance between the conflicting legal interests, as there is no reasonable proportionate relations between the benefit of the public interest resulting from the prohibition of the political party endorsement or recommendation and the loss therefrom.

(C) In addition to the above, Article 84 of the Public Officials Election Act is problematic also in light of the rule of clarity, whereas the so-called rule of clarity has a specifically significant meaning in the legislation that regulates the freedom of expression (*See* 10-1 KCCR 327, 342, 95Hun-Ka16, April 30, 1998). That is, where the proviso of Article 84 of the Public Officials Election Act permits the statement of the candidate's present or past political party membership or affiliation, such statement of present or past political party membership or affiliation is conventionally made as a means to express the political party's endorsement or recommendation. Actually, in many cases, the central office of a political party practically nominates a candidate by choosing a candidate for the autonomous local council member election through, for example, an internal competition in the relevant district and then giving such candidate a uniform title or office of the political party such as the 'chair of the local self-government committee' for the pertinent autonomous local administrative unit. Where there is a so-called 'internal nomination' by the above method, whether the act underlying such office or title should be deemed as a mere statement of the candidate's political party membership or activities or as an expression of the political party endorsement or recommendation is subject to disputes. Here, neither one may serve as a satisfying answer because regarding such act as a mere statement of present or past political party membership and activities will eviscerate the purpose of the main provision of Article 84, whereas regarding such act as an expression of party endorsement or recommendation will ignore the purpose of the proviso of Article 84, of the Public Officials Election Act. This may explicate the contradicting decisions that, whereas the lower court found the defendant not guilty by deeming such act as a statement of the present or past political party membership or activities, the Supreme Court found the defendant guilty by deeming such act as an expression of political party endorsement or recommendation (*See* Supreme Court Decision 98Do3648 delivered on January 15, 1999 (Gong 1999(Vol.I), 326); Supreme Court Decision 2000Do734 delivered on May 30, 2000 (Gong 2000, 1584), etc.).

Likewise, Article 84 of the Public Official Election Act, due to its main provision and proviso with overlapping areas of regulation, causes unpredictability on the part of the candidates in the process

of election for the members of the autonomous local council as to how much they are allowed to express the information concerning the political party of their membership and affiliation in their electoral campaign process and even provides an excuse for the arbitrary exercise of the state's authority to penalize particular conduct in violation of the rule of clarity.

(D) Therefore, Article 84 of the Public Official Election Act excessively infringes upon the freedom of political expression on the part of the candidates in violation of the principle of proportionality, for an uncertain legislative purpose, in a method that lacks both efficiency and clarity.

(2) Whether Article 84 violates the principle of equality

The principle of equality prohibits the legislators from both arbitrarily treating essentially identical matters differently and arbitrarily treating essentially different matters identically. Therefore, the legislators impede the right to equality should the legislators treat two of the factual relations differently where there is no difference that may justify a different treatment between the two factual relations under comparison. However, when two of the factual relations under comparison are not completely identical in every aspect but identical only in certain aspects, one of the issues is which elements will serve as determinative factors in judging whether or not such of two factual relations under comparison will be deemed as legally identical or not. A judgment upon whether or not two of the factual relations are essentially identical normally depends on the meaning and the purpose of the relevant provision (*See* 8-2 KCCR 680, 701, 96Hun-Ka18, December 26, 1996).

In the instant case, among four different types of local elections, Article 84 singles out the election of the autonomous local council members and prohibits only the candidates for such elections from expressly stating the party endorsement or recommendation. However, if the meaning and the purpose of the above provision is to establish decentralization of powers and regional autonomy by eliminating the influence of the political parties and promoting an election based on the qualifications of the individual candidates, the same may commonly be applicable to the elections for the members of the regional local legislature, for the head of the regional local government, and the head of the autonomous local government, and not only to the election for the members of the autonomous local legislatures or councils. Therefore, the election of the autonomous local council members and the rest of the three other local elections should be deemed as legally identical factual relations.

Consideration of any fundamental differences between the election of the members of autonomous local councils and the rest of the local elections fails to find any ground to treat these elections differently. First, between the regional local government and the autonomous local government, there is no ground for treating these two legally differently, as the only difference between these two is they belong to different kinds of local self-government units and there is no essential difference in the self-governing function of decentralization.

Furthermore, there is no reasonable ground for eliminating the influence of the political parties in the case of the election of the autonomous local council members as opposed to the election of the head of the autonomous local government. Rather, should any influence of the political parties be removed from various institutions of autonomous local government, it should be the head of the autonomous local government who is in charge of executive affairs, rather than the autonomous local council, because the chief executive officer of the autonomous local government is in a position to direct and supervise most of the public officials belonging to the same autonomous local government, to compile and implement the budget, and to pursue and execute regional businesses and current matters considerably affecting national level elections such as the presidential election or the general election of the members of the National Assembly. The fact that various injustices actually occur relating to the election of the head of the local government such as donations for the party's nomination reveals this aspect. Also, in light of the fundamental ideas of local self-government of the realization of checks and balances at the local level, it is not reasonable to permit a political-party recommended candidate in the election for the head in the autonomous local government and to not permit a candidate's express statement of political party endorsement or recommendation in the election to an autonomous local council.

Then, Article 84 of the Public Officials Election Act is in violation of the principle of equality as this provision singles out and disfavors candidates for election to the autonomous local councils compared with the candidates in other local elections with no reasonable ground for such different treatment.

(3) Sub-conclusion

The "candidate for election to an autonomous *Ku/Shi/Kun* council" part of Article 84 of the Public Officials Election Act is unconstitutional, as such part infringes upon such candidate's freedom of political expression and violates the principle of equality.

5. Conclusion

Therefore, it is so decided and ordered, that the request for constitutional review of Article 47(1) of the Public Officials Election Act is dismissed and that the "candidate for election to an autonomous *Ku/Shi/Kun* council" part of Article 84 of the Public Officials Election Act is hereby declared unconstitutional.

The previous decision of the Constitutional Court, 99Hun-Ba28, November 25, 1999, which held that the "candidate for election to an autonomous *Ku/Shi/Kun* council" part of Article 84 of the Public Officials Election Act was not unconstitutional, is hereby modified to the extent that such previous decision is inconsistent with the holding of the instant case.

The holding of the instant case is a unanimous decision by all of the participating Justices, with the exception of the dissenting opinion of Justices Han Dae-hyun, Ha Kyung-chull, and Kim Kyung-il indicated below in Paragraph 6.

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

In a previous case of 99Hun-Ba28, November 25, 1999, the Constitutional Court held that the "candidate for election to an autonomous *Ku/Shi/Kun* council" part of Article 84 of the Public Officials Election Act was not unconstitutional; the summary of the decision therein is as follows:

「This provision prohibits the express statement of the political party endorsement or recommendation solely by the candidate for election to an autonomous local council among all of the elections regulated by the law. The question of enacting the above content falls within the boundary of legislative discretion drawn by contemplating the entirety of the factors including the Constitution's institutional guarantee of the local self-government and the perception of the citizens toward the nation's political culture and local self-government. Such legislative formation should not be subject to a holding of unconstitutionality, in its very nature, unless there is an abuse of discretion deviating from its limits.

Furthermore, in determining whether or not this provision exceeded the limits of legislative formation, the reality of the local self-government system and its special nature should first be understood as a precondition of such determination.

The constitutional guarantee of the local self-government system

can be epitomized as the realization of self-government by the residents as the bearers of the sovereignty in that particular region arising out of the fundamental principle of people's sovereignty. Thus, it is constitutionally requested that the very core of the essential content of the local self-government should be protected against the intrusion by the central government including its legislative activities. Harmony is crucial in the vertical separation of powers between the national and the local governments, and under no circumstances may any impairment by the national government or by legislation of the essence of the local self-government be permitted in the process of promoting such harmony.

Particularly, we should take into consideration the political reality of the nation that has not been able to overcome the problem of regionalism, the undemocratic nature of the political party administration, the electoral climate dominated by the regional relations, blood ties, and school connections, and, further, the lack of experience of local self-government. Should we permit the participation of the candidates recommended by a particular political party in the election for the members of the autonomous local council as in the rest of elections for public officials, not considering the above factors, the political party will directly and indirectly influence the political activities of the elected candidates as well as the outcome of the election for such particular candidate. This means that the decision of an autonomous local council that should autonomously operate to reflect the particular circumstances of the region will change subject to the decisions of the political parties. When a political party's decisions determine an autonomous local council's move, such autonomous local council has already lost its original purpose and function except for its name alone.

Also, should we permit the participation in the election of the autonomous council members of the candidates recommended by the political party without any restrictions, the candidates' party membership or the policy directions in line with the political party will serve as a more important factor in the voting decision rather than the abilities and the qualifications of the individual candidates. However, as an autonomous local council is a deliberative institution for the sake of independently resolving the issues concerning the economy, the society, and the culture of the particular region rather than those issues at the national level, constituting the autonomous local council with those individuals equipped with ability and professional expertise required for the particular region as much as possible than with those recommended by the political parties colored by the national politics of political party's policy directives at the national level conforms more to the essence of the local self-government pursuing the sepa-

ration and the decentralization of powers.

We hereby agree with the importance of the purpose of this provision in that this provision is part of legislation indispensable to the realization of undiluted local self-government that is suitable for the reality of the particular region unaffected by the political party's influence upon the formation and the activities of the autonomous local council. Prohibiting the candidate for election to an autonomous local council from expressly stating the political party's endorsement or recommendation is the necessary and least restrictive means that is both appropriate and effective adopted to achieve such legislative purpose. Although this provision prohibits the candidates from directly providing voters with information concerning the political ideologies they seek or the political party of their membership thereby restricting the voters' opportunity to obtain such information, this provision leaves room for the candidates to at least indirectly state and disclose their political ideologies and the political party membership by way of the statement of the candidates' present or past political party membership or related activities (the proviso of Article 84 of the Public Officials Election Act), thereby satisfying the principle of the least restrictive means. The advantage of the institutional guarantee of the local self-government through prohibitions on the candidates' expression of the political party endorsement or recommendation outweighs any loss from the infringement upon the candidates' right to serve in the public office and the freedom of electoral campaign, therefore the provision on review also satisfies the required balance between two conflicting legal interests. Therefore, this provision is not in violation of the principle of the prohibition against excessive legislation, and is thus not unconstitutionally infringe upon the petitioner's right to serve in public office (the right to be elected) or freedom of electoral campaign.

This provision that treats the candidates for election to an autonomous local council differently in the political area of life compared with the rest of the elections to elect public officials by prohibiting the former from expressly stating the political party endorsement or recommendation is indispensable to the legislative purpose of institutional guarantee of the local self-government pursued under the Constitution. Also, as such, this provision is not in violation of the principle of equality as it adopts the necessary, least restrictive, and inevitable means to achieve the legislative purpose.』

We respectfully disagree with the opinion of the Court as we believe that the holding of the above 99Hun-Ba28 decision remains valid and appropriate and that there has been neither any change in circumstances nor necessity to demand a different conclusion.

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

---

Aftermath of the Case[2)]

The Constitutional Court Act provides that, should a provision imposing criminal punishment be held unconstitutional, such provision shall lose its effect retroactively, and allows a request for retrial of the final judgment of conviction pursuant to such provision. As of March 31, 2004, there have been eighteen(18) requests for retrial, wherein relief is sought and obtained for those criminally punished in the past on the ground of expressly stating the political party endorsement or recommendation as the candidates for election to an autonomous local council.

2) Not part of the official opinion of the Court. (translator's note)

2. *Fixed-Term Employment of University Faculty Members*

(15-1 KCCR 176, 2000Hun-Ba26, February 27, 2003)

Contents of the Decision

1. The importance of education and the meaning of Article 31(6) of the Constitution mandating that the status of teachers shall be determined by statute.
2. Whether Article 53-2(3) of the former Private School Act (Amended by Act No. 4226 on April 7, 1990, Prior to Amendment by Act No. 5274 on January 13, 1997; hereinafter referred to as the 'provision at issue in this case') that permitted the employment of a faculty member at a private university for a fixed term pursuant to the bylaws of such university educational foundation is in violation of the principle of statutory status of the teachers (affirmative).
3. Decision of nonconformity to the Constitution, on the ground that a holding of simple unconstitutionality of the provision at issue in this case would be tantamount to a decision holding the fixed-term employment itself unconstitutional.

Summary of the Decision

1. Education is a fundamental means to realize the culture state sought by the Constitution, as it allows individuals to develop individuality in every field of life through awakening of the individual potentials, lays the foundation for the political culture for an effective functioning of democracy by fostering the qualification of the constituents as democratic citizens, and serves as a forum to transmit the outcome and achievement of academic research. In light of the important functions as such assumed by education, the Constitution mandates under Article 31(6) that fundamental matters pertaining to the educational system including in-school and lifelong education, administration, finance, and the status of teachers be determined by statute. Therefore, fundamental matters pertaining to the status of teachers which should be determined by the legislators in the form of a statute include matters pertaining to the minimum obligation to protect so that the status of a teacher may not be unjustly deprived.

2. A. The provision at issue in this case includes no directions at all as to whether a teacher is entitled to be reemployed upon completion of a fixed employment term as long as there is no signif-

icant defect or cause, as to the standard or requirement to exclude such teacher from reemployment, or as to the procedure for a prior notice on the ground of not extending further employment. The provision at issue in this case is also silent with respect to the procedure to be adopted should a relief be sought against an unjust rejection of reemployment. Therefore, the provision at issue in this case encompasses much room for abuse and misuse to remove a teacher critical of the private educational institution or for other subjective purposes of someone with the authority to make employment decisions, deviating from the original legislative purpose of fixed-term renewable employment of preventing the faculty from being professionally unproductive that might result from tenure protection, promoting the research atmosphere, and improving the quality of the college education. First, although a decision pertaining to the renewal of employment should be subject to the faculty personnel committee as an important matter of personnel decision, in many cases such decisions were made without any faculty personnel committee review at all or with only *pro forma* procedures, and, in some cases, a renewal of employment at the end of the fixed employment term was rejected by the final decisionmaker with no specific reason despite the faculty personnel committee's recommendation or approval of renewal. Second, as the provision at issue in this case is silent as to the grounds for rejecting renewal or the procedures for relief, there is no countermeasure to relieve a victimized faculty member should a private university reject to renew employment under uncertain standards open to arbitrary interferences without providing in its bylaws any relatively objective standards such as the research product or lecturing capacity as the grounds for denial of renewal. Third, in light of the experience of human history that absolute and unfettered discretion inevitably causes abuse thereof, providing a means of relief to protect university faculty members from an arbitrary denial of renewal is a minimum obligation on the part of the state. That is, informing the grounds on the part of the decisionmaker for not renewing the employment contract for its faculty member and providing an opportunity for such faculty member to explain as to such grounds is a minimum requirement of due process. Fourth, setting forth grounds for denial of renewal under objective standards and providing an opportunity to state his or her position and challenge the result of the review for a faculty member whose renewal is rejected in order to eliminate arbitrary review by someone with authority to make employment decisions is not excessively burdensome on the part of the decisionmaker; further, providing a relief procedure to challenge the lawfulness of a decision not to renew in no way hinders the achievement of the legislative purpose sought under the fixed-term employment of university faculty members.

B. As reviewed above, in light of the important functions assumed by universities in modern society and the request for minimum protection against an unjust deprivation of the status of university faculty members, the provision at issue in this case is undeniably in violation of the principle of statutory status of the teachers of Article 31(6) of the Constitution, as this provision lacks any objective standard applicable to a decision to not renew the employment, any opportunity to be heard on the part of a teacher whose employment is not being renewed, or a prior notice of the decision to not renew the employment, and, further lacks any institutional device to challenge a decision to not renew.

3. The unconstitutionality of the provision at issue in this case does not lie in the fixed-term employment of faculty members itself. Instead, the unconstitutionality of the provision at issue in this case lies in completely blocking a way for a faculty member whose employment is not renewed to seek any relief therefrom, by failing to provide any regulations as to the ground for a decision to not renew, relief procedure prior to a final decision to not renew, or relief procedure to challenge an unjust denial to renew. Here, however, a holding of simple unconstitutionality of the provision at issue in this case would be tantamount to a decision holding that the fixed-term employment of faculty members itself is unconstitutional. Therefore, we hereby issue a decision of nonconformity of the provision at issue in this case to the Constitution, instead of a decision of simple unconstitutionality. The legislators should, with all due deliberate speed, eliminate the unconstitutionality of the provision at issue in this case, by revising the provision to include such procedures available both prior to and subsequent to a decision to not renew the employment of a faculty member at the conclusion of the original fixed-term employment under this provision and a relief procedure to challenge such decision to not renew.

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

Article 31(6) of the Constitution mandates that the status of teachers be determined and regulated by statute, not only to protect the rights and interests of the teachers or to protect the teachers against unjust infringement thereupon by governmental powers, but also to effectively guarantee the citizens' basic right to education. Therefore, the subject matter of the statutes enacted based on Article 31(6) of the Constitution may concern not only the rights and interests of teachers including the guarantee of the status and the economic and social postures of the teachers, but also the obligation of teachers such as

a prohibition of conduct potentially impeding upon the citizens' right to education. Furthermore, the statutes may also concern the limitation of the basic rights of the teachers. Thus, pursuant to the provision at issue in this case, the education foundation of private universities, in recruiting faculty members, may either adopt a tenure system with a guarantee of employment through retirement, or adopt a fixed-term employment mechanism. When a private university adopts a fixed-term employment system, it may further freely choose a mechanism most suitable for itself on its own judgment among various employment systems, such as (i) a fixed-term employment with an automatic renewal at the successful completion of the original term, and (ii) a fixed-term employment where the employment relationship automatically closes at the end of the original term and a renewal of the employment is at the sole discretion of the decisionmaker. The legislative purpose of this provision is sufficiently agreeable as the above mechanism is a system designed to maximally guarantee the independence of education at each private university and the autonomy of the private university upon consideration of the particularities of private universities compared with national or public universities. Therefore, although the prior and subsequent procedures argued for by the majority of the Court are understandably to further protect the status of the teachers at private universities, lack of such devices alone may not render the provision at issue in this case unconforming to the Constitution for impairing the essence of the principle of the statutory status of teachers.

Parties

Complainant

Yoon Byung-man
Counsel of record: Chun Young-ha and 1 other

Original Case

Supreme Court, 99Da41398, wages, etc.

Holding

Article 53-2(3) of the former Private School Act (Amended by Act No. 4226 on April 7, 1990, Prior to Amendment by Act No. 5274 on January 13, 1997) does not conform to the Constitution.

Reasoning

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

A. Overview of the Case

(1) The complainant was employed as a faculty member by Ajou University operated by an educational foundation of Daewoo in its division of business administration for a ten-year term from March 1, 1983 to February 28, 1993. Subsequently, the complainant was suspended from the position on March 1, 1984, and then was discharged from the position on October 31, 1984 by the administration. Upon discharge, the complainant filed a lawsuit against the above educational foundation and obtained a judgment partly in his favor to the effect that the 'Daewoo Educational Foundation should pay to the complainant in the amount of the wages for the period between March 1, 1984 and February 28, 1993 until the petitioner's reinstatement,' which judgment was confirmed by the Supreme Court in 92Da30801 issued on July 29, 1994. However, as the educational foundation did not reinstate the complainant, the reinstatement of the status became no longer possible upon the completion of the original employment term.

(2) Subsequently, the complainant filed a lawsuit titled 97GaHab2514 in the Suwon District Court against the educational foundation, seeking the payment of wages or damages in the comparable amount and the retirement payment or the damages in the comparable amount, or the damages for emotional distress, on the ground of invalid discharge of his employment and unlawful failure to reinstate him in the original position. While his appeal was pending at the Supreme Court(99Da41398), the complainant requested the constitutional review of Article 53-2(3) of the former Private School Act (Amended by Act No. 4226 on April 7, 1990, Prior to Amendment by Act No. 5274 on January 13, 1997; hereinafter referred to as the 'provision at issue in this case'). The Supreme Court rejected the complainant's appeal on the merits on February 11, 2000 and also rejected the above request for constitutional review (2000Kagi18). The complainant thereupon filed this constitutional complaint with the Constitutional Court on March 14, 2000, pursuant to Article 68(2) of the Constitutional Court Act.

B. Subject Matter of Review

(1) The content of the provision at issue in this case, which is the subject matter of review, is as follows:

Article 53-2 of *the former Private School Act* (Appointment and Dismissal of Teachers Other Than Heads of Schools)

(1)-(2) [omitted]

(3) Faculty members of college educational institutions may be employed for a fixed term pursuant to the bylaws of the respective educational foundations.

(2) The provision at issue in this case has subsequently been amended as follows:

Article 53-2(3) of *the former Private School Act (Amended by Act No. 5274 on January 13, 1997)* (Appointment and Dismissal of Teachers Other Than Heads of Schools)

(1)-(2) [omitted]

(3) Faculty members of college educational institutions may be employed for a fixed term pursuant to the bylaws of the respective educational foundations. In this case, the provisions concerning the term of office applying to faculty members of national and public college educational institutions shall apply *mutatis mutandis*.

Article 53-2 of *the Private School Act (Amended by Act No. 6004 on August 31, 1999)* (Appointment and Dismissal of Teachers Other Than Heads of Schools)

(1)-(2) [omitted]

(3) Faculty members of college educational institutions may be employed by fixing contract terms such as term of office, salary, conditions of service, work and merit agreement on such terms and conditions as the bylaws of the respective educational foundations concerned may determine. In this case, with respect to the term of office, the provisions concerning the term of office applying to faculty members of national and public college educational institutions shall apply *mutatis mutandis*.

(4) Where the term of office for faculty members employed pursuant to paragraph (3) expires, the person who has the power to appoint and dismiss shall determine whether to reappoint such faculty members after deliberation by the faculty personnel committee.

Addenda (1) (Enforcement Date)

This Act shall enter into force on the date of its promulgation: Provided, That the amendments to Articles 21(2) and (4) and 53-4 shall take effect on March 1, 2000 and the amendments to Article 53-2(3) shall take effect on January 1, 2002.

Addenda (2) (Transitional Measures on Contractual Appointment)

Faculty members appointed for a specified period pursuant to the former provisions shall, notwithstanding the amendments to Article 53-2(3), be governed by the former provisions until their terms of appointment expire.

2. Grounds for the Constitutional Complaint, Grounds for Rejecting the Request for Constitutional Review by the Supreme Court and Opinions of the Related Parties

A. Summary of the Grounds for the Constitutional Complaint

As Article 31(6) of the Constitution mandates that the fundamental matters pertaining to the status of teachers be determined and regulated by statute, once a fixed-term employment system is adopted for the employment of university faculty members, the statute should also provide for such matters concerning the obligation to review for renewal, the standard applicable to a decision denying renewal, and the relief procedure available to a faculty member whose employment is not renewed. However, the provision at issue in this case does not provide for any of such matters that are fundamental to the status of teachers and is thereby in violation of the principle of the statutory status of teachers mandated by Article 31(6) of the Constitution, and is thus unconstitutional, violating the right to equality, the academic freedom, the right to trial and judicial process, and the principle of statutory work conditions, protected by the Constitution under Articles 11, 22, 27(1) and 32(3), respectively.

B. Grounds for Rejecting the Request for Constitutional Review by the Supreme Court

The provision at issue in this case intends to permit a person with authority to make personnel decisions to determine whether or not to renew a contract of a faculty member upon completion of such faculty member's internal employment term upon reviewing the person's qualification as a faculty member. As such, the provision at issue in this case confirms the autonomy of the faculty personnel decisionmaker and does not regulate the research activities or methodologies of the faculty. Therefore, the provision at issue in this case is legitimate in its legislative purpose and within the limits of legislative discretion, and is thus not in violation of Article 22(1) or 31(6) of the Constitution.

The relationship concerning the status of a teacher at a private school is private in nature and is fundamentally different from that

of a teacher at a national or public university. Therefore, the provision at issue in this case does not violate the right to equality of Article 11 of the Constitution. Also, the general laws regulating labor relations cannot squarely apply to the employment relationship of a teacher because the content of the service that a teacher renders is education, whose primary beneficiaries are the students who in turn have the right to be educated. Therefore, the provision at issue in this case does not violate the principle of statutory work conditions stipulated in Article 32(3) of the Constitution.

C. Summary of the Opinion of the Minister of the Ministry of Education (as modified to the Ministry of Education and Human Resources Development pursuant to the Government Organization Act as revised by Act No. 6400 on January 29, 2001)

(1) A constitutional complaint pursuant to Article 68(2) of the Constitutional Court Act should be filed within fourteen(14) days of the rejection of the request for constitutional review. However, the constitutional complaint in the instant case at bar was filed on March 14, 2000, past fourteen(14) days by far of the Supreme Court's rejection on February 11, 2000, and is therefore procedurally improper and unjusticiable.

(2) Education at colleges and universities is different from education in elementary and middle schools, in that the former intends to seek profound academic theories and their application methodologies for the development of the nation and the human society and to cultivate personality and leadership, whereas the latter focuses on the transmission of the generally approved fundamental knowledge to the students. The authority to appoint and remove a faculty member at a private university is part of the unique authority of the educational foundation, as the relationship between a faculty member at a private university and the educational foundation is a contractual employment relationship under private law.

The academic freedom of college and university faculty should be discussed in relation to the guarantee of the right to learn of the students who are the consumers of education and to the university's public responsibility to perform sincere and substantial research. It is not appropriate to apply general labor relations law to faculty members as the employment relationship pertaining to faculty members is different from the employment relationships in general, due to the special position of the faculty to protect more than anything else the right to learn of the students who are the objects of education through

incessant research and greater expertise. Further, any legal dispute concerning the appointment and removal of faculty members at private universities may be readily resolved in a civil litigation. Therefore, the provision at issue in this case is not unconstitutional.

3. Review on the Legal Prerequisites

A constitutional complaint pursuant to Article 68(2) of the Constitutional Court Act should be filed within fourteen(14) days of the date of rejection of a request for constitutional review of the subject legal provision (Article 69(2) of the Constitutional Court Act). Here, the 'date of rejection' refers to the date on which the decision rejecting the request for constitutional review is served upon the requesting party, unless there have been extraordinary circumstances (1 KCCR 131, 134, 89Hun-Ma38, July 21, 1989). The 「certificate of delivery of mail」 by the Korea Post indicates that a certified copy of the Supreme Court's decision rejecting the above request for constitutional review was served upon the complainant on March 2, 2000. Therefore, the petitioner's constitutional complaint filed with the Constitutional Court on March 14, 2000 is timely and has satisfied the procedural requirement in this regard.

4. Review on the Merits

A. Legislative purpose and legislative history of the fixed-term employment system

(1) The provision at issue in this case provides that the " faculty members of college educational institutions may be employed for a fixed term pursuant to the bylaws of the respective educational foundations." This provision intends to allow employment of faculty members for collegiate educational institutions for a fixed term and to permit the educational foundation as a decisionmaker for personnel matters to determine whether or not to renew employment upon completion of the original employment term by reviewing the individual faculty member's qualifications and appropriateness as a teacher, in order to raise research productivity of the faculty, lift the research atmosphere, and improve the quality of the collegiate education at the same time (*See* the First Minutes of the Culture, Education, and Communication Committee of the 93rd National Assembly on July 4, 1975; 10-2 KCCR 116, 145, 96Hun-Ba33, etc., July 16, 1998). The Supreme Court, upon this matter, has interpreted that the decision of whether or not to renew employment of a faculty member upon completion of the original employment term ultimately belongs to the

unique discretion of the decisionmaker for personnel matters, as the education law requires highly professional knowledge, great teaching capabilities, and mature personality, thereby necessitating a decision based on various factors as above on whether or not to renew employment upon completion of an employment term (*See* Supreme Court Decision 96Da7069 delivered on June 27, 1997 (Gong 1997(Vol.II), 2315)).

(2) Article 9(3) of the Public Educational Officials Act enacted on July 23, 1975 by Act No. 2774 in the form of a National Assembly-initiated legislation under the 7th amended Constitution provided that "faculty members of college educational institutions (including teachers' colleges and junior colleges) shall be appointed for a specified period as follows: 1. Professors and Associate Professors: 6 to 10 years, 2. Assistant Professors and Full-time Lecturers: 2 to 3 years, 3. Assistant Lecturers: 1 year," thereby adopting a fixed-term employment system in recruiting faculty members at the national and public universities. As a transitional measure for the implementation of this system, those who were in the position as faculty at the national and public universities at that time were subjected to a renewal by the end of February of 1976. Also, a faculty renewal review committee was established, and the necessary matters concerning its organization, function, and operation were to be determined and regulated by presidential decree.

Article 53-2 of the Private School Act amended on July 23, 1975 by Act No. 2775 also provided that "faculty members of college educational institutions, depending on their respective positions, shall be employed for a fixed term not more than 10 years pursuant to the bylaws of the respective educational foundations," thereby requiring private colleges and universities to employ the faculty members through the fixed-term employment system. As a transitional measure, Article 2 of the addenda provided that "faculty members who are in office at colleges or universities (including teachers' colleges and junior colleges) at the time of the enforcement date of this Act shall be reappointed pursuant to the provisions of Article 53-2 on the last day of February 1976."

Subsequently, Article 53-2(2) of the Private School Act amended on February 28, 1981 by Act No. 3373 provided that "faculty members of college educational institutions, depending on their respective positions, shall be employed by a head of each institution for a fixed term not more than 10 years pursuant to the bylaws of the respective educational foundations," thereby providing the 'head of the private colleges or universities' to have the authority to make personnel decisions including appointment and removal of faculty members. Most recently, through revision by Act No. 4226 on April 7, 1990, the provision at issue in this case came into effect.

(3) Upon introduction of the fixed-term employment system, through the initial renewal process in February of 1976, 212 out of 4,260 individuals (4.97%) did not have their employment renewed within the national and public university system, and 104 out of 5,511 individuals (1.89%) did not have their employment renewed by private colleges and universities (additionally, 2.4% of the faculty members voluntarily resigned). Also, from 1986 through 1997, 116 individual faculty members (approximately 0.5%) failed to have their employment renewed; among them, 12 of them were in the national and public university system and 104 of them were in private colleges and universities, pursuant to the materials provided by the Ministry of Education. On the other hand, according to recent materials provided by the Korean Council for University Education and the Korean Council for College Education, in private colleges and universities, two(2) full professors, seventeen(17) associate professors, thirty-five(35) assistant professors, and forty-five(45) full-time lecturers failed to renew their employment, during the period of 2000 through 2002.

B. Employment of Faculty Members at Collegiate Educational Institutions Overseas

(1) In the United States, although various systems are utilized in employing and retaining collegiate faculty members, the norm is that the faculty is employed under an initial one(1)-year contract and then becomes tenured through retirement upon successful completion of a certain probationary period unless there is an extraordinary circumstance. Pursuant to the 1940 Statement of Principles on Academic Freedom and Tenure adopted in 1940 through a series of conferences between the Association of American Colleges and the American Association of University Professors, it is recommended that the probationary period may not exceed seven(7) years in aggregate, and, that, when a faculty member is not tenured upon completion of the probationary period, a minimum of one(1)-year notice be given to such individual prior to the completion of the probationary period.

(2) In the United Kingdom, all faculty members were employed on a tenure basis with a guarantee through retirement throughout the 1970s. However, the conservative administration led by Prime Minister Thatcher enacted the educational reform act in 1988, under which new faculty members are put on a three(3)-year probationary period and then become tenured through a strict renewal review. Under this system, approximately 90% of the faculty members become tenured. When a faculty member is not granted tenure, a notice is given three(3) months prior to discharge. In addition, concerning the requirements for faculty recruitment, promotion, and tenure, transparency

and fairness is secured under objective standards and procedures, pursuant to the rules adopted and affirmed through the agreement between the Association of University Teachers and the Committee of Vice-Chancellors and Principals.

(3) In Germany, most universities are national universities and, while a fixed-term employment system is adopted in employing the research assistants and private tutors of Privatdozents having intimately to do with the succession of academic traditions, once an individual gains the status of professorship, such individual obtains the status of a public official with a guarantee through retirement, thereby not being discharged out of position or transferred to other institutions against such individual's will.

(4) In France, an objective institution of the university review committee performs a review upon the research product of the candidates and the faculty members all together for both an initial recruitment and a promotion to the higher level. While a strict requirement and procedure is applied to the initial recruitment of faculty members, instead, France does not adopt a fixed-term employment system in employing and retaining faculty members. Thus, whereas the initial recruitment process for a faculty member is difficult to pass, once employed, all faculty members are tenured with the guarantee through retirement.

(5) In Japan, there is no provision concerning the retirement age applicable to the national or public university faculty members, and each university has its own rules concerning retirement age. For example, Tokyo University sets sixty(60) years of age as the retirement age. Also, although there is no provision concerning the method of employing faculty members in the Private School Act of Japan, most private colleges and universities guarantee the position of faculty through retirement.

C. Unconstitutionality of the provision at issue in this case

When a legal provision is alleged to violate various constitutional provisions or infringe upon various basic rights at the same time, the unconstitutionality of such legal provision should be assessed and reviewed beginning from the constitutional provision in the most intimate relationship to the subject matter of the case or the basic right the infringement upon which is the most egregious, considering the intention of the complainant who alleges such violation of the constitutional provisions or such infringement upon the basic rights and the objective motives of the legislators (*See* 10-1 KCCR 327,

337, 95Hun-Ka16, April 30, 1998; 14-1 KCCR 410, 426, 2001Hun-Ma614, April 25, 2002). In the instant case, the alleged unconstitutionality of the provision at issue in this case is in the most intimate relationship with the principle of the statutory status of the teachers, considering the relief sought and intended by the complainant and the legislative intent as previously reviewed. Therefore, we first review whether or not the provision at issue in this case violates the principle of the statutory status of the teachers.

(1) Education stimulates and develops one's potential, thereby having such individual extend his or her personality in each aspect of life. Especially in a modern society with highly specialized and developed industries, education functions as an indispensible prerequisite for each of the individuals in obtaining various abilities and qualifications required for vocational activities to independently meet life's demand. Therefore, a guarantee of an equal opportunity for education serves as an important means to realize a social state, in implementing substantive equality in vocational and economic lives. Also, education lays a foundation for the political culture demanded for a smooth operation of democracy by fostering the qualities of the constituents as democratic citizens, and is a fundamental means to realize a culture state that our Constitution pursues by functioning as the forum for the inheritance of academic achievements.

In light of such important functions that education assumes, the Constitution provides under Article 31 that all citizens shall have an equal right to receive education corresponding to their abilities (Section 1); that all citizens with children under their support shall be responsible at least for their elementary education and other education as provided by statute (Section 2); that the state is responsible for compulsory education that is free of charge and the promotion of education for life (Sections 3 and 5); that independence, expertise and political impartiality of education, and the autonomy of the institutions of higher learning shall be guaranteed (Section 4); and that fundamental matters pertaining to the educational system including in-school and lifelong education, administration, finance, and the status of teachers shall be determined by statute (Section 6).

(2) The specific content of Article 31(6) mandating that the "fundamental matters pertaining to the status of teachers shall be determined by statute," in relation to faculty members at colleges and universities, is as follows.

(A) Full-time 'faculty members' at colleges and universities are people who educate and guide students and do academic research or people who only carry out academic research at colleges and univer-

sities including industrial colleges, teachers' colleges, junior colleges, air and correspondence colleges, and technical colleges, and they are classified into professors, associate professors, assistant professors, and full-time lecturers (Article 9 of the Framework Act on Education; Articles 2, 14, and 15 of the Higher Education Act). Teachers or faculty members at private institutions for higher learning including colleges and universities, as well as those of the national and public universities are included in the definition of the teachers in Article 31(6) of the Constitution. The 'status' of teachers is an inclusive concept encompassing the social treatment they receive depending upon the perception toward the importance of their functions and the performance capabilities, or the work conditions, guarantee of the status, and compensation and other material benefits (3 KCCR 387, 417, 89Hun-Ka106, July 22, 1991).

(B) The 'fundamental matters' pertaining to the status of teachers should be interpreted to mean important matters necessary for the teachers' independent, professional, and neutral education in light of the intent of the Constitution particularly mandating a statutory status of teachers compared with those in other professions and the special nature of education which is the content of the service provided by teachers. Therefore, such fundamental matters mandated to be determined and regulated by statute include, *inter alia*, matters concerning a minimum obligation of protection against unjust deprivation of the status of teachers. Should the status as a teacher be subjected to arbitrary dispositions of governmental power or the founder or other makers of personnel decisions of private educational institutions, it may be difficult to exclude the influence of such decisionmakers from the teacher's education of the students. This may cause a result contrary to the constitutional principles of independence, expertise, and politically neutral education that education should be led and performed by educators and educational experts unhindered by outside political influence. This point has an even greater meaning for teachers or faculty members at institutions of higher education such as colleges and universities, as the main task of such higher education does not end with a mere delivery of generally accepted conventional knowledge or perceptions but extends further to seek new perceptions based upon a critical assessment thereof.

(C) The 'statute' within the meaning of the above constitutional provision is a statute under its formal definition legislated by the National Assembly endowed with democratic legitimacy as the representative of the people. The constitutional mandate that specifically the status of teachers as well as the educational system, as the human and material foundations of education respectively, be determined and regulated by statute legislated by the National Assembly indicates

the constitutional perception that matters concerning the status of teachers or educators have a significant meaning in accomplishing the unique mission of education, to the extent that such matters may not be left under the decisions of the executive branch or belong to the realm of private autonomy.

(D) In summary, in light of the spirit of the principle of statutory status of teachers as stated above, it is confirmed that fundamental matters pertaining to the status of teachers mandated to be determined and regulated by the legislators in the form of statute include such matters concerning the minimum obligation of protection against unjust deprivation of the status of teachers.

(3) Upon the issue of whether the provision at issue in this case satisfies the principle of statutory status of teachers with respect to the protection of the status of educators at institutions of higher education

(A) The provision at issue in this case permits a possibility to adopt a system under which a private university's educational foundation may employ a faculty member for a 'fixed term' pursuant to its by-laws, and such educational foundation may thus determine whether or not to renew employment of such faculty member upon completion of the initial employment term by reviewing the qualifications and appropriateness of the faculty member. Although a fixed-term employment system may provide relatively less protection of the status than a tenure system for university faculty members, the fixed-term employment system and the tenure system respectively have both merits and disadvantages, both in the nation's performing its obligation to promote science for the realization of a culture state and as a methodology to realize the right to be educated retained by the citizens (*See* 10-2 KCCR 116, 148, 96Hun-Ba33, etc., July 16, 1998). Therefore, as the legislators retain the discretion to choose between these two systems, the adoption by the legislators of a fixed-term system for the sake of securing the effectiveness of the citizens' right to be educated does not by and in itself render such choice unconstitutional. Yet, the provision at issue in this case does not provide any directions with respect to whether or not a faculty member is entitled to renewal upon completion of the initial employment term unless there is a material defect, the standard or requirement as to the exclusion from the renewal, a procedure to provide any prior notice of the ground for denial of renewal, or the relief procedure to challenge unjust denial of renewal.

(B) The provision at issue in this case, therefore, encompasses ample possibilities of misuse and abuse by providing a means to remove a faculty member who is critical of a private institution's educational

foundation or for personal and subjective purposes of the decisionmakers, deviating from the original legislative purpose of the fixed-term employment system of increasing productivity of the faculty, promoting the research environment, and improving the quality of the collegiate education.

First, a decision of renewal or denial thereof for a faculty member is an important matter concerning personnel matters and, therefore, such decision should be subjected to review by the faculty personnel committee. However, under the old law that did not include a provision as in the current Private School Act (Article 53-2(4)) obligating a decision as to renewal of a faculty member to be subjected to a faculty personnel committee upon completion of a fixed employment term (*See* Supreme Court Decision (full bench decision) 95JaeDa199 delivered on May 18, 2000 (Gong 2000(Vol.II), 1473)), there were many cases where there was no or only a *pro forma* review process at the faculty personnel committee, and there was even a case where the final decisionmaker denied to renew the employment relationship for no particular reason against the faculty personnel committee's recommendation to renew. This shows that the educational foundation has ample influence upon the composition of a faculty personnel committee as the forming of a faculty personnel committee itself is subjected to the regulations of the educational foundation's bylaws (Article 53-3(2) of the Private School Act) and that, under such circumstance, a faculty personnel committee cannot serve as a guard against an arbitrary operation of the fixed-term employment system.

Second, due to the silence of the provision at issue in this case with respect to the grounds for denial of renewal or relief procedure thereagainst, there is no alternative for substantively relieving a victimized faculty member, when the bylaw of a private collegiate institution denies to renew the employment relationship under an uncertain standard with ample room for arbitrary intrusion without setting forth any relatively objective standards for denial of renewal such as the research product or teaching capabilities of a faculty member. That is, Ministry of Education Appeal Commission for Teachers is of the position that a denial of renewal of faculty employment relationship may not be a subject matter for review other than a failure to abide by the employment term fixed under the bylaw of an educational foundation or the original employment contract (*See* Ministry of Education Appeal Commission for Teachers 94-203 Revocation of Denial of Employment Renewal Case, 96-94 Affirmation of Nullity of Expiration Notice for Employment Renewal Case, etc.). Also, the Supreme Court held that a faculty member of a private university employed under a fixed-term employment system pursuant to the provision at issue in this case automatically loses the status as a faculty

member upon completion of the original employment term regardless of any particular procedure such as a decision to deny renewal, as long as there is no execution of a renewal contract absent a provision within the bylaw or the personnel rules of an educational foundation guaranteeing a renewal, and that such faculty member whose employment relationship is not renewed does not have a standing to seek affirmation of nullity of a decision of non-renewal and notice thereof, as such decision and notice by the educational foundation toward the faculty member following the above automatic loss of the status merely functions to confirm and notify such automatic closure of the employment relationship upon completion of the original employment term and does not thereby cause any legal effect between the faculty member and the educational foundation (Supreme Court Decision 97Da3132 delivered on June 10, 1997 (Gong 1997(Vol.II), 2132).

Third, in light of the experience of human history that absolute and unfettered discretion is to be abused, it is a minimum obligation to protect on the part of the state to provide a relief procedure for the protection of university faculty members against an arbitrary denial of renewal of employment relationship. That is, it is the minimal requirement of due process to obligate a decisionmaker to explain why a particular faculty member is not being renewed and to provide such faculty member with an opportunity to be heard. Should a decision of denial of renewal be secretly made behind closed doors and should there be no notice thereof, there can be no device to check upon such arbitrary decisions.

Fourth, considering that there should be a reasonable ground for a decision not to renew a university faculty member's employment relationship and that there can be found no reason for the decisionmaker to fear disclosure of such ground as long as the ground is reasonable, it is not an excessive burden upon the decisionmaker to require an objective standard for denial of renewal and to provide a faculty member whose renewal is being denied with an opportunity to state his or her position and challenge the denial, in order to eliminate arbitrary judgment by a decisionmaker in the process of renewal review. Further, providing for a relief procedure to dispute the lawfulness of a decision of denial of renewal does not pose any hindrance upon the achievement of the legislative purpose sought by the fixed-term employment system as applicable to the university faculty members.

(C) As stated above, in many of other developed nations, no system of fixed-term employment or subsequent renewal is currently adopted, and, where they adopt a fixed-term employment system, they guarantee tenure through retirement above certain ranks in position. In the United Kingdom and the United States where contractual rela-

tionships widely apply even in public relations, although collegiate faculty members are recruited and retained under a fixed-term employment system, there are objective standards and procedures both to benefit from the merits of the fixed-term employment and to supplement the disadvantages thereof, through negotiations and agreements between the association of the faculty members and the association of the colleges and universities. Furthermore, once a probationary period is successfully completed, a tenure or retirement guarantee is provided by way of the guarantee of the status that is indispensible for the unfettered freedom of research and science.

When it is practically difficult to move to different universities in Korea, if faculty members are subject to continuous renewals through retirement, the faculty members cannot but become submissive to the decisionmakers in order to be renewed, as the possibility to move into a new profession reduces as the faculty members become older. In addition, uncertain standards for renewal decisions leave much room for a subjective judgment, and the lack of relief procedures both before and after the decision to unjustly not renew correspondingly and seriously threatens the independence required for freedom of research and science. This aspect becomes even more conspicuous assuming that the provision at issue in this case might be used as an excuse for permitting denial of renewal due to the expression of philosophical, political, or ideological beliefs of an individual faculty member.

(4) As reviewed above, in light of the important functions assumed by universities in modern society and the request for a minimum protection against an unjust deprivation of the status of university faculty members, the provision at issue in this case is undeniably in violation of the principle of statutory status of the teachers of Article 31(6) of the Constitution, as this provision lacks any objective standard applicable to a decision to not renew the employment, any opportunity to be heard on the part of a teacher whose employment is not being renewed, or a prior notice of the decision to not renew the employment, and, further lacks any institutional device to challenge a decision to not renew. Once it is held that the fixed-term employment system as provided under the provision at issue in this case is in violation of the principle of statutory status of the educators, we do not further review separately the violation of the right to equality, the academic freedom, the right to trial, and the requirement of statutory work conditions as alleged by the complainant that may possibly be caused as a result of the violation of the principle of statutory status of educators.

D. Decision of nonconformity to the Constitution

The unconstitutionality of the provision at issue in this case does not lie in the fixed-term employment of faculty members itself. Instead, the unconstitutionality of the provision at issue in this case lies in completely blocking a way for a faculty member whose employment is not renewed to seek any relief therefrom, by failing to provide any regulations as to the ground for a decision to not renew, relief procedure prior to a final decision to not renew, or relief procedure to challenge an unjust denial to renew. Here, however, a holding of simple unconstitutionality of the provision at issue in this case would be tantamount to a decision holding that the fixed-term employment of faculty members itself is unconstitutional. Therefore, we hereby issue a decision of nonconformity, instead of a decision of unconstitutionality.

As a decision of nonconformity of a specific legal provision to the Constitution creates an obligation to revise the law on the part of the legislators to remove the unconstitutional status of such legal provision by the earliest possible moment, the legislators should, with all due deliberate speed, eliminate the unconstitutionality of the provision at issue in this case, by revising the provision to include such procedures available both prior to and subsequent to a decision to not renew the employment of a faculty member at the conclusion of the initial fixed-term employment under this provision and a relief procedure to challenge such decision to not renew.

5. Conclusion

It is so determined and ordered as stated in the holding, as the provision at issue in this case does not conform, as reviewed above, to the Constitution. Therefore, the previous decision of the Court in 96Hun-Ba33 of July 16, 1998 and others wherein the Court held that the provision at issue in this case was not in violation of the Constitution is hereby modified pursuant to the holding of this case by the agreement of seven(7) Justices excluding Justices Han Dae-hyun and Ha Kyung-chull.

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

A. Article 31(6) providing that "fundamental matters pertaining to the educational system including in-school and lifelong education, administration, finance, and the status of teachers shall be determined

by statute" is interpreted to be based on the perception that it is appropriate to specifically form and change the educational system by the legislature as the representative of the public through a democratic method reflecting the particular social conditions and the special nature of education, for the education system including the status of educators by its nature should be formed and developed in harmony with the ideologies and morals of the national and social communities of the time. Therefore, the above constitutional provision mandates that the status of teachers be determined by statute, not only to protect the rights and interests of teachers or to protect teachers against unjust infringement thereupon by governmental powers, but also to effectively guarantee the citizens' basic right to education. Therefore, the subject matter of the statutes enacted based on Article 31(6) of the Constitution may concern not only the rights and interests of teachers including the guarantee of the status and the economic and social positions of teachers, but also the obligation of teachers such as a prohibition of conduct potentially impeding upon the citizens' right to education and, further yet, may also concern the limitation of the basic rights of teachers.

On the other hand, Article 31(4) of the Constitution provides that "independence, expertise and political neutrality of education, and the autonomy of the institutions of higher learning shall be guaranteed under the conditions as prescribed by statute," thereby guaranteeing the independence of education and the autonomy of the collegiate educational institutions. This is for the sufficient functioning of the collegiate institutions of the pursuit of the truth and the cultivation of the personality, by way of research and education by those belonging to such institutions free of restraints by eliminating interferences with such institutions from outside such as by the governmental power and having the constituents themselves operate such institutions. Independence of education or the autonomy of the collegiate institutions is indispensible as a sure method of guaranteeing the academic freedom protected under Article 22(1) of the Constitution and is a constitutional basic right guaranteed to such institutions of higher education of colleges and universities. The autonomy of colleges and universities not only means the autonomy in management and operation of the school facilities, but also means the autonomy in the content, method and object of the research and education, the composition of the curriculum, and the recruitment and admission of students. Specifically, such autonomy includes the autonomy concerning the matters relating to the appointment and removal of faculty members.

B. The tenure system with a guarantee of retirement as applicable to the college and university faculty members has the merit of securing independence and continuity required for academic research and ac-

tivities through the guarantee of status; at the same time, however, it has a problem of overinclusively protecting those who are inappropriate to assume the position of the college or university faculty by being academically unproductive and neglecting academic research and activities and other obligations as educators and also those who are solely interested in the areas outside the academic research and activities uniquely required for the position as college and university faculty. On the other hand, the fixed-term employment system has the merit of encouraging faculty members to incessantly perform academic research and activities by subjecting them to a renewal decision upon review at the completion of the initial employment term; instead, however, is vulnerable to the interference of a subjective bias of the decisionmaker possibly leading to renewal decisions and denials thereof unsupported by objectivity and fairness, which might harm independence and continuity of academic research and activities through insecurity of the status of faculty members. Therefore, the tenure system and the fixed-term employment system have their respective merits and disadvantages in terms of the nation's implementation of the obligation to promote science for the realization of a culture state or the realization of and the methodology for the right to education retained by the citizens, which in turn renders it difficult to judge which system is better or more desirable. A decision or choice concerning the above will thus be better to be left as a matter of legislative policy than to be resolved by the Constitutional Court.

C. When a private university adopts a fixed-term employment system pursuant to the provision at issue in this case, it may further freely choose a mechanism most suitable for itself on its own judgment among various employment systems, such as (i) a fixed-term employment with an automatic renewal at the successful completion of the original term, and (ii) a fixed-term employment where the employment relationship automatically closes at the end of the original term and a renewal of the employment is at the sole discretion of the decisionmaker. The legislative purpose of this provision is sufficiently agreeable as the above mechanism is a system designed to maximally guarantee the independence of education at each private university and the autonomy of the private university upon consideration of the particularities of private universities compared with national or public universities.

Therefore, although the prior and subsequent procedures argued for by the majority of the Court are understandably to further protect the status of teachers at private universities, lack of such devices alone may not render the provision at issue in this case unconforming to the Constitution for impairing the essence of the principle of the statutory status of educators. Rather, it invites concern that mandating

such devices might harm the independence of the private collegiate education or the autonomy of the private collegiate institutions.

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

Aftermath of the Case[1)]

Following this decision, the Ministry of Education and Human Resources carried out a project to revise the relevant legal provisions: various opinions of the interested parties were received, a public hearing to discuss matters to revise the law was held on October 27, 2003, and a statutory revision to reflect the decision of the Constitutional Court is currently under process as of November 27, 2003.

1) Not part of the official opinion of the Court. (translator's note)

3. *Disclosure of the Identity of Sex Offenders Convicted of Acquiring Sexual Favors from Minors in exchange for Monetary Compensation*

(15-1 KCCR 624, 2002Hun-Ka14, June 26, 2003)

Contents of the Decision

1. Whether Subdivision 1 of Article 20(2) of the Juvenile Sex Protection Act (hereinafter referred to as the "Act"), which mandates the disclosure of identity of sex offenders convicted for acquiring sexual favors from minors in exchange for monetary compensation,
   (i) violates the principle of double jeopardy (negative);
   (ii) lacks proportionality and violates the principle against excessive restriction (negative);
   (iii) violates the principle of equality (negative);
   (iv) infringes upon the right to trial by judge (negative); or
   (v) violates the principle of due process (negative).
2. Whether Article 20(5) of the Act, which delegates matters concerning the time, duration, and procedure of disclosure to be regulated by presidential decree, violates the principle against blanket delegation (negative).

Summary of the Decision

1. With respect to Subdivision 1 of Article 20(2) of the Act,

Opinion of Justices Yun Young-chul, Ha Kyung-chull, Kim Hyo-jong, and Kim Kyung-il that Subdivision 1 of Article 20(2) of the Act is constitutional

A. Whether the provision on review violates the principle of double jeopardy

The 'punishment' within the meaning of Article 13(1) of the Constitution is, in principle, the imposition of punishment as the exercise

of the state's authority to punish crime, and not all of the sanctions or prejudicial dispositions imposed by the state are included within the above definition of "punishment."

As Article 20(1) of the Act expressly states that the legislative purpose of the disclosure of the identity of convicted offenders under the Act is to "guide the public not to commit such crimes as acquiring sexual favors from minors in exchange for monetary payment," possible shame and dishonor may be followed on the part of the person whose identity is disclosed, but such shame and dishonor is merely incidental to the above legislative purpose and not a primary purpose. In addition, the identity and the underlying criminal conduct disclosed under the Act are part of conviction from a public trial and are therefore not new elements concerning the identity or privacy of the convicted defendant. Although disclosure for the sake of the public interest may incidentally incur shame, this cannot be deemed as a separate punishment in the nature of punishment of disgrace or indignity. Therefore, the disclosure of identity under the Act does not violate the principle of double jeopardy in Article 13 of the Constitution.

B. Whether the provision on review lacks proportionality and violates the principle against excessive restriction

The disclosure of identity under the Act is not to punish the convicted offender. Instead, it is adopted to increase awareness in order to protect the community against the existing danger of sexual offenses and for the self-control of the general public against the criminal impulse to sexually take advantage of minors. The objective of the 'protection of the sexual integrity of the minors' is one of the most important public interests in our community.

Considering, in comparison, the degree of the restriction upon the general right to personality and the right to privacy of sex offenders convicted for acquiring sexual favor in exchange for monetary payment, as Article 20(2) of the Act provides the "identity such as name, age, and vocation and the summary of the criminal conduct" to be disclosed, the disclosure here means that the state discloses, for the public's interest, certain parts of the public record of the decision of conviction rendered in a criminal proceeding that was a public procedure. Therefore, the public's knowledge of the identity and the criminal history of the convicted offenders, which was readily obtainable information in a public trial, does not manifestly infringe upon the right to personality or privacy of such convicted offenders.

In addition, a further restriction upon the basic rights of the convicted criminals compared with whose identity and criminal

conduct are disclosed unlike the general public is readily tolerable by the state's exercise of the authority to punish crimes. Even if the offenders convicted for acquiring sexual favors from minors in exchange for monetary compensation feel ashamed and are defamed by the disclosure of their identity and criminal conducts, the degree of protection therefor is duly different from that of the general public, therefore there is room for a further restriction upon such convicted offenders' right to personality and privacy as long as the restriction is not upon the essential part of such rights.

Therefore, as the degree of restriction upon the right to personality and privacy of the offenders convicted for acquiring sexual favors from minors in exchange for monetary compensation, is not greater than the request of public interest to protect the sexual integrity of minors, the disclosure of identity under Subdivision 1 of Article 20(2) does not infringe upon the right to personality and privacy of the convicted offenders concerned in violation of the principle of proportionality or the prohibition against excessive restriction.

C. Whether the provision on review violates the principle of equality

The meaning and the purpose of the legal provision setting forth the sexual offenses against minors subject to the disclosure of identity of the offender is to protect the minors against the harm caused by such conduct as acquiring sexual favors from minors in exchange for monetary compensation. In light of the above meaning and purpose, such sexual offenses against minors and other crimes in general cannot be manifestly deemed as 'essentially identical' to be compared. Further, there are no factors to conclude that the above standard for distinction is especially arbitrary.

Also, where certain offenders having committed other sexual crimes against minors are excluded from the disclosure under the Act, it seems that the difference in the degree of illegality of conduct is taken into account as such exclusion applies to the act of aiding and abetting, in nature, in terms of the object or the type of the act. Therefore, the law excluding certain offenders having committed other sexual crimes against minors from the disclosure of identity is not manifestly arbitrary or unreasonable.

Although the disclosure of identity accompanies a different treatment in the degree of restriction upon basic rights, such different treatment is not deemed to be discriminatory in terms of the proportionality between the legislative purpose and the means to achieve such purpose, and does not otherwise violate the right to equality.

D. Whether the provision on review infringes upon the right to a trial by court and judge

Although the requesting court avers that the disclosure of identity infringes upon the right to a trial by court and judge as the decision to disclosure identity is subject to the Commission on Youth Protection, the disclosure of identity is not, as discussed above, included in the definition of 'punishment.' Therefore, the disclosure of identity does not infringe upon the right to a trial by judge.

E. Whether the provision on review violates the principle of due process

Article 20(3) of the Act provides that the Commission on Youth Protection should, in determining the disclosure of identity, take into account the motive of the crime, the circumstances subsequent to the crime, and other factors. Article 20(5) of the Act provides that necessary matters concerning specific procedures of disclosure be determined and regulated by presidential decree. The inferior provisions, pursuant to the above legal provisions, provide convicted sex offenders whose identity is determined to be disclosed with an opportunity to state an opinion in writing by designating a time period of ten(10) days or longer, subject to an irrebuttable presumption that such person does not hold an opinion should no opinion be stated within such period, while the disclosure of identity is determined upon review should an opinion be stated.

The Commission on Youth Protection is an institution with some extent of independence and neutrality (*See* Articles 29 and 32, and other relevant provisions of the Youth Protection Act). There is a guaranteed opportunity to dispute the legality of the Commission on Youth Protection's decision to disclose identity by way of an administrative litigation. Also, any decision to disclose identity is made subsequent to sentencing upon conviction of a crime through a trial by judge.

Therefore, as the disclosure of identity under Subdivision 1 of Article 20(2) of the Act is performed pursuant to the formal procedure provided by the law and as the content of such procedure is also reasonable and justifiable, the above provision does not violate the principle of procedural due process.

Opinion of Justices Han Dae-hyun, Kim Young-il, Kwon Seong, Song In-jun, and Choo Sun-hoe that Subdivision 1 of Article 20(2) of the Act is unconstitutional

(1) Infringement upon the right to personality

(A) For an unhindered manifestation and realization of personality of an individual through societal activities, the right to self-determination upon such individual's social personality factors, that is, the right to determine for himself or herself upon various informative materials that can be crucial in defining his or her image in the eyes of others. The disclosure of identity under the Act in this case considerably infringes upon the right to personality of the convicted offenders by grossly restricting the right to self-determination upon such social personality factors.

(B) The disclosure of identity has a remarkably similar characteristic to that of a punishment of shame and indignity, to the extent that it may be compared to a 'Scarlet Letter of the modern times.' That is, the current identity disclosure mechanism insinuates a strong impression that those subject to the identity disclosure are treated as a means to prevent the crime through a public display rather than being respected as the holders of unique personality. This is in outright violation of the constitutional principle declaring that it is the obligation of the state to protect fundamental dignity and the value of every individual, even for a convicted criminal.

(C) In order to cure the evil practice of acquiring sexual favors from minors in exchange for monetary compensation, it is readily possible to utilize synthetically such various mechanisms as treating and effectively watching over the sex offenders, guiding the minors and implementing policies to improve the environment harmful to the minors, rather than monolithic punishment of criminal sentencing or identity disclosure. Rather, in light of the reality where the ratio of discovered incidents of acquiring sex from minors in exchange for monetary compensation against such incidents overall is extremely low, it seems that it is more desirable to focus on the above fundamental preventive measures. The state's employment of an abnormal means of identity disclosure that might significantly infringe upon the individuals' right to personality even before making an exhaustive effort of prevention is problematic also in terms of the principle of the least intrusive means.

(D) A criminal punishment is understood to be the very last means (the *'ultima ratio'*) of the state sanction as it causes significant restriction upon the individual's freedom and safety. It is an excessive abuse of the state's power to impose the disclosure of identity

that may be even severer than a punishment, where a punishment is already imposed and the disclosure of identity does not serve any purpose or assume any function distinct from that of a punishment. Furthermore, while the infringement upon the basic rights of the individual whose identity is disclosed is egregious, the effect on crime prevention from such disclosure of identity is minimal or uncertain. The identity disclosure under the Act, also in this respect, seriously lacks balance between the legal interests concerned.

(E) In summary, the disclosure of identity of offenders convicted of acquiring sex from minors in exchange for monetary compensation excessively infringes upon the right to personality of such individuals.

(2) Violation of the principle of equality

Subdivision 1 of Article 20(2) of the Act restricts the right to self-determination upon social personality factors of the offenders convicted of acquiring sex from minors in exchange for monetary compensation, on the ground of the prevention of crime. However, although the Act does not permit such restriction through identity disclosure upon other criminals in general or even certain groups of sex offenders against the minor (hereinafter referred to as the 'other convicted criminals in general'), the crime prevention rationale should be equally applicable to the case of other convicted criminals in general. Therefore, whether or not the distinction between the above two groups can be justified requires a constitutional explanation. Here, the disclosure of the identity of criminals convicted for purchasing sex from minors is not due to a more egregious nature of the crime, a severer minimum sentence, or a higher likelihood of recidivism. Furthermore, the special nature of the legal interest of the 'protection of the sexual integrity of minors' does not function as a crucial standard in determining the disclosure of identity, as shown by the fact that the identity of those criminals convicted of inducing or soliciting minors to offer sexual favors in exchange for money (*See* Article 6(4) of the Act), who are criminals inciting and promoting the sale and purchase of sex from minors, is not disclosed, despite a severer minimum sentence.

In summary, no reasonable ground for treating the other criminals in general and the purchaser of the sex of the minors differently can be found, with the exception of the legislative intent to convey a strong warning to adult males against the conduct of purchasing sex from minors, which may serve as the sole ground for distinction.

However, the above legislative purpose is not of the nature or of the significance sufficient to justify the disclosure of the identity of the offenders convicted of purchasing sex from minors, as previously

reviewed in the context of discussing the possible infringement upon the right to personality.

Therefore, the disclosure of the identity of the offenders convicted of purchasing sex from minors and not of the other criminals in general is against the principle of equality, as it lacks any proper balance between the ground for the distinction and the content of the distinction.

2. With respect to Article 20(5) of the Act,

Opinion of Justices Yun Young-chul, Ha Kyung-chull, Kim Hyo-jong, and Kim Kyung-il that Article 20(5) of the Act is constitutional

The "specific time, duration, and procedure and other matters" delegated by Article 20(5) of the Act are merely incidental to the disclosure of identity, and does not constitute an essential part thereof. Furthermore, the "time" of disclosure to be provided by the presidential decree is anticipated to be a point closer from the date of the conviction and final decision of the court to a certain time at the interval of twice or more per year considering Article 20(1) (requiring that a "statement of guidance be prepared more than twice per year"), the "duration" of disclosure is anticipated to be normally for a period of six(6) months or shorter as a reasonable time period for the achievement of the legislative purpose considering that the above provision sets forth the frequency of "more than twice per year," the general content of the "procedure" is predictable considering various relevant provisions of the Act such as Article 20(3) of the Act, and "other matters" are to a certain degree anticipated to be such other matters necessary to the disclosure of the identity to be regulated by presidential decree similar to the time, duration and procedure of the disclosure. Therefore, the general content delegated to be provided and regulated by presidential decree under the Act is reasonably predictable.

Therefore, Article 20(5) of the Act is not against the principle of the prohibition against blanket delegation.

Opinion of Justices Han Dae-hyun, Kim Young-il, Kwon Seong, Song In-jun, and Choo Sun-hoe that Article 20(5) of the Act is unconstitutional

The time, duration, and procedure of the disclosure are not merely incidental matters, but very essential elements of the identity disclosure

mechanism that determine the overall nature and operative direction of such mechanism, and are also important factors that directly affect the basic rights of the individuals whose identity is disclosed. Article 20(5) of the Act, however, does not specifically provide for the basic content or the scope of the time, duration, or procedure of disclosure and, instead, delegates such matters all together to the presidential decree. Therefore, it is impossible to understand the overall content of the specific time, duration, and procedure of the identity disclosure based on the Act alone without further referring to the inferior provisions and orders.

Therefore, the provision on review is a statutory provision of blanket delegation, and, as such, is beyond the legitimate scope of legislative delegation permissible under the Constitution.

Parties

Requesting Court

Seoul Administrative Court

Petitioner

Doo, ○ Gyoon
Counsel of record: Choi, Jong-baek and 2 others

Original Case

Seoul Administrative Court, 2001Gu28240,
Seeking Revocation of Disposition Disclosing Identity

Holding

1. Neither Subdivision 1 of Article 20(2) nor Article 20(5) of the Juvenile Sex Protection Act (Enacted by Act No. 6261 on February 3, 2000) is unconstitutional.

2. The remainder of the request for constitutional review of the statute is dismissed.

Reasoning

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

A. Overview of the Case

(1) The petitioner was sentenced to a fine in the amount of ₩5,000,000 by the Jeon-Joo District Court on August 18, 2000 for the violation of Article 5 of the Juvenile Sex Protection Act, upon conviction of a sexual intercourse with a minor on July 1, 2000 in exchange for the payment to the minor in the amount of ₩60,000. This judgment was entered and became final on August 26, 2000.

(2) The Commission on Youth Protection, pursuant to Article 20 of the Act, determined on May 3, 2001 to disclose the name, age, birthdate, vocation, and address of the petitioner and the summary of the crime in the official gazette, and to disclose the same on the Internet homepage of the Commission on Youth Protection for six(6) months and also on the bulletin board of the main office of the Central Government Complex, the city halls of Seoul and the metropolitan cities, and the main office of each province for one(1) month.

(3) The petitioner thereupon filed a lawsuit on July 16, 2001 with the Seoul Administrative Court against the Commission on Youth Protection (2001Gu28240) seeking revocation of the above disposition to disclose the petitioner's identity and, while the above lawsuit was pending, moved the court to request for a constitutional review of Article 20 of the Act (2002A15). The Seoul Administrative Court dismissed the motion for the request for constitutional review with respect to Subdivisions 2 through 7 of Article 20(2) of the Act, and rejected the motion on the merit with respect to Article 20(1) of the Act. With respect to Subdivision 1 of Article 20(2) of the Act and Articles 20(3), 20(4), and 20(5) of the Act, the Seoul Administrative Court granted petitioner's motion and filed a request on July 26, 2002 for constitutional review of the above provisions of the Act with the Constitutional Court.

B. Subject Matter of Review

The subject matter of review in this case is whether Subdivision 1 of Article 20(2) or Article 20(3), 20(4) or 20(5) of *the Juvenile Sex Protection Act (Enacted by Act No. 6261 on February 3, 2000)* is unconstitutional. The content of the provisions on review and other relevant provisions is as follows:

Article 20 (Guidance for Crime Prevention)

(1) The Commission on Youth Protection shall post or distribute instructions for preventing offenses including the purchasing of sex with Juveniles at least twice a year by ways set forth in the Presidential Decree including posting in the official gazette.

(2) The instructions in Section 1 may disclose personal information such as name, age, or occupation and the gist of the offense of offenders of any of the following, after sentence is determined, except when the offender is a Juvenile.

(i) Any person who violates Article 5

(ii) - (vii) [omitted]

(3) In determining the disclosure of personal information pursuant to Section 2, the Commission on Youth Protection shall ensure that there is no improper infringement of human rights against the subject and his/her family taking into account the age of the victimized Juvenile and the offender, the motivation, the method, the result and the nature of the offense, the criminal history of the offender, the relationship of the offender with family and the subject Juvenile or other circumstances after the offense.

(4) In the disclosure of personal information pursuant to Section 2, the subject or victimized Juveniles of Article 5 to Article 10 may not be disclosed.

(5) Specific timing, period or process of posting the instructions pursuant to Sections 1 and 2 shall be provided by Presidential Decree.

Article 5 (Conduct of Acquiring Sexual Favors from Minors in exchange for Monetary Compensation)

Any person who purchases sex with Juveniles shall be sentenced to imprisonment up to 3 years or fined up to 20 million won.

The Juvenile Sex Protection Act (Enacted by Act No. 6261 on February 3, 2000, Prior to Amendment by Act No. 6479 on May 24, 2001)

Article 2 (Definitions)

The following terms have the following meanings:

(1) The term "Minor" herein shall mean any person below nineteen(19) years old.

(2) The term "Purchasing sex from minors" herein shall mean to purchase sex from minors by offering or expressing the intention to offer money and goods or interests of a proprietary nature, or compensation of service, convenience, etc. to the minors him/herself, with the person pandering to minors or the person virtually protecting/supervising the minors to do any of the following:

(i) Sexual intercourse with minors

(ii) Quasi-sexual intercourse by means of a part of the body including the oral cavity or the anus, or with sexual apparatus

(3) [omitted]

2. Opinions of the Requesting Court and the Related Parties

A. Grounds for Requesting Constitutional Review

(1) Disclosure of the identity of a person convicted of acquiring sexual favors from a minor in exchange for monetary compensation (hereinafter referred to as the 'offender convicted for purchasing sex from a minor') intends to effect both special and general crime prevention and, as such, practically has the nature of punishing such conduct. Furthermore, the criminal punishment against the offender convicted for purchasing sex from a minor and the disclosure of the identity of such individual following the final sentencing decision share the identical conduct as the object and intend to protect the same legal interest. Therefore, the disclosure of the identity of the offender convicted for purchasing sex from a minor meets the definition of double jeopardy prohibited under Article 13(1) of the Constitution.

(2) As long as the identity disclosure has the nature of criminal punishment, the determination upon disclosure by the Commission on Youth Protection, which is an administrative institution, infringes upon the right to trial by court and judge and violates the principle of due process.

B. Argument of the Petitioner

(1) The name, age, birthdate, vocation, and address of the offender convicted for purchasing sex from a minor and the summary of the criminal conduct belong to the privacy of the individual concerned, and the public disclosure of the above information incurs a severe insult on the personality of the offender convicted for purchasing sex from a minor. Therefore, even as a means to achieve the legislative purpose of protection of minors, in order to minimize the infringement upon basic rights, a better utilization of the existing mechanism of criminal punishment and preventive security measures is more desirable than a new system of identity disclosure. Even in adopting an identity disclosure system in addition to criminal punishment, an incremental disclosure according to the nature of the crime or the likelihood of recidivism should be employed as a method thereof. However, the current identity disclosure system allows a nationwide public disclosure of the identity of even a first-time offender or someone imposed of

a relatively light sentence such as a fine. Therefore, the currently identity disclosure system is unconstitutional as it excessively infringes upon the right to personality or privacy of the offender convicted for purchasing sex from a minor.

(2) Whereas Article 20(2) provides for the disclosure of the identity of the offender convicted for purchasing sex from a minor, there is no such comparable provision for disclosure of the identity of the convicted criminal applicable to the crime of murdering a minor, kidnapping and false imprisonment of a minor, burglary against a minor, or taking a minor hostage. There is no essential difference between the conduct of purchasing sex from a minor and the above crimes in the sense that the above crimes all infringe upon the legal interest of the protection of the minors. Singling out and disclosing the identity of sex offenders only violates the principle of equality.

Furthermore, Article 20(2) provides the identity of the criminals convicted of only part of sexual offenses against minors to be disclosed, whereas the sexual offenses the committers of which are subject to the disclosure of identity and the sexual offenses that do not cause disclosure of identity of the offenders intend to protect the same legal interest of the protection of minors. However, the standard distinguishing these two groups is vague and unclear, which causes a problem of the violation of the principle of equality.

(3) Other than the above, the petitioner shares generally the same opinion with that of the requesting court.

C. Opinion of Chairman of the Commission on Youth Protection

(1) The current identity disclosure system was adopted under a legislative policy for the achievement of the protection of the sexual integrity of minors. As such, it is a new crime prevention device distinct from such typical criminal sanctions as criminal punishment or preventive security measures and also has a different meaning and significance from that of punishment in terms of the essential nature, the purpose, and the function. Therefore, disclosing the identity of sex offenders having committed sexual crimes against minors separately from the imposition of punishment does not violate the prohibition against double jeopardy.

(2) Although fortifying criminal punishment and preventive security measures may be considered as one of many possible means to achieve the goal of the 'protection of the sexual integrity of minors,' such means may not discernibly be something less restrictive upon the basic rights. In addition, it may be possible for certain administrative au-

thorities to register and retain a list of sexual offenders having committed sexual crimes against minors and to disclose the information concerning such offenders merely to those who reside in the same district as the residence of such sexual offenders as an alternative to the nationwide disclosure toward the general public, this may not necessarily be less intrusive than the current identity disclosure system, as this means will require disclosure of much more detailed and concrete information than the currently required information in order to secure effectiveness. Therefore, adopting the current identity disclosure system and not the above alternatives is not against the requirement of least intrusiveness.

Furthermore, the current identity disclosure system intends to 'protect the sexual integrity of minors' which is the most important public interest of our society, and the information subject to disclosure, which includes the name, age, birthdate, vocation, address (based on the statement thereof in the final judgment of the court as less detailed than the unit of *Shi/Ku/Kun*) and the summary of the criminal conduct, does not exceed the scope of items disclosed in any final judgment of the court. In addition, considering that, in reality, the criminal conduct of an individual usually becomes known to those surrounding such individual in the process of a trial or during the investigation or detention, the current identity disclosure system can hardly be deemed as a system lacking a balance between the legal interests concerned. Therefore, the current identity disclosure system does not infringe upon the basic rights of the sex offenders in violation of the principle of proportionality or the principle against excessive restriction.

(3) The legal interest protected by punishing sexual offenses against minors is the protection of the sexual integrity of minors, whereas the legal interests protected by punishing the murder of minors, kidnapping and false imprisonment of the minors, burglary against minors and taking minors hostage are the life, liberty, and property of the minors, respectively. Therefore, the above two groups are different in their essence and a different treatment of the above two is thus not against the principle of equality.

In addition, distinguishing the sexual offenses against minors subject to the disclosure of the identity of the offenders from the sexual offenses against minors that are not subject to disclosure is based on the differences in the objects, purposes, and characteristics of the respective conduct, and is thus a reasonable distinction. Therefore, such distinction is not against the principle of equality.

(4) The disclosure of identity should not necessarily be determined by a judge, as it is not a criminal punishment or a sentence. Also,

the disclosure of identity is determined subsequent to a final sentencing decision through a trial by a judge and an individual whose identity is determined to be disclosed is provided with an opportunity to be heard pursuant to Article 9(3) of the Operative Bylaw of the Subcommittee for Review prior to Identity Disclosure and is also guaranteed an opportunity to dispute the lawfulness of the determination to disclose the identity in an administrative litigation. In light of the above, the current identity disclosure system neither infringes upon the right to trial by judge nor violates the principle of due process.

3. Review on the legal prerequisites

A. With respect to Subdivision 1 of Article 20(2) of the Act

Subdivision 1 of Article 20(2) of the Act is a precondition of the underlying trial as it serves as the direct ground for disclosing the identity of the offenders convicted for purchasing sex from minors.

B. With respect to Articles 20(3) and 20(4) of the Act

The requesting court requested a constitutional review of Articles 20(3) and 20(4) of the Act as well, on the ground that Articles 20(3) and 20(4) also become inapplicable should Subdivision 1 of Article 20(2) of the Act be held unconstitutional. However, even if Subdivision 1 of Article 20(2) were to be held unconstitutional, no incidental decision holding Articles 20(3) and (4) also unconstitutional would be required, considering there is no request for constitutional review with respect to Subdivisions 2 through 7 of Article 20(2) of the Act.

On the other hand, Article 20(3) of the Act provides that a determination to disclose identity should not infringe upon the human rights of the individual subject to identity disclosure or such individual's family members upon considering various factors. Additionally, Article 20(4) of the Act provides that the identity of the minor who is the victim of the offenses subject to the identity disclosure at issue should not be disclosed. As such, the content of the above provisions is not relevant at all to the constitutionality or unconstitutionality of the identity disclosure of the offenders convicted for purchasing sex from minors at issue in this case. Nor does it seem that the court in the underlying trial will reach a different conclusion in rendering its judgment depending upon the constitutionality or unconstitutionality of Article 20(3) or 20(4) of the Act. Therefore, Article 20(3) or 20(4) of the Act is not a precondition of the underlying trial and the request

for constitutional review of these provisions is thus unjusticiable.

C. With respect to Article 20(5) of the Act

Article 20(5) of the Act delegates the regulation of matters concerning the time, duration, and procedure of the disclosure of identity to be done by presidential decree. If this provision is held unconstitutional, the relevant provisions of the presidential orders and the dispositions of identity disclosure pursuant to this provision would also be unconstitutional. Article 20(5) of the Act is thus a precondition of the underlying trial, as this provision is applicable to the underlying trial, the constitutionality of which affects the outcome of the underlying trial.

4. Overview of the Identity Disclosure System

A. Content of the Identity Disclosure System

The Commission on Youth Protection must prepare a newsletter of statements and instructions for prevention of crimes such as acquiring sexual favors from minors in exchange for monetary compensation not less often than twice a year and post or distribute such newsletter nationwide by means of publishing it in the official gazette. The identity of the criminals convicted of rape and other sexual offenses to minors, acquiring sex from minors in exchange for money and arranging such exchange, or manufacturing or distributing obscene materials featuring minors may be included in the above newsletter and thereby disclosed (Articles 20(1) and 20(2) of the Act).

The Commission on Youth Protection therefor should request biennially the head of the relevant government institutions including the Ministry of Justice and the Ministry of Defense for information concerning individuals convicted for crimes listed in each of the subdivisions of Article 20(2) of the Act (Article 2(1) of the Enforcement Decree of the Juvenile Sex Protection Act, hereinafter referred to as the 'Enforcement Decree'), and should also prepare a newsletter of statements and instructions and post or distribute the same within five(5) months from the date of receiving the above relevant information (Article 3(1) of the Enforcement Decree).

The actual determination to disclose identity is made by the Identity Disclosure Prior Review Subcommittee (hereinafter referred to as the 'Review Subcommittee') consisting of nine(9) experts from relevant fields including the legal community, academia, and NGOs commissioned by the Chairman of the Commission on Youth Protection established

under the Commission on Youth Protection. Pursuant to the 'Operative Bylaw of the Subcommittee for Review prior to Identity Disclosure' (hereinafter referred to as the 'Operative Bylaw'), which is an internal regulation of the Commission on Youth Protection, the Review Subcommittee renders, upon review pursuant to the so-called 'Identity Disclosure Review Guideline,' a determination to disclose the identity of an individual convict whose final score is sixty(60) or higher (out of the scale of 100) by combining the result of the review of such requisite components as the gravity of the sentence, the type of crime, the age of the minor victimized, the motive, means, outcome and nature of the crime, and the past criminal record and the result of adjustment based on other factors (add or subtract within the range of 10% from the original score) (See Article(1) and other provisions of the Operative Bylaw).

The Commission on Youth Protection must provide an individual whose identity has been determined to be disclosed with an opportunity by a notice of ten(10) days or longer, to state in writing such individual's opinion (Article 9(3) of the Operative Bylaw). Should no opinion be stated by the expiration of the given period of time, it is conclusively presumed that the individual does not hold an opinion; should the individual state an opinion, a further review is taken for the disclosure of identity (Article 9(4) of the Operative Bylaw). When a final determination is reached to disclose the identity of certain individual convicts, a notice of such fact must be served upon each individual, and the identity of such individual is to be disclosed after sixty(60) days from the date an effective service is made (Article 4 of the Enforcement Decree).

What is disclosed includes the individual convict's name (stated in both the Korean and the Chinese alphabets and, in the case of a foreign national, stated in the Korean alphabet and in the Roman alphabet or Chinese alphabet), age and birthdate, vocation (based on the statement thereof in the final judgment of the court), address (based on the statement therof in the final judgment of the court, with no further descriptions than *Shi/Kun/Ku*), and the summary of the criminal conduct (*See* the main provision of Article 20(2) of the Act and Article 3(2) of the Enforcement Decree). The methods of disclosure include 'posting in the official gazette,' the 'posting on the Internet homepage of the Commission on Youth Protection for a period of six(6) months,' and 'posting on the bulletin board of the main office of the Central Government Complex, the City of Seoul, the metropolitan cities, and the provinces for a period of one(1) month' (*See* Article 20(1) of the Act and Article 5(1) of the Enforcement Decree).

B. Present Situation Concerning the Identity Disclosure System

Disclosure of the identity has been made four(4) times as of the issuance of the decision in this case since the initial disclosure on August 30, 2001. The situation concerning the disclosure of identity by the type of the crime in the first through third disclosures is indicated in the table below:

	rape		sexual offense other than rape		acquiring sex in exchange for money		arrangement of acquisition of sex in exchange for money		manufacturing obscene materials		numbers in total	
	aggregate number of convictions	number of disclosures	aggregate number of convictions	number of disclosures	aggregate number of convictions	number of disclosures	aggregate number of convictions	number of disclosures	aggregate number of convictions	number of disclosures	aggregate number of convictions	number of disclosures
1st incident of disclosure	82	65	93	61	109	27	16	16	-	-	300	169
2nd incident of disclosure	183	150	162	120	424	123	56	49	1	1	824	443
3rd incident of disclosure	241	214	263	167	626	178	113	111	1	1	1,244	671
numbers in total	506	429	518	348	1,159	328	185	176	2	2	2,368	1,283

On the other hand, in the fourth incident of disclosure on April 9, 2003, out of 1,221 convicted criminals subject to identity disclosure review, the identity of the aggregate number of 643 individuals, specifically 208 individuals convicted of rape, 200 individuals convicted of sexual offenses other than rape, 155 individuals convicted of acquiring sex with minors in exchange for money, 70 individuals convicted of arranging acquisition of sex with minors in exchange for money, and 10 individuals convicted of manufacturing obscene materials featuring minors was disclosed. In terms of the proportion of disclosure by the type of the crime, the identity of 89% of the criminals convicted of rape and other sexual offenses and everyone except for one(1) person convicted of arranging sexual purchase or manufacturing obscene materials was disclosed, whereas the identity of 22.7% of the criminals convicted of acquiring sex with minors in exchange for money was disclosed.

5. Opinion of Justices Yun Young-chul, Ha Kyung-chull, Kim Hyo-jong, and Kim Kyung-il

A. Legislative background and legislative purpose of the identity disclosure system

As a certain type of sexual crime against minors such as the prostitution between an adult and a minor and the manufacturing of obscene materials featuring minors became a serious social phenomenon around November of 1999, the legislature, in order to meet this social problem, referring to such systems publicly sharing the relevant information as the registration of convicted sexual offenders in the U.S. commonly known as Megan's Law, decided to introduce a system under which the identity of offenders having committed sexual crimes against minors would be disclosed. The legislature thereupon enacted the Juvenile Sex Protection Act on February 3, 2000 (effective July 1, 2000).

The Act intends to protect minors from sexual offenses, thereby protecting their human rights and helping them to grow up to be sound members of society (Article 1). The minor here is defined as a person under the age of nineteen(19). In order to achieve the above legislative purpose, the Act, in Article 20(1), provides that the Commission on Youth Protection should prepare a newsletter of statements and instructions for the prevention of crimes such as acquiring sexual favors from minors in exchange for monetary compensation; post such newsletter in the official gazette; post or distribute nationwide such newsletter in a method provided by presidential decree; and the identifying information including the name, age and vocation of the sexual offenders convicted of crimes such as purchasing sex from minors and the summary of their criminal conduct may be included in the above newsletter of statements and instructions and thereby disclosed subsequent to a final decision on sentence (the main provision of Article 20(2); hereby defined as the 'identity disclosure system').

The legislators chose to disclose the identity of certain sexual offenders convicted of such conduct as acquiring sex from minors in exchange for monetary compensation, upon judging that typical criminal sanctions such as the existing criminal punishment or preventive security measures were insufficient for the prevention of serious social diseases of adults' purchasing sex from minors under the age of nineteen(19), that guidance was necessary to prevent such new forms of crimes, and that, as the guidance, disclosing the identity of such convicted criminals would be an effective means to prevent the crime.

B. Constitutionality of Subdivision 1 of Article 20(2) of the Act

In this case, the issues include whether the identity disclosure system under the provision on review violates the principle of double jeopardy, whether the same excessively restricts the right to personality and other basic rights, and whether the same violates the principle of equality.

(1) Whether Subdivision 1 of Article 20(2) of the Act violates the principle of double jeopardy

Article 13(1) of the Constitution provides that "no citizen ... shall ... be placed in double jeopardy," thereby prohibiting double jeopardy. This principle is a constitutional declaration of the 'double jeopardy' prohibiting prosecution or punishment for the second time of the same matter once a final judgment is entered, as a principle binding the state's authority of criminal punishment, intended to guarantee the basic rights, especially the freedom from bodily restraint, of the citizens. Here, the 'punishment' within the meaning of Article 13(1) of the Constitution is, in principle, the imposition of punishment as the exercise of the state's authority to punish crime, and does not include all of the sanctions or prejudicial dispositions by the state (6-1 KCCR 619, 627, 92Hun-Ba38, June 30, 1994).

Although the disclosure of identity is not listed in Article 41 of the Criminal Code that defines the types of punishment, such identity disclosure causes shame and indignity upon the relevant convicted individuals in addition to the final judgment of guilt. In reviewing whether or not such disfavor and prejudice is actually included in the scope of punishment on honor or reputation, the legislative purpose of the identity disclosure system, the information that is disclosed, and the relationship to the judgment of guilt should be taken into consideration.

As Article 20(1) of the Act expressly states that the primary purpose of the identity disclosure system is to "guide the public not to commit such crimes as purchasing sex from minors," the identity disclosure system was introduced as a means to prevent similar crimes. As such, although the identity disclosure system may cause shame and defame to the convicted individuals whose identity is disclosed, this is merely incidental to the legislative purpose sought by the identity disclosure system and is not at the center of the system. An examination of the actual situation concerning the disclosures made so far indicates that the disclosure was only partial information of the relevant individuals for the sake of guiding the general public not to commit

crimes and was no more than a disclosure of some actual examples.

The identity factors and the criminal conduct disclosed under the identity disclosure system are part of the final judgment of guilt from a trial already made public pursuant to the main provision of Article 109 of the Constitution, and are not new factors concerning the identity or privacy of the individuals concerned. As discussed above, even though a feeling of shame is incidentally caused in the process of disclosure for the purpose of public interest, this cannot be deemed as the separate 'punishment of shame' or 'punishment of dishonor' in addition to the punishment sentenced upon the judgment of guilt.

Generally, legislators are vested with legislative discretion or the freedom to legislate when it comes to questions of which conduct should be defined as crimes and punished as such by which specific types of punishment, upon considering synthetically our history and culture, the situation, values and legal perceptions of the general public at the time of the legislation, the current situation and nature of the crime, the legal interests to be protected, and the effect of crime prevention (7-1 KCCR 478, 487, 91Hun-Ba11, April 20, 1995; 10-2 KCCR 701, 711-712, 97Hun-Ba67, November 26, 1998). Therefore, legislators are permitted to freely exercise the power to legislate by choosing a measure to prevent crimes in order to meet a specific social phenomenon. As far as the identity disclosure system cannot be understood as an unconstitutional institution that infringes upon human rights as discussed below, even if the disclosure of identity may accompany the feeling of shame and indignity on the part of the criminals, the identity disclosure system is not beyond the scope of the statutory formation that may be chosen to meet a new form of antisocial crime such as the crime of acquiring sex from minors under the age of nineteen(19) in exchange for monetary compensation.

For the reasons stated above, the identity disclosure system is not discernibly included in the definition of the punishment as an exercise of the state's authority to punish crime and is thus not violative of the principle of double jeopardy in Article 13 of the Constitution.

We may here refer to the decision of the United States Supreme Court that Megan's Law of the State of Alaska requiring the convicted sexual offenders to register with the competent authorities as to the identity and guilt among those factors made public by the final judgment of guilt (violation thereof is criminally punishable) and making such information publicly available on the Internet does not thereby impose a punishment of shame or dishonor.

(2) Whether Subdivision 1 of Article 20(2) of the Act violates the principle of proportionality or the principle against excessive restriction

(A) basic rights restricted

The first sentence of Article 10 of the Constitution provides that "all citizens shall be assured of human worth and dignity and have the right to pursue happiness." A general right to personality is derived from human worth protected by this provision (2 KCCR 306, 310, 89Hun-Ma82, September 10, 1990; 3 KCCR 518, 526-527, 89Hun-Ma165, September 16, 1991).

Further, Article 17 of the Constitution provides that the "privacy of no citizen shall be infringed."

The identity disclosure system restricts the general right to personality of the individuals concerned by disclosing to the public the identity of such individuals and the content of such crimes as purchasing sex from minors. The state unilaterally discloses the items belonging to the privacy of such individuals, through the identity disclosure system. Therefore, the identity disclosure system restricts the general right to personality and the right to privacy.

(B) content of the principle of proportionality or the principle against excessive restriction

Such restriction upon privileges and rights shall not violate the principle of proportionality or the principle against excessive restriction under Article 37(2) of the Constitution, in terms of its purpose and its means.

The principle of proportionality or the principle against excessive restriction means a basic principle that should be observed in the state's legislative activity restricting the basic rights of the citizens or limiting the legislative activities. The principle of proportionality or the principle against excessive restriction is a constitutional principle which means that the legislative purpose of the statute restricting the basic rights of the citizens should be legitimate under the structure of the Constitution and statutes (legitimacy of the purpose), that the means to achieve such legislative purpose should be effective and appropriate (appropriateness of the means), that the restriction of the basic rights should be minimum in light of the necessity by considering any and all less restrictive forms or means of restriction, even if the restriction upon the basic rights chosen by legislators is appropriate for the achievement of the legislative purpose (least possible restriction), and that the public interest that is protected should outweigh the private interest restricted, upon balancing the public interest to be protected by the legislation against the private interest restricted

by such legislation (balance between the legal interests) (*See* 2 KCCR 245, 260, 89Hun-Ka95, September 3, 1990).

(C) legitimacy of the legislative purpose

The legislative purpose of the identity disclosure system is to protect minors by alerting the general public of the sexual offenses against children or minors through disclosure of the identity and the criminal conduct of the convicted criminals concerned, thereby preventing similar crimes.

At the time of the legislation, the pervasiveness of the crime of acquiring sex from minors in exchange for monetary compensation and the increase of such crimes were very serious, and the moral hazard was also egregious due to the lack of consciousness as to the serious harm caused by the sexual offenses committed against minors to the development of the minors accompanied by the rapid development of the media such as the Internet. No improvement in the above situation was expected based solely on the morality of adults or minors and there was a demand for the prevention thereof through the sanction of law.

The conduct of acquiring sex from minors in exchange for monetary compensation does a significant harm to the sound development of the spirit and the body of the minors. Even if a minor technically consents to such conduct, such consent can hardly be found to be effective as a judgment of a minor may be less than competent and the minors are in a position to easily surrender to the lure of money. Such conduct egregiously deviates from the social rules and the legal order of the community thereby corrupting the fundamental morality of our society and harming traditional cultures developed and maintained by ancestors, as an expression of mammonism that money can do anything and minors can even offer sexual favors for money. It requires a serious concern, in a sense that our society might turn to a decadent society should we neglect such conduct without actively adopting countermeasures.

It can be inferred that legislators took the above legislative measures, facing the above phenomenon of social epidemic, in order to protect minors who were the future of the nation and to preserve the minimum morality concerning the sexual culture of our society.

As such, the legislative purpose of the provision on review is legitimate as necessary for the public welfare as provided in Article 37(2) of the Constitution.

(D) appropriateness of the means

Although there remains room for doubt as to whether the identity disclosure system is the most effective and appropriate means to

achieve the above legislative purpose, common sense confirms that a disclosure to the public of the identity of the individual convicts concerned will have an impact on deterring or preventing the general adult population to not become a purchaser of sex from minors. Therefore, the identity disclosure system possesses the appropriateness of the means required by the principle of proportionality or the principle against excessive restriction.

Today the problem of sexual abuse of children including the purchase of sex is at the center of the concern all over the world and various countries adopt new legislative measures similar to the identity disclosure system. The United Nations Convention on the Right of the Child of 1989 provides for an obligation of the member states to protect the child from all forms of sexual exploitation and sexual abuse (Article 34). Also, the participating countries in the 'First World Congress Against Commercial Sexual Exploitation of Children' held in Stockholm, Sweden in 1996 declared that they would develop within five(5) years measures to decrease the number of the children falling victims to commercial sexual exploitation.

In the United States, convicted sexual offenders are required to register regularly with the competent authorities of the name, address, vocation and the content of the judgment of guilt and also to submit their pictures and fingerprints, which are posted on the Internet (specifically in the State of Alaska). Also, in Taiwan, the Act to Prevent Purchase of Sex from Children and Minors (as revised on November 8, 2000) provides that the competent authority, upon final judgment in a criminal trial, should post and announce the name and the picture of the convicted criminals and the summary of the judgment, when a person eighteen(18) years of age or older is engaged in a sexual intercourse or obscene conduct with a child (under the age of 12) or a minor (under the age of 18), or criminal conduct involving sex with a child or a minor as provided by the Act, in exchange for monetary compensation (Article 34).

The above examples of legislation reflect the fact that the existing criminal punishment or preventive security measures are not sufficient to achieve the legislative purpose of protecting the sexual integrity of children and minors. This is grounded upon the special nature of the crime of purchasing sex from minors and also of the victims thereof.

Although there is criticism that the current identity disclosure system does not deter crime as it does not provide concrete information of the convicted criminals such as the face or the picture and it does not screen off minors who are the objects of the purchase, the appropriateness of the means can be confirmed because the purpose of this system itself is the prevention of the crime of purchasing

sex from minors at a more general level that the system intends to protect the sexual integrity of minors thereby protecting the human rights of minors and helping them grow to be sound members of society by guiding and correcting the harm and the serious problem concerning the conduct of purchasing sex from minors, rather than a concrete and specific one to provide information to protect the potential victims and the community from the released sexual offenders such as in the so-called Megan's Law, and, also because the identity disclosure system has an impact upon the general public to suppress the impulse to commit sexual offenses against minors.

(E) least restrictive means

In reviewing the question of whether the means adopted is the least restrictive, it should be noted that the identity disclosure system is based upon the extremely important legislative purpose of protecting the sexual integrity of minors that is seriously being dilapidated in our society.

Specifically, we examine whether there exists any means alternative to the identity disclosure system that is clearly less restrictive in effectively achieving the significant legislative purpose of protecting the sexual integrity of minors.

As indicated above, the criminal punishment or preventive security measures are not sufficient to achieve the legislative purpose; for the possible policies of curing the sexual offenders having committed crimes against minors and establishing effective systems of vigilance and guiding minors, the material and human resources such as the experts in correction geared to the offenders having committed sexual crimes against minors are lacking; it takes much time and effort to more fundamentally and widely improve the aspects of social culture including the excessively liberal position of minors toward sex, the mammonist attitude of minors, wrongful tendency toward consumption regarding sex as a commodity, and the distorted conception of sex held by the adult population. Therefore, it cannot be discernibly concluded that a legislative measure such as the identity disclosure system is unnecessary to prevent currently increasing sexual crimes committed to minors.

Also, assuming a system under which a list of convicted sexual offenders is registered with the administrative authority or the police authority and the information is released upon request of a resident, detailed information as to the convicted criminals concerned must be made available in order to achieve effectiveness of such system, which may in turn demand such means of disclosure as the newspaper or the broadcast that is more easily accessible than the official gazette or the Internet. This system is not necessarily clearly less intrusive

than the current system.

In addition, such mechanisms to minimize the prejudice on the part of the individuals whose identity is disclosed are readily available as the requirement of Article 20(3) of the Act that there should be no unjust infringement upon the human rights of the convicted criminal or his or her family by considering the age of the convicted criminal and the minor concerned and the motive, means, and outcome of the crime in determining the disclosure of identity, and as the provision of the opportunity to be heard under the inferior provisions, as stated below, for the convicted criminal whose identity is determined to be disclosed.

Therefore, the identity disclosure system does not excessively restrict the basic rights of the convicted criminals concerned notwithstanding alternative less restrictive legislative means and the choice among various possible legislative means where it is not known which one is less intrusive falls within the authority of legislators to decide. Thus, the identity disclosure system does not violate the principle of the minimum restriction.

(F) balance between legal interests concerned

Purchase of sex from minors by adult is, as previously stated, rapidly increasing. Such criminal conduct may do serious harm to the development of the spirit, body and socialization of the minor that cannot be cured throughout the life of the minor.

The identity disclosure system is not to punish the individual criminals. Instead, it was adopted to raise the awareness to protect the social community against the existing danger of sexual violence, and to deter the general population from the impulse to commit such crimes as purchasing sex from minors. As such, the purpose of the 'protection of the sexual integrity of minors' intended by the identity disclosure system is one of the most important public interests in our society.

Considering, in comparison, the degree of restriction upon the general right to personality and the right to privacy of the purchaser of sex from minors, Article 20(2) of the Act provides for the public disclosure of the "identity including the name, age, and vocation and the summary of the criminal conduct," which is therefore a disclosure by the state for the sake of the public interest of part of the content of the court's decision to convict in a public criminal litigation, which is a public record. Therefore, it may not be discernibly concluded that knowledge of the general public of the identity and the criminal record of the convicted criminals already made public in the criminal litigation infringes upon the right to personality or privacy of such convicted criminals.

In addition, a further restriction upon basic rights concerned of the convicted criminals whose identity and criminal conduct are disclosed than the general public is readily tolerable by the state's exercise of the authority to punish crimes. Even if the offenders convicted for acquiring sexual favors from minors in exchange for monetary compensation feel ashamed and are defamed by the disclosure of their identity and criminal conducts, the degree of protection therefor is duly different from that for the general public, therefore there is room for a further restriction upon such convicted offenders' right to personality and privacy as long as the restriction is not upon the essential part of such rights.

Therefore, as the degree of restriction upon the right to personality and privacy of the purchasers of sex from minors is not greater than the request of public interest to protect the sexual integrity of minors, the disclosure of the identity under Subdivision 1 of Article 20(2) does not violate the principle of balance between the legal interests concerned.

(G) sub-conclusion

The identity disclosure system under Subdivision 1 of Article 20(2) of the Act does not infringe upon the right to personality and privacy of the convicted criminals concerned in violation of the principle of proportionality or the principle against excessive restriction under Article 37(2) of the Constitution.

(3) Whether Subdivision 1 of Article 20(2) of the Act violates the principle of equality

The issues include that of whether the provision on review violates the principle of equality in that the individuals convicted of other general crimes against minors including murder, kidnapping, or illegal solicitation of minors are not subject to disclosure of identity whereas the illegality of such criminal conduct may be more egregious than that of the category of sexual offenses subject to identity disclosure, and also in that the individuals convicted of a certain group of sexual offenses such as providing the location for purchase of sex from minors or acting as an intermediary in such sexual purchase, as opposed to other sexual offenses against minors under the statute, are not subject to the disclosure of identity.

The meaning and the purpose of the legal provision listing the sexual offenses against minors that are subject to the disclosure of the identity of the convicted offenders is to protect the minors from harm that may be caused by such conduct as the adults' purchase of the sexual favors from minors in exchange for money. In light of

the above, the sexual offenses against minors and the other general crimes are not discernibly 'essentially identical' to constitute two object groups under comparison. Further, there is no ground to deem such standard for distinction to be particularly arbitrary.

Furthermore, in the case of such sexual offenses against minors that are not subject to the disclosure of the identity of the offenders as inducing and soliciting minors to engage in the purchase of sex in exchange for monetary compensation (Article 6(4) of the Act); inducing, soliciting, or coercing minors to engage in sex in exchange for monetary compensation as a profession (Subdivision 1 of Article 7(2) of the Act); and providing a location for the sexual purchase of minors or acting as an intermediary for such purchase (Subdivisions 2 and 3 of Article 7(2) of the Act), such punishable conducts are of the nature of complicity for the purchase of sex from minors in exchange for money in terms of the object of the conduct or the type of the conduct. As such, the distinction deems to have arisen out of the consideration of the difference in illegality of the conduct. Therefore, even though certain convicted sexual offenders who committed crimes against minors are not subject to the disclosure of identity, the legislation reflecting such distinction cannot be discernibly deemed to be arbitrary or unreasonable.

Even if the identity disclosure system may cause a different treatment in terms of the restrictions upon the basic rights, there is more room for the restriction upon the basic rights for the criminals convicted of the purchase of sex from minors than that for the non-criminally convicted group of individuals, the information disclosed has already been made public in the criminal litigation, the provision on review has not been enacted with the intent to prejudice particularly those convicted of purchasing sex from minors as opposed to other crimes, and the discrimination here is merely incidental and indirect one that has incurred in the process of legislating the guiding measures to prevent such sexual offense.

Therefore, the different treatment brought by the identity disclosure system under Article 20(2) of the Act is not disproportionate in terms of the relationship between the legislative purpose and the means to achieve such purpose, and it cannot be deemed to otherwise violate the principle of equality under Article 11(1) of the Constitution or the right to equality.

(4) Whether Subdivision 1 of Article 20(2) of the Act violates the right to trial by judge

Article 27(1) of the Constitution provides that "all citizens shall have the right to be tried in conformity with the statute by judges

qualified under the Constitution and the statute." This provision is interpreted to guarantee a right not to be tried in civil, administrative, election or domestic proceedings, or punished in any form if not by a judge (10-1 KCCR 610, 618, 96Hun-Ba4, May 28, 1998).

Although the requesting court argues that the identity disclosure system infringes upon the right to trial by judge as it is implemented by the Commission on Youth Protection, the identity disclosure system is not 'punishment' as discussed above. Therefore, the identity disclosure system does not infringe upon the right to trial by judge.

(5) Whether Subdivision 1 of Article 20(2) of the Act violates the doctrine of due process

Now we review the issue of whether the identity disclosure system violates the doctrine of procedural due process (we omit the discussion with respect to the issue concerning the substantive due process as it is in this case identical to the discussion and the conclusion with respect to the principle of proportionality).

Article 20(3) of the Act provides that the Commission on Youth Protection should, in determining the disclosure of identity, take into account the motive of the crime, the circumstances subsequent to the crime, and other factors. Article 20(4) of the Act provides that necessary matters concerning specific procedures of disclosure be determined and regulated by presidential decree. The inferior provisions, pursuant to the above legal provisions, provide convicted sex offenders whose identity is determined to be disclosed with an opportunity to state an opinion in writing by designating a time period of ten(10) days or longer (Article 9(3) of the Operative Bylaw), subject to an irrebuttable presumption that such person does not hold an opinion should no opinion be stated within such period, while the disclosure of identity is determined upon review should an opinion be stated (Article 9(4) of the Operative Bylaw).

The Commission on Youth Protection is an institution with some extent of independence and neutrality (*See* Articles 29 and 32, and other relevant provisions, of the Youth Protection Act. There is a guaranteed opportunity to dispute the legality of the Commission on Youth Protection's decision to disclose identity by way of an administrative litigation. Also, any decision to disclose identity is made subsequent to the sentence upon conviction of a crime through a trial by judge.

Therefore, as the disclosure of identity under Subdivision 1 of Article 20(2) of the Act is performed pursuant to the formal procedure provided by law and as the content of such procedure is also reasonable

and justifiable, the above provision does not violate the principle of procedural due process.

C. Constitutionality of Article 20(5)

Article 20(5) of the Act delegates those necessary matters concerning the concrete time, duration, and procedure with respect to the posting of the guiding statement and so forth pursuant to Articles 20(1) and 20(2) of the Act to be determined and regulated by presidential decree. In this case, the issues include that of whether the above delegation provision is a blanket delegation prohibited by Article 75 of the Constitution.

Article 75 of the Constitution provides that "the president may issue presidential decrees concerning matters delegated to him or her by statute with the scope specifically defined and also matters necessary to enforce the statute," thereby serving as the ground for legislation delegating law-making authorities, and at the same time indicating the scope and the limit of the delegation by legislation by limiting the matters to be regulated by the presidential decree to the matters delegated by the statute with a scope that is specifically defined.

The Constitutional Court held that the 'matters delegated by statute with the scope that is specifically defined' mean that the general content to be regulated by presidential decree should be predictable to everyone from the delegating legislation itself as the basic elements of the content and the scope to be regulated by presidential decree are concretely and clearly stated in the delegating legislation (7-2 KCCR 562, 591, 91Hun-Ba1, etc., November 30, 1995; 11-1 KCCR 1, 8, 97Hun-Ka8, January 28, 1999). Also, the Constitutional Court held that the predictability should be reviewed not based solely on a specific provision but instead in a relational and synthetical context of the relevant provisions in the entirety, and that the predictability should also be reviewed concretely and on a case-by-case basis according to the nature of the respective statutes under review (12-2 KCCR 233, 241, 99Hun-Ba104, August 31, 2000).

In this case, the "concrete time, duration, procedure, and other matters" delegated pursuant to Article 20(5) of the Act are not essential components but incidental components of the identity disclosure system, because the core components of the identity disclosure system are provided in the statute as the identity disclosure system itself is provided in the statute and the scope of the disclosure is also expressly stated in detail in the main provision of Article 20(2) of the Act. Where certain information with respect to the identity of the convicted criminals and other related information is readily and invariably made

available to the public, even if Article 20(5) of the Act delegates the matters of when, how long, and under which procedure the identity information is to be disclosed to the presidential decree, this question is merely incidental to the restriction upon the right to personality or privacy of the convicted criminals.

Furthermore, as the matters delegated to the presidential decree here are "such matters additionally necessary to the disclosure of the identity including the concrete time, duration, and procedure," such delegation is a delegation "with a scope specifically defined." In addition, the "time" of disclosure to be provided by the presidential decree is anticipated to be a point closer to the date of the conviction and final decision of the court to a certain time at the interval of twice or more per year considering Article 20(1) (requiring that a "statement of guidance be prepared more than twice per year"), the "duration" of disclosure is anticipated to be normally for a period of six(6) months or shorter as a reasonable time period for the achievement of the legislative purpose considering that the above provision sets forth the frequency of "more than twice per year," the general content of the "procedure" is predictable considering various relevant provisions of the Act such as Article 20(3) of the Act, and "other matters" are to a certain degree anticipated to be such other matters necessary to the disclosure of the identity to be regulated by presidential decree similar to the time, duration, and procedure of the disclosure. Therefore, the general content delegated to be provided and regulated by presidential decree under the Act is reasonably predictable.

For the reasons stated above, Article 20(5) of the Act is not against the principle of the prohibition against blanket delegation.

D. Conclusion

Subdivision 1 of Article 20(2) of the Act and Article 20(5) of the Act are constitutional.

6. Opinion of Justices Han Dae-hyun, Kim Young-il, Kwon Seong, Song In-jun, and Choo Sun-hoe

A. Unconstitutionality of Subdivision 1 of Article 20(2) of the Act

(1) Infringement of the Right to Personality

(A) basic rights restricted by the disclosure of identity

Article 10 of the Constitution declares that all citizens shall be

assured of human worth and dignity and have the right to pursue happiness, and underscores that the state is obligated to confirm and guarantee the basic and inviolable human rights of individuals. Therefore, every person is entitled to develop one's own life pursuant to one's own free will and freely express one's own personality, in pursuit of happiness. Such rights are endowed regardless of the individuals' physical conditions, talents, education, wealth, or gender by birth, and the fundamental human worth and dignity as a human being is respected and guaranteed even for a convicted criminal. This is indeed the utmost value and the basic ideal pursued by our Constitution.

When the state inconsiderately discloses information that significantly affects the reputation of an individual in the society including the criminal conviction, no overall personality is described including the positive aspects of the individual, but, instead, solely negative aspects of such individual are saliently emphasized towards the outer world thereby possibly hindering such individual's free expression and realization of personality in the future through contact and interaction with society. Therefore, in order for free expression and realization of personality of an individual through social activities, it is crucial to guarantee a right for the individual to determine as to various materials containing information that can be an important factor in forming the image of such individual in the eyes of others, that is, a right of self-determination upon social personality factors. The state is obligated to maximally guarantee such right.

The identity disclosure system in this case discloses to the public certain defects of an individual that the individual would wish to hide, thereby conspicuously restricting the right of self-determination upon social personality factors described above. As such, the identity disclosure system in this case significantly infringes upon the right to personality of individuals convicted of a crime.

(B) uncertainty of the legislative purpose

The purpose of disclosing the identity of those convicted of purchasing sex from minors is to 'protect the minors by preventing the act of purchasing sex.' However, with respect to a more concrete purpose of the system, there are numerous opinions such as alerting the public of the significance of the crime of purchasing sex, aiming for punishment and deterrence through the disclosure of the identity of those convicted of purchasing sex from minors, or providing information for potential victims in advance to prevent sexual offenses. A general perception that the identity disclosure system in this case was borne out of and serves all of the above legislative purposes notwithstanding, such unclear legislative purpose is the very reason for a fundamental problem of the operation of the identity disclosure system in a way that is inappropriate for any of the above percepti-

ble legislative purposes.

(C) violation of the principle of proportionality or the prohibition against excessive restriction

1) First of all, in order to simply raise the awareness of the public for guidance purposes, a disclosure of the identity of the purchaser of sex is by no means mandated. Even if the explanation of examples may help increase the effect of crime prevention, such purpose of crime prevention for the awareness of the significance of sexual purchase can sufficiently be reached even when the anonymity of the individuals concerned is guaranteed by the use of a pseudonym instead of an actual name. Therefore, from this perspective, the disclosure of identity unnecessarily restricts the basic right and is therefore excessive.

2) Next, should the protection of the potential victims through providing the information be intended, the identity disclosure system in this case can hardly overcome the criticism that this system barely has any effect of such since it provides insufficient information. Because the information disclosed is limited to the name, age, birthdate, vocation, address (no more detailed than *Shi/Kun/Ku*), and the summary of the crime, potential victims in general can hardly identify the individuals whose identity is being disclosed solely based on the information disclosed. Furthermore, as the vocation and the address among the information disclosed are based on those stated in the final judgment of conviction, should the vocation or the address change afterwards, incorrect information is provided under the current system.

Also, disclosing the information invariably for not longer than six(6) months biennially around the time of the sentencing in each case does not even remotely serve the purpose of protecting potential victims from the danger of recidivism. Whereas the above measure significantly and immediately hinders the normal social life of an individual concerned through the disclosure of identity when an individual is sentenced to a relatively light punishment (such as a fine or probation) and there is only a low possibility of recidivism where the information provided is not imperative, on the other hand, when an individual is sentenced to a long prison term for several years due to the high possibility of recidivism, the identity of such convicted criminal is disclosed under the above measure only during the prison term when the provision of information is meaningless, and when the provision of information becomes meaningful following the release from the prison, no information will be provided thereby neglecting the purpose of protecting potential victims.

Therefore, from this perspective, the current identity disclosure system lacks effectiveness, and the appropriateness of the means can

thus hardly be found.

3) On the other hand, in our society where relational social esteem matters significantly, the institutional measure to disclose to the public the identity of an offender along with the fact of the crime does have, in reality, a considerable effect as a sanction and as a deterrent. If the primary purpose and function of the current identity disclosure system lies in having the offender lose face and deterring the general public by announcing that a 'purchaser of sex from minors will likewise lose face,' it then shares a notably similar characteristic to that of the punishment of indignity to the extent that it may be compared to a 'modern-day Scarlet Letter.'

However, the punishment of indignity bears fundamentally significant problems in its basic structure in publicly lowering the social esteem of a convicted criminal thereby inciting abhorrence against such criminal among the public and placing such criminal in the public's contempt and social exclusion. That is, the punishment of indignity has a defect that its degree of punishment significantly varies depending upon the subjective feeling of reputation of individual criminals or their social relationships, or the scope and the intensity of the expression of hate from the public toward the criminals. Also, this type of punishment neglects the principle of the rule of law, and might promote uncontrolled revenge or self-policing conduct. Most of all, the most fundamental defect of this type of punishment lies in the confusion between the anti-value of the criminal conduct and the non-existence of the personality of an individual convicted of a crime. Regarding a convicted criminal, despite the criminal conduct, as an individual who has a unique personality with moral capability to assume responsibility marks both the basic premise and the ultimate limit in exercising the authority to punish crime. Furthermore, what should truly be severed in a society is, in its strict meaning, not the individuals convicted of crime, but the criminal conduct. However, a punishment of indignity takes on the strong intention eventually to socially bury the individuals convicted of crime by treating such individuals as a means to fight against crime and not as humans with personality and by subjecting such individuals to public ridicule or scorn. This will not stop at the devastation of the personality of the individuals convicted of crime, but may even create a lack of sensitivity towards human dignity throughout the entire society.

Thus, although the punishment of indignity was widely adopted in Europe and beyond until the early nineteenth century, it subsequently changed into punishment concerning the status (such as suspension or disqualification of capacity). Taking the basic structure of the punishment of indignity that already disappeared in the developmental history of modern criminal justice systems by institutionalizing dis-

closure of the identity of the purchaser of sex goes against the modern practice and might revitalize almost exactly the same problems of the punishment of indignity.

The current identity disclosure system takes the nature of treating those subject to identity disclosure as mere means to fight crime by making use of them in a public exhibition, rather than respects those individuals as the holders of unique personalities. The individuals subject to identity disclosure might be deprived overnight of the social position and environment they built for a long time, beginning from the scorn from the acquaintances to a forced change of work place or residence, to a disrupture of a family including divorce. Furthermore, identity disclosure might, as a result, subject the innocent family members altogether to mental anguish or deprive them of the platform upon which their life has been built. Considering the above, the identity disclosure system sufficiently poses a question as to whether the state defines the individual criminals as well as the mere criminal conducts as evil and treats such individuals as objects to be eliminated from society. This is undeniably facially against the principle of our Constitution declaring that it is the obligation of the state to guarantee the fundamental dignity and value of every person as a human being even for an individual convicted of a crime.

4) There is a strong argument in our society as well that identity disclosure is indeed an effective countermeasure to correct the evil tradition of adults' acquiring sex from minors in exchange for money and that it is inevitable to adopt such a drastic medicine. Of course, such argument has certain truth that cannot be ignored. However, the widespread conduct of adults' acquiring sex from minors in exchange for money can be explained as a phenomenon of disease based on the combination of the distorted perception toward sex or lack of control over sexual impulse on the part of the adult population, the excessively liberal perception toward sex and mammonist behavior on the part of minors, male-chauvinistic perceptions considering the female gender as an object of oppression, and excessive consumer-capitalism regarding purchasing sex from teenagers as a commercial commodity. Therefore, a fundamental cure for such epidemic can only be made possible through a multilateral approach toward each of the elements causing the disease. Specifically, it seems to be more desirable to focus on the fundamental preventive measures, as it is readily possible to synthetically utilize various means, instead of monolithic sanctioning of punishment or identity disclosure, such as medical treatment or effective vigilance to sexual offenders, guidance of minors, and implementation of policies to improve the environment harmful to minors, and also in light of the reality that the ratio of the discovered cases out of the entire number of cases of purchase

of sex from minors is minimal. Relying on such an abnormal method as identity disclosure by the state that might significantly infringe upon the right to personality of the individuals even before the state makes exhaustive efforts through the above preventive measures is problematic even from the perspective of the minimum restriction.

5) On yet another hand, disclosure of identity requires none of the new elements of conduct in addition to the criminal conducts already punished in a criminal procedure and, as such, it imposes additional sanctions for the same criminal conduct. Furthermore, unlike general administrative sanctions, the identity disclosure system does not intend to secure the performance of the administrative obligation, but instead directly intends to prevent the crime itself. The system's purpose is pursued primarily through the effect of sanction or deterrence than guidance or provision of information. Thus, disclosure of identity and the criminal punishment shares considerably overlapping purposes and functions.

However, it is hard to predict how much of further deterring effect the identity disclosure subsequent to criminal punishment may bring. Not only is there a criminal-psychological analysis that identity disclosure lacks either general or special preventive effect and might instead force the individual criminals to an even more destructive behavior, but also there is no sign that has yet been detected telling that the rate of sexual crimes has reduced despite the disclosures of identity on four separate occasions. In addition, in the immediately preceding fourth disclosure, four individuals who were previously on the list in the second or third disclosure were once again included, which manifestly indicates that it is doubtful that the current identity disclosure system has any effect of deterring crime.

Criminal punishment is assessed and understood to be the very last means ("*ultima ratio*") of the state-imposed sanction, as it significantly invades the freedom and the safety of individuals. Disclosing the identity of individuals convicted of crime that may be even severer than the criminal punishment itself where such criminal punishment has already been imposed, while such disclosure of identity serves neither a purpose nor a function distinct from that of the criminal punishment, is an excessive abuse of the state power. Furthermore, the effect of deterring crimes of the identity disclosure is too weak or uncertain against the significant infringement upon the basic rights of the individuals whose identity is disclosed, therefore, also in this regard, the current identity disclosure system conspicuously lacks the balance between the legal interests concerned.

6) The supporters of the identity disclosure system argue that the recent decisions of the United States Supreme Court holding the socalled Megan's Law[1] constitutional[2] should be brought to our attention. However, Megan's Law and our identity disclosure system are conspicuously different in the specific legislative directions and contents,[3] and, further, such decisions of the United States Supreme Court entertained solely the issues concerning Ex Post Facto Clause and the Procedural Due Process Clause.[4] Therefore, the above deci-

---

1) Megan's Law refers generally to the laws of various States of the United States providing, although the laws vary in details from one State to another, for the 'registration of the convicted sex offenders,' and the 'notice to the community' that is comparable to our identity disclosure system. The first of these laws was the Sex Offender Registration and Notification Law of New Jersey, enacted following the incident in 1994 where a seven-year-old girl named Megan Kanka was sexually offended and murdered in New Jersey by a man within the neighborhood who had been previously convicted twice for sexual offenses. Out of various such State statutes, Megan's Law of Alaska and Megan's Law of Connecticut were subjected to judicial review by the United States Supreme Court.

2) *See Smith v. Doe*, 538 U.S. 84 (2003); *Connecticut Dept. of Public Safety v. Doe*, 538 U.S. 1 (2003).

3) Under Megan's Law in the United States, the primary purpose and concern lies in the 'registration' of the convicted sexual offenders in order to track such individuals, and the 'notification to the community' is incidental. Under Megan's Law in the United States, there are certain institutional mechanisms to update the information as those individuals who are subject to the registration are obligated to re-register every year or in every ninety(90) days. The duration of the registration is relatively long as it lasts for the minimum of five(5) years and for the maximum of a lifetime. On the other hand, the notification system focuses on notifying potential victims that a convicted sexual offender is being released, thereby alerting the community of the presence of such individual. Thus, the registration and the notification are conducted from the time of release of a convicted sexual offender, and detailed information as to the identity including the photograph and the address is disclosed.
To the contrast, our system does not include that of registration of convicted sexual offenders, which might depreciate the effectiveness of the disclosure of identity as a one-time event. In addition, it lacks a mechanism to secure detailed and updated information, the duration of disclosure is limited to the period of six(6) months at the maximum, and the disclosure of identity is conducted at the time of the final judgment. This indicates that our identity disclosure system focuses more upon punishment or deterrence than the protection of potential victims.

4) With respect to Megan's Law of Alaska, the United States Supreme Court held that, by a majority of six(6) out of nine(9) Justices, the law does not violate the provision prohibiting Ex Post Facto Law, even when the law applies to those who committed sexual offenses prior to the enactment of the law. To summarize the main reasoning, the sanctioning imposed under the law cannot be deemed as criminal punishment, as the legislature intended to create a civil sanction in order to protect the safety of the public and did not intend to introduce a criminal sanction, and the effect of the sanctions under the law may not be deemed to be clearly criminal sufficient to ignore such legislative intent in light of the reasonable relation of the registration and the disclosure of identity under the law to the purpose of the law that is non-criminal.

sions of the United States Supreme Court may not be referred to in determining the issues of whether our identity disclosure system violates the principle of proportionality or prohibition against excessive restriction or the principle of equality.

7) On the other hand, the so-called Sarah's Law of the United Kingdom may be exemplary with respect to the issue of how we can reconcile and adjust between the safety of the public and the right to personality of convicted criminals.

The Sex Offender Act of 1997 enacted by the Diet in 1997 did not include a general notice provision, but it instead contained a provision under which the police were allowed to notify schools or other specific individuals of the information concerning the offenders having committed sexual crimes against the children residing in the community under exceptional circumstances. Pursuant to the practice guide of the Ministry of Internal Affairs of the United Kingdom on this point, the police could disclose the information solely when there were exceptional circumstances upon specific case-by-case judgment as to the danger of the crime. However, in July of 2000, an eight-year-old girl named Sarah Payne was discovered sixteen days after disappearance, sexually offended and murdered. The citizens of the United Kingdom urged that the United Kingdom Diet introduce a general notice system such as the one under Megan's Law, calling for a stricter measure to be adopted. However, despite the boiling public opinions, the United Kingdom Diet did not adopt a general notice system, when the Diet revised the Sex Offender Act toward the end of the year 2000. This revised Act dubbed 'Sarah's Law,' instead, provided that solely the number of convicted sex offenders for each district should be disclosed to the public. This was to avoid subjecting sex offenders to social persecution through the disclosure of identity on one hand, and, on the other hand, to put the general public on notice of the danger of sexual offenses in the particular community. That is, the United Kingdom Diet, upon a thorough reflection considering the general notice system, concluded to uniquely and harmoniously compromise the interest of protecting the children and the interest of rehabilitating the convicted sexual offenders for their normal return to the society, without being easily swayed by the voice of the potential voters.

With respect to Megan's Law of Connecticut, the Supreme Court of the United States held that the law does not violate the principle of procedural due Process even though the law does not provide for a prior hearing opportunity to determine the present danger posed by the convicted sexual offenders, on the ground that the law merely requires a previous 'final judgment of conviction' of sexual offense as a precondition for the law's applicability and not the 'present danger' posed by such convicted sex offenders.

Such legislative example of the United Kingdom suggests much toward us as it forms a stark comparison against our current identity disclosure system under which the right to personality and a normal return to the society of the convicted criminals is neglected in a nationwide general and invariable disclosure of such individuals' identity under the vague justification of raising the public consciousness and restoring the public morals, without any individual or specific review over the danger of crime.

(D) sub-conclusion

No one may say that the conduct of acquiring sex from minors in return for monetary compensation is an unjustifiable sexual exploitation sickening the body and the soul of the growing children that leaves an incurable aftereffect in their life, and that such conduct is a crime that destructs the sexual morals and darkens the future of the nation also from the perspective of the state as a whole. However, this does not justify any and all restrictions upon the basic rights of the purchasers of the sex from minors.

The current identity disclosure system is beyond the purpose of pure guidance to raise the consciousness of the significance of the sexual crimes involving minors as victims, nor is it a means to fight against the actual danger of recidivism posed by individuals who are subject to the disclosure of identity in light of the standard applicable in selecting individuals subject to disclosure, or the timing, duration, and scope of the disclosure. Rather, the current identity disclosure system focuses solely on maximizing the effect of punishment and deterrence by adopting an extremely abnormal and inflammatory method of exposing an individual's defects to the general public directly and actively by the state.

However, evidence to support the effectiveness of the current identity disclosure system in actually deterring or preventing crime is nowhere to be found. On the other hand, the disclosure of identity causes the harm of sentencing a 'social death penalty' once again onto the same individual who has already paid the deserving price for the previously committed crime through serving criminal punishment. This is in excess of the limit of the last measure permitted for the state power, and the content thereof is cruel and severe beyond the extent permissible in any modern civilized nation.

From the above stated positions, disclosure of the identity of purchasers of sex from minors excessively intrudes upon the right to personality of the individuals whose identity is subject to disclosure, as it can hardly be deemed to meet the requirements of the justifiable specific legislative purpose, the appropriateness of the means, the minimum of harm, or the balance between the legal interests concerned.

(2) Violation of the Principle of Equality

(A) question under review

Subdivision 1 of Article 20(2) of the Act restricts the right to self-determination upon the social personality factors of those convicted of purchasing sex from minors, on the ground of prevention of crime. The same provision does not permit the above restriction through the disclosure of identity with respect to the convicted criminals in general or certain group of sexual offenders against the minors (hereinafter referred to as the 'other general criminals'). However, crime prevention is similarly required in the case of the other general criminals as well. Therefore, it requires a constitutional explanation whether or not discrimination between these two can be justified.

(B) standard of review

Where the Constitution specifically indicates the standard that may not serve as the ground for a differential treatment or the area where a differential treatment is prohibited, or when a differential treatment is to cause a significant restriction upon the basic rights concerned, it is the established position of the Constitutional Court that the standard of review here is that, under the principle of proportionality, a proper balance between the ground and the content of the differential treatment should be met, beyond a mere confirmation of the existence of a reasonable ground for such differential treatment (*See* 11-2 KCCR 770, 787, 98Hun-Ma363, December 23, 1999, etc.).

In this case, none of the constitutionally prohibited standard or area of differential treatment is applicable. However, disclosing the fact of the crime along with the actual name of the individuals convicted of a crime and sentenced to a criminal punishment to the general public is an example of a significant restriction upon the right to personality in the sense that this might conspicuously hinder such individual's free expression and realization of personality by negatively affecting the social personality factors of the individuals subject to identity disclosure. Furthermore, when individuals convicted of a specific group of crimes and not all the crimes are subject to disclosure of identity, such individuals are branded in the perception of the general public as those who are more dangerous or despicable than other convicted criminals, and the effect of social stigma thereby increases to the same extent. Consequentially, a selective disclosure of identity has the meaning of singling out those individuals subject to it as the particular targets of social rejection. Then, in this case, as a discriminatory treatment is causing a significant restriction upon the basic rights concerned, a standard of review under the above principle of proportionality should apply.

(C) review of the provision on review

Reviewing this case on this premise, it is questionable to begin with whether a reasonable ground for different treatment exists, on the following points:

First, the crime of purchasing sex from minors is not necessarily more egregious than other crimes in the nature of the crime or in the maximum permissible sentence. An example is that the nature of the crime and the maximum permissible sentence for the crime of murdering a minor or burglary by holding a minor hostage is more serious than those of purchase of sex from the minors, but convicted committers of such crimes are not subject to the disclosure of identity.

Next, as the crime of purchasing sex from minors requires the consent to sexual transactions by the minors who are the other parties to the sexual transaction as an essential element of a crime, it hardly bears a violent nature or there is hardly any danger that a random person unexpectedly becomes a victim. Also, the danger of recidivism may not be a justifiable ground for disclosing the identity of the purchasers of sex from minors, as repeat offenders convicted of battery, burglary, or theft with higher recidivism rates are not subject to the disclosure of identity.

Finally, the special nature of the legal interest of the 'protection of the sexual integrity of minors' does not serve as a crucial standard in determining the disclosure of identity of offenders. Although a severer legally maximum sentence is presupposed, compared with the crime of purchasing sex from minors, for the crimes of inducing or inviting minors to be the other parties to the sexual transactions (Article 6(4) of the Act), inducing, soliciting, or coercing minors to be the other parties to the sexual transactions by vocation (Subdivision 1 of Article 7(2) of the Act), or providing the location or serving as an intermediary for the purchase of sex from minors (Subdivisions 2 and 3 of Article 7(2) of the Act), each of which is a crime of invoking or promoting the sale and purchase of sex from minors thereby more seriously intruding upon the above legal interest, the offenders in the above crimes are not subject to the disclosure of identity.

Then, there is hardly any reasonable ground to treat the purchasers of sex from minors differently from the other general criminals, and the sole ground for a different treatment may be the legislative intent to convey the message that warns adult male population against the conduct of purchasing sex from the minors.

However, such legislative intent is not of the nature or significance sufficient to justify the disclosure of the identity of convicted purchasers of sex from minors, as previously discussed in reviewing

the intrusion upon the right to personality. Whereas disclosure of identity strongly violates the spirit of the Constitution guaranteeing human dignity and encompasses a serious side effect of excessively hindering the normal return of once criminally punished individuals to society, on the other hand, it lacks effectiveness in deterring or preventing the crime. Therefore, the current identity disclosure system is an excessive means to achieve the legislative intent stated above.

(D) sub-conclusion

Therefore, there is no proper balance between the ground and the content of a discriminatory treatment in discriminately disclosing the identity of the purchasers of sex from minors unlike those convicted of other crimes. The current identity disclosure system thus violates the principle of equality.

B. Unconstitutionality of Article 20(5) of the Act

(1) Question Under Review

Article 20(5) of the Act delegates all of the matters concerning the specific time, duration, and procedure of disclosure of identity to be provided and regulated by presidential decree. With respect to this provision, the issue is whether such delegation can be justified under the Constitution.

(2) Limit of the Statutory Delegation

Article 75 of the Constitution provides that the "president may issue presidential decrees concerning matters delegated by statute with the scope specifically defined," thereby expressly stating, at the same time, the ground for and the limits of the statutory delegation. That is, in light of the purpose of the above provision seeking to realize the principle of legislation by the legislature and the rule of law, the phrase of the 'scope specifically defined' is interpreted to mean that the statute must specifically and clearly provide the basic matters so that everyone can predict the general content of the matters to be provided and regulated by a presidential decree from the delegating statute itself. The degree of the specificity and the clarity requested from the delegating statute may vary according to the type or the nature of the matters being delegated, however, especially when the statute possibly concerns a direct restriction of or infringement upon the basic rights of the citizens, a higher degree of specificity and clarity is required (12-1 KCCR 16, 36-37, 96Hun-Ba95, etc., January 27, 2000).

(3) Review of Unconstitutionality of Article 20(5) of the Act

(A) In the identity disclosure system, the time, duration, and procedure of the disclosure have a meaning more than as a merely incidental matter.

First, with respect to the 'time' of the disclosure, the issue is whether the identity of offenders should be disclosed immediately after a final judgment of sentence or not until the time an individual offender is released after completing the sentence as under Megan's Law of the United States. This is a greatly important matter that may define the overall nature of the identity disclosure system, as it concerns the question of whether to focus on the guidance or deterrence or on providing the information necessary for the self-defense of the potential victims in disclosing the identity of offenders.

In addition, the identity disclosure has a characteristic that once it is performed, any damage incurred thereby may hardly be cured. An immediate disclosure after the determination of the individual offenders subject to disclosure before the time period for requesting an administrative trial or filing an administrative litigation is expired would practically deprive an opportunity for any substantive relief of the individuals subject to the determination of identity disclosure. As such, the question of how much later from the determination of the individual offenders subjected to the identity disclosure the actual disclosure should be done is also an important issue concerning the time of the disclosure of identity.

Next, the 'duration' of disclosure is also a matter essential to the identity disclosure system. The essential nature of the identity disclosure system is that it makes the information that may negatively affect the social personality factors of an individual 'easily accessible by anyone.' This ease of access to the information itself exposes the individuals subject to the disclosure to the danger of psychologically daunting such individuals or subjecting such individuals to an unpredictable social persecution. As the core nature of the identity disclosure system likewise lies in the ease of the access to the information by the general public, the question of in which manner and for how long the disclosure is conducted is undeniably an important element determining the effect of the identity disclosure, as it significantly affects the ease of accessing information.

Finally, the 'procedure and other matters' of Article 20(5) of the Act seem to encompass the entire process through the actual disclosure of identity. That is, this includes all of the matters concerning how to collect the materials necessary for identity disclosure, which institution under which standards should review such materials, whether

to provide an opportunity to be heard for the individuals concerned in the process of determining the individuals whose identity is to be disclosed or, if so, in which method to provide such opportunity to be heard. Such matters also constitute an important content of the identity disclosure system. It is because such questions as whether the standard applicable in determining the individuals to be subjected to the disclosure of identity should focus on the specific danger of recidivism or on the degree of the nature of the crime, how to secure neutrality and expertise in forming a review institution, and how to reflect the opinion of the individuals concerned in the determining procedure in case there is an expression of opinion by an individual being subjected to the disclosure have an intimate relationship to a general operative direction and securing the fairness of the identity disclosure system.

(B) As such, the time, duration, procedure, and other matters of the disclosure of identity constitute the essential content determining the general characteristics and the directions of operation of the identity disclosure system, and also are important matters directly affecting the basic rights of the individuals subject to the identity disclosure. Also, concerning the above matters, the subject matter of the regulation is not of a nature that is extremely varied or constantly changing, therefore there is a demand for a stricter specificity and clarity of delegation. Article 20(5) of the Act delegates the entirety of the matters concerning the time, duration, procedure, and others to be provided and regulated by presidential decree without specifically defining the basic content or scope concerning such matters. Therefore, it is impossible to perceive the general content of the matters concerning the specific time, duration, and procedure of the disclosure of identity from the statute itself without having to refer to inferior legal provisions.

(4) Sub-conclusion

Therefore, the provision on review is a statutory provision of blanket delegation, and, as such, is beyond the legitimate scope of legislative delegation permissible under the Constitution.

C. Conclusion

As reviewed above, Subdivision 1 of Article 20(2) of the Act is unconstitutional as it excessively infringes upon the right to personality of the individuals subject to disclosure of identity and violates the principle of equality as it prejudicially discriminates against those convicted of purchasing sex from minors compared with those convicted of other general crimes without legitimate ground. Article

20(5) of the Act is also unconstitutional as it violates the principle of prohibition against blanket delegation of Article 75 of the Constitution by delegating the matters concerning the time, duration, procedure, and other matters of the disclosure of identity to presidential decree in the entirety without specifically defining basic contents and scopes of the time, duration, procedure, and other matters concerning the disclosure.

7. Conclusion

The part of the request for constitutional review with respect to Articles 20(3) and 20(4) of the Act is dismissed as unjusticiable as it lacks the prerequisite relationship to the underlying trial by the unanimous opinion of the participating Justices. With respect to Subdivision 1 of Article 20(2) of the Act and Article 20(5) of the Act, Justices Yun Young-chul, Ha Kyung-chull, Kim Hyo-jong, and Kim Kyung-il are of the opinion that such provisions are not unconstitutional, and Justices Han Dae-hyun, Kim Young-il, Kwon Seong, Song In-jun, and Choo Sun-hoe are of the opinion that such provisions are unconstitutional. Although more of the Justices are of the opinion that such provisions are unconstitutional, this number is short of the quorum required for an unconstitutionality decision set forth under Subdivision 1 of Article 23(2) of the Constitutional Court Act, which mandates a decision that the above provisions on review are not unconstitutional. It is so ordered.

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

---

Aftermath of the Case[5)]

Subsequent to this decision, the Commission on Youth Protection mapped out the policy direction and embarked on the revision of the relevant provisions of the Juvenile Sex Protection Act, to bifurcate the identity disclosure system so that those convicted individuals with higher possibility of recidivism would be subject to the disclosure of

5) Not part of the official opinion of the Court. (translator's note)

detailed information as to the identity including a facial photograph, and those with lower possibility of recidivism would be provided with an opportunity for educational programs upon successful completion of which they would be exempted from disclosure of identity. Those convicted of peddling and arranging for the purchase of sex are likely to be initially subject to the disclosure of detailed information including a facial photograph. Encouraged by the decision of the Constitutional Court holding the identity disclosure system not unconstitutional, the Commission on Youth Protection is expected to expand and develop this system in the future.

4. *Prohibition of Assembly in the Vicinity of Diplomatic Institutions*

[15-2(B) KCCR 41, 2000Hun-Ba67, etc.,(consolidated), October 30, 2003]

Contents of the Decision

1. Dual constitutional functions of the freedom of assembly.
2. Guarantee of peaceful assemblies.
3. Content of the guarantee of the freedom of assembly.
4. Constitutional meaning of the place of assembly.
5. Grounds for distinction between outdoor assemblies and indoor assemblies under the Act on Assembly and Demonstration.
6. Prohibition and dispersal of assembly as the final means.
7. Legislative purpose of the part of Subdivision 1 of Article 11 of the Act on Assembly and Demonstration concerning foreign diplomatic institutions existing in the Korean territory (hereinafter referred to as the provision at issue in this case) where Subdivision 1 of Article 11 of the Act prohibits outdoor assemblies in the entirety within one-hundred meters from the facilities intended for diplomatic institutions existing in the Korean territory.
8. Whether a special provision setting forth the places where assembly is prohibited is an excessive regulation (negative).
9. Whether it is unequivocally necessary to prohibit assembly in the entirety with no permitted exception in particular circumstances (affirmative).
10. Violation of the principle of proportionality (affirmative).

Summary of the Decision

1. The freedom of assembly serves dual constitutional functions as an element for consummation of personality of the individuals and as an element that constitutes democracy. Within our constitutional order where the dignity of human beings and the unhindered consummation of personality are regarded as ultimate values, the freedom of assembly, like all other basic rights, is, first of all, a basic right that serves and contributes to the autonomous decisionmaking and the consummation of personality of the individuals. In addition, as the citizens may affect the formation of the public opinion by collec-

tively expressing their opinions and arguments through an assembly, the freedom of assembly, along with the freedom of expression, is one of the indispensable and fundamental elements in order for any democratic community to function.

2. What is protected under the freedom of assembly is limited to a 'peaceful' or 'nonviolent' assembly. The freedom of assembly is a means of spiritual debates and discussions in a democratic nation, and, as such, it constitutionally protects an expression of opinions through peaceful means, however, not an imposition of opinions by way of violence. The Constitution guarantees the freedom of assembly as a basic right of the citizens thereby denying to perceive a peaceful assembly itself as a threat to or infringement upon public safety and order, and the Constitution itself provides that certain inconveniences to the general public or threats to legally protected interests that inevitably occur in the process of collective exercise of the freedom of assembly held by individuals must be accepted by the state and the third party to the extent they harmoniously conform to such legal interests.

3. The freedom of assembly guarantees the right to autonomously determine the time, place, manner, and purpose of the assembly. Some of the important activities specifically protected under the freedom of assembly include preparation, organization, supervision, participation, and decision upon the time and place of the assembly. Therefore, the freedom of assembly not only prohibits the state from acting to interfere with an individual's participation in an assembly or forcing an individual to participate in an assembly, but also prohibits any and all measures taken by the state that affect the exercise of the freedom of assembly of an individual such as the interference with the travel to and from the place of assembly or with the access to the place of assembly by delaying it by way of inspecting and examining the participants of the assembly.

4. As the purpose and content of an assembly is inseparably and internally related to the place of the assembly in general, the choice of the place of assembly in many occasions determines the success and the failure of the assembly. Because the place of the assembly has an important meaning for the very purpose and effect of the assembly, the freedom of assembly may be effectively guaranteed only when every and any person can freely decide the 'location' of the planned assembly in principle. Therefore, unless justified in order to protect other legally protected interests, the freedom of assembly prohibits the separation of the place of the assembly from the object of the protest.

5. The Act on Assembly and Demonstration distinguishes outdoor assemblies from indoor assemblies on the ground that there is a

greater danger in the case of outdoor assemblies of clashes against other legal interests due to the possibility of direct contact with the holders of other fundamental rights, therefore it is required to regulate in further detail the manner and the procedure of the exercise of the freedom of assembly in the case of outdoor assemblies. It is on one hand to have the freedom of assembly substantively exercisable and, on the other hand, to sufficiently protect the legal interests of a third party that are in conflict with the freedom of assembly.

6. Exemplary acts of the state that limit the freedom of assembly include the prohibition of the assembly, the dispersal of the assembly, and the conditional permission of the assembly under the Act on Assembly and Demonstration. Any limits on the freedom of assembly may be justified only when such limits are unequivocally necessary in order to protect other important legally protected interests, and the prohibition or dispersal of the assembly, especially, may be permitted only in a limited circumstance where there is a clear, present, and direct danger to the public safety and order as a matter of principle. The prohibition or dispersal of an assembly should be the final means to be adopted that may be considered only upon exhaustion of all other means that restrict less of the freedom of assembly or exhaustion of all possibilities of permitting the assembly by imposing certain conditions.

7. Assemblies in the vicinity of diplomatic institutions have a higher probability in general to cause conflicts with important legally protected interests compared with other places and thereby to inflict infringement upon such other legal interests. Therefore, the provision at issue in this case prohibits assemblies in the vicinity of diplomatic institutions in the entirety in order to effectively prevent in advance a situation of such serious conflicts between legally protected interests. The legal interests protected under the provision at issue in this case include the guarantee of free entry and exit to and from the diplomatic institutions existing in the Korean territory and of the smooth performance of activities and the bodily safety of the diplomats.

8. Should a particular location be specifically protected due to the importance of the performance of activities within such location and the legislators determine that an effective protection of such important institutions may be rendered by prohibiting, in principle, all assemblies on that location, such judgment of the legislators cannot be deemed to be manifestly wrong. The legislators are entitled to regulate certain special situations with higher probability of infringing upon other legally protected interests, such as an outdoor assembly at nighttime or an outdoor assembly at a particular location, in proportion to the degree of the impact of the assembly upon the public safety and order or of the danger of the conflicts between the legally protected interests.

9. When a general assumption that an assembly at a particular location causes a direct threat to the legal interests protected under the provision at issue in this case may be rebutted by a specific situation, the legislators should provide for possible permission of the assembly as an exception to the general prohibition, from the perspective of the 'principle of the least restrictive means.' The preventive judgment of the legislators upon the presumptive danger on which the provision at issue in this case is based may be rebutted in the following specific circumstances.

First, in case of an assembly not against a diplomatic institution but targeting an object of protest that coincidentally exists in the location where all assemblies are prohibited, there is less danger of conflicts between the legal interests premised in the provision at issue in this case. The provision at issue in this case poses a problem of over-inclusiveness in prohibiting all assemblies including not merely those assemblies to protest against a diplomatic institution or a particular foreign nation located in the no-assembly zone but also those assemblies for other purposes within that zone.

Second, in case of assemblies of a relatively small size, there is generally less danger of intrusion upon the legal interest protected under the provision at issue in this case. For example, in the case of an intended assembly in front of an embassy of a foreign nation with a small number of participants by way of peaceful picketing without generating noise, unless there is a concern that it will be expanded by subsequent participation of the general public or a danger that it will turn to a violent demonstration, there can hardly be any ground justifying prohibition of such a small peaceful assembly.

Third, when an assembly is intended to be and is actually held on a holiday when the diplomatic institution is officially closed for work, there is generally less danger of intrusion upon such legally protected interests as guaranteeing free access to and from the diplomatic institution or smooth performance of administration therein.

10. Therefore, although the legislators may prohibit, in principle, all assemblies on certain locations on the premise of the presumption that an 'assembly in the vicinity of a diplomatic institution has a general tendency of inflicting serious conflicts between legally protected interests,' there should be at the same time those provisions setting forth exceptions to such general prohibition in order to mitigate the possibility of excessive limitation upon the basic right that may result out of such general and abstract provision of law. The provision at issue in this case nonetheless imposes a prohibition without permitting exceptions for those situations where there exists no specific danger premised under the provision at issue in this case. It is an excessive limitation beyond the scope of measures necessary

to achieve the legislative purpose. Therefore, the provision at issue in this case is unconstitutional as it excessively limits the freedom of assembly in violation of the principle of the least restrictive means.

Opinion of Justice Kim Young-il that the provision at issue in this case does not conform to the Constitution

I agree with the majority that the provision at issue in this case is of an unconstitutional nature with respect to the cases of an 'assembly that is not against a diplomatic institution but instead targeting other objects of protest coincidentally existing in the no-assembly zone' and an 'assembly of a relatively small size' as indicated above, I respectfully disagree with the majority that we should hold the provision unconstitutional. Instead, I am of the opinion that the provision at issue in this case should be held nonconforming to the Constitution on the above ground, so that the National Assembly, with its expansive legislative-formative power, will remove the unconstitutionality through specific statutory revisions and restore the constitutional order.

The general grounds for prohibition of assembly set forth in Article 5 of the Act on Assembly and Demonstration are insufficient to effectively achieve the legislative purposes of the provision at issue in this case of 'guaranteeing the function of diplomatic institution' and 'protecting safety of diplomatic facilities.' Therefore, a decision of nonconformity to the Constitution would be appropriate as such decision would permit tentative application of the provision at issue in this case until the statutory revision by the legislators, thereby preventing a vacuum or confusion in law that might be caused by nullification of the provision at issue in this case.

Opinion of Justice Kwon Seong that the provision at issue in this case is constitutional

The question of how much locational distancing is necessary in order to warrant nonviolence of an assembly should be ultimately determined by the legislature under its legislative discretion considering the totality of the degree of respect for law and order, the frequency of utilizing assemblies for competition among different political systems, the internal nature of public sentiment, and the atmosphere of the society. In light of this, the one-hundred-meter distancing set forth in the provision at issue in this case does not unequivocally exceed the degree that is necessary.

In light of the transformability and the unpredictability of an

assembly that may be compared to a small piece of ash kindled to far-reaching fire, those circumstances where an assembly is of a small size at its initiation or that a facility which is the target of an assembly coincidentally stands in the vicinity of the objects an assembly against which is prohibited cannot be an element in determining the constitutionality of the provision at issue in this case. The provision at issue in this case is thus not unconstitutional.

Parties

Complainants

1. National Alliance for Democracy & Reunification of Korea(2000Hun-Ba67)

   Representative : Oh, Jong-ryul, Permanent Chair
   Counsel of Record : Myungin Law Firm
   Counsel in charge : Yoon, Jong-hyun and five others

2. Committee Fighting for Reinstatement of Former Employees of Samsung (2000Hun-Ba83)

   Representative : Kim, Sung-hwan, Chair
   Counsel of Record : Kwon, Doo-seob, Attorney

Original Case

1. Seoul Administrative Court, 2000Gu7642, Nullification of Notice of Prohibition of Assembly (2000Hun-Ba67)
2. Seoul Administrative Court, 2000Gu15360, Nullification of Notice of Prohibition of Assembly (2000Hun-Ba83)

Holding

Part of Subdivision 1 of Article 11 of the Act on Assembly and Demonstration that provides for the "diplomatic institutions of a foreign nation located in the Korean territory" is unconstitutional.

Reasoning

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

A. Overview of the Case

(1) 2000Hun-Ba67 Case

(A) The complainant, the National Alliance for Democracy & Reunification of Korea, is a nationwide civil organization associated on December 1, 1991 for the realization of democratic reform and the peaceful reunification of Korea. The complainant intended to hold an outdoor assembly on February 23, 2000 under the title of 'Appeal for Truth-Finding Inquiry into the Civilian Massacre by the United States Army during the Korean War' at the empty lot within the Yulinmadang Park located at 76 Sejong-Ro, Jongno-Gu in Seoul. The complainant therefor submitted an outdoor assembly report to the Superintendent of the Jongno Police Station, the competent authority, at approximately 9 o'clock in the morning on February 21, 2000, pursuant to Article 6 of the Act on Assembly and Demonstration.

On February 22, 2000, the Superintendent of the Jongno Police Station served a notice of prohibition of outdoor assembly on the complainant on the ground that the 'intended location for assembly was within the no outdoor assembly or demonstration zone under Article 11 of the Act on Assembly and Demonstration as it was located within ninety-seven(97) meters from the boundary of the United States Embassy at 82 Sejong-Ro, Jongno-Gu, Seoul, and thirty-five(35) meters from the boundary of the Consulate Division of the Japanese Embassy at E-Ma Building, 146-1, Soosong-Dong, Jongno-Gu, Seoul.'

(B) The complainant thereupon filed an administrative proceeding with the Seoul Administrative Court in March of 2000 seeking to nullify the notice of prohibition of the assembly (2000Gu7642), on the ground that Subdivision 1 of Article 11 of the Act on Assembly and Demonstration, which was the ground for the above measure prohibiting the intended assembly, was unconstitutional, and petitioned the Seoul Administrative Court to request a constitutional review of the same provision. Upon dismissal of the petition for request by the Seoul Administrative Court (Seoul Administrative Court 2000A643), the complainant filed a constitutional complaint on August 16, 2000 with the Constitutional Court pursuant to Article 68(2) of the Constitutional Court Act, which is the case at bar.

(2) 2000Hun-Ba83 Case

(A) The complainant, the Committee Fighting for Reinstatement of Former Employees of Samsung, is an association organized to seek reinstatement of those individuals who were formerly employed at Samsung and then laid off. The complainant intended to hold an outdoor assembly for five consecutive days from April 24 to April 28, 2000 on the sidewalk in front of the former Korean Daily News Corp. building under the tile of 'Conference to Pulverize Nepotism by the Samsung Family and Achieve Reinstatement of Employment' and then to march to the Korea Chamber of Commerce and Industry located on 4-Ga Namdaemoon-Ro. The complainant therefor submitted an outdoor assembly report at approximately 2 o'clock in the afternoon on April 20, 2000 to the Superintendent of the Namdaemoon Police Station, the competent authority, pursuant to Article 6 of the Act on Assembly and Demonstration.

On April 20, 2000, at approximately 9:05 in the evening, the Superintendent of the Namdaemoon Police Station served a notice on the complainant to the effect that the complainant should either cancel the march or change the route of the march, on the ground that the route as reported was in violation of Article 11 of the Act on Assembly and Demonstration prohibiting demonstration including outdoor assemblies and marches within one-hundred meters from the boundary of an embassy of a foreign nation, as the reported route for march included the sidewalks in front of the Samsung Headquarter building that housed the Singaporean Embassy and the Samsung Life Insurance building that housed the El Salvadorian Embassy. Upon refusal of the complainant to conform to the above notice, the Superintendent of the Namdaemoon Police Station served a notice of prohibition of outdoor assembly on the complainant on April 21, 2000, prohibiting the assembly in this case.

(B) The complainant thereupon filed an administrative proceeding with the Seoul Administrative Court seeking to nullify the notice of prohibition of the assembly (2000Gu15360), on the ground that Article 11 of the Act, which was the ground for the above measure prohibiting the intended assembly, was unconstitutional, and petitioned, during the pendency of the above proceeding, the Seoul Administrative Court to request a constitutional review of the same provision. Upon dismissal of the petition for request by the Seoul Administrative Court (Seoul Administrative Court 2000A497), the complainant filed a constitutional complaint on November 1, 2000 with the Constitutional Court pursuant to Article 68(2) of the Constitutional Court Act, which is the case at bar.

B. Subject Matter of Review

As the pertinent part of Article 11 of *the Act on Assembly and Demonstration* (hereinafter referred to as the "Assembly and Demonstration Act") in this case is limited to the "diplomatic institutions of a foreign nation located in the Korean territory" of Subdivision 1, the subject matter of review in this case is also limited to this part only. Therefore, the subject matter of review in this case is whether the part of Subdivision 1 of Article 11 of the Assembly and Demonstration Act providing for the "diplomatic institutions of a foreign nation located in the Korean territory" violates the Constitution. The provision subject to constitutional review and other relevant provisions are as follows:

Article 11 (Prohibited Place of Outdoor Assembly and Demonstration)

No person may hold any assembly or demonstration at any place within one hundred meters from the borderline of the following office buildings or residences:

(1) The National Assembly building, each level of courts, the Constitutional Court, diplomatic institutions of a foreign nation located in the Korean territory;

(2) The Presidential residence, the official residences of the Speaker of the National Assembly, the Chief Justice of the Supreme Court, and the President of the Constitutional Court; and

(3) The official residence of the Prime Minister, residences of the foreign diplomatic missions in Korea: Provided, That this shall not apply to a parade.

2. Opinions of the Complainants and the Related Parties

A. Summary of the Arguments of the Complainants (2000Hun-Ba67 and 2000Hun-Ba83 cases)

(1) Article 11 of the Assembly and Demonstration Act defines the no outdoor assembly and demonstration zone in an overly broad manner and, further, within such zone, not merely the manner of particular assemblies or demonstrations is restricted, but any and all assembly and demonstration is prohibited altogether. The assembly and demonstration in such zone should be regulated only to the extent that an assembly or demonstration in such zone considerably interferes with the administration of official business in such public institutions or deprives the general public of the right to make use

of public property.

(2) The provision at issue in this case that prohibits assemblies and demonstrations in the vicinity of the diplomatic institutions of a foreign nation located in the Korean territory does not selectively prohibit particular assemblies or demonstrations that touch diplomatically sensitive issues out of concern over diplomatic conflicts and friction with that particular foreign nation. Instead, the provision at issue in this case preventively and entirely prohibits any and all assemblies and demonstrations in a location within one-hundred meters from diplomatic institutions regardless of the subject or the nature of individual assemblies and demonstrations. This type of restriction on the freedom of assembly is in violation of the principle of proportionality or the principle against excessive restriction, which mandates that a restriction should not exceed what is reasonable and is permissible as a necessary minimum.

(3) As most of the structures and residences enumerated in the subdivisions of Article 11 of the Assembly and Demonstration Act are located in the center of Seoul, the result thereof is that no assembly or demonstration can practically be held in the center of the city that is the most appropriate location to communicate the ideas and opinions of the person intending to hold an assembly or demonstration.

B. Summary of Reasons for Rejecting the Request for Constitutional Review by Seoul Administrative Court (2000Hun-Ba67 and 2000Hun-Ba83 cases)

(1) Article 11 of the Assembly and Demonstration Act imposes certain locational restrictions upon the freedom of assembly. Such locational restrictions are due to the facts that the National Assembly, the courts, the Constitutional Court and other listed institutions perform an especially significant function among various public institutions and that maintaining order and tranquility and the safety from extrinsic and collective threats is a crucial element for the performance of such significant functions. The diplomatic institutions of a foreign nation located in the Korean territory are included in the no outdoor assembly and demonstration zone as the normal functioning and safety thereof significantly affect the national interest from the aspect of maintenance and development of amicable diplomacy.

(2) The practical necessity for protecting diplomatic institutions against threats upon their functioning and safety imposed by collective expression of ideas through an outdoor assembly is not varied by the direct relevance or lack thereof of the content of the assembly to the particular foreign nation. Therefore, the uniform applicability

of the restrictions and the uniform scope of such restrictions regardless of the content, object, or manner of a particular outdoor assembly under the provision at issue in this case is not, without further, in violation of the constitutional principle of proportionality or principle against excessive restriction.

(3) The one-hundred meter distance under Article 11 of the Assembly and Demonstration Act is deemed to be out of an appropriate balancing as to the scope between various conflicting basic rights. Notwithstanding the outcome that considerable part of the streets, plazas, and parks in the center of Seoul falls within the no demonstration zone due to the inclusion of the entire diplomatic institutions under the provision at issue in this case, this has not resulted in a complete prohibition of any and all outdoor assembly in the center of Seoul, nor does it limit the essential part of the freedom of assembly.

C. Opinion of the Superintendent of the Namdaemoon Police Station (2000Hun-Ba83 case)

(1) Article 11 of the Assembly and Demonstration Act intends to protect such important legal interests as the national security and the maximization of national interest through protection of the function and the business of public institutions, maintenance of amicable relationships with foreign nations and protection of diplomatic institutions and also as the protection of the right of other citizens to obtain service from public institutions. As such, with its justifiable and necessary purpose, this provision is not excessively restrictive.

(2) In case of a demonstration held in the center of a city, in general, even if it generates considerable degree of noise by utilizing loud speakers, no restriction is normally imposed in reality, and the targeted institutions or the general public accessing such institutions can find out with ease the occurrence of the assembly and the content of the argument advanced at the assembly through the gathering of the participants in the assembly and their advocation of the epithets even if an assembly is held over one-hundred meters away. Therefore, such locational restriction does not limit the essential part of the freedom of assembly.

The provision at issue in this case should not be held unconstitutional on the mere ground that, while a march has a high tendency of transforming into a violent incident, the complainant cannot proceed with the intended march through the intended route or the march cannot proceed effectively due to the existence of many diplomatic institutions in the center of Seoul, where the smooth flow of traffic is difficult even in normal times due to a high volume of traffic of both pedestrians and vehicles.

3. Review

A. Constitutional meaning and function of the freedom of assembly

Article 21(1) of the Constitution provides that "all citizens shall enjoy freedom of speech and the press, and freedom of assembly and association," thereby guaranteeing as the basic right of the citizens the freedom of expression, the freedom of assembly and the freedom of association, which is the basic right for the exchange of ideas and opinions with others. The Constitution guarantees the freedom of assembly as a fundamental right of the citizens thereby denying to perceive a peaceful assembly itself as a threat to or infringement upon public safety and order, and the Constitution itself provides that certain inconveniences to the general public or threats to legally protected interests that inevitably occur in the process of collective exercise of the freedom of assembly held by individuals must be accepted by the state and the third party to the extent they harmoniously conform to such legal interests.

The freedom of association serves dual constitutional functions as an element for consummation of personality of the individuals and as an element that constitutes democracy.

(1) Within our constitutional order which places the highest value in the dignity of human being and the consummation of unhindered personality, the freedom of assembly, like all other basic rights, is the basic right that contributes more than anything else to the autonomous decisionmaking and consummation of personality of an individual. Desiring to contact other individuals, to exchange each other's ideas and thoughts, and to collectively express and consummate personality is the very basic urge of every human being as a social animal. The freedom of assembly is the fundamental right that guarantees the freedom for coexistence with others in order to express and consummate personality, that is, the freedom for collective expression and consummation of personality through an exchange of opinions with others. At the same time, the freedom of assembly is the fundamental right that protects individuals against forced isolation from others and social community by the state power. Thus, an assembly with others for the collective expression and consummation of personality in and by itself belongs to the zone of personal freedom that should be valued and protected by the fundamental right. The freedom of assembly, together with the freedom of association, guarantees the freedom to gather with others.

(2) The freedom of assembly, together with the freedom of asso-

ciation, is one of the indispensable and essential elements for the functioning of a democratic community, as the citizens affect the formation of public opinions by collectively expressing their opinions and arguments through an assembly. The freedom of assembly is the freedom to collectively express opinions and, as such, provides an opportunity in a democratic nation to participate in the formation of political opinions and decisions. Under our Constitution that has adopted representative democracy instead of direct democracy, the general public is left with the unique possibility of affecting the formation of political opinions and decisions in the form of demonstration by exercising the freedom of assembly, other than exercising the right to vote and participating in the political party or social organizations.

In addition, the freedom of assembly functions to integrate those dissatisfied with politics and to contribute to political stability by allowing public expression of dissatisfaction with and criticism against social and political situations. The freedom of assembly, especially, serves an increasingly significant function as the window through which minority opinions are channeled to state affairs by offering an appropriate means to advocate the rights, interests and arguments of the minority groups that normally cannot access mass media in the modern society, for the freedom of assembly functions as an effective means to collectively express political disagreement to the holder of power in national politics. In this sense, the freedom of assembly is an important fundamental right for the protection of minorities. When there is a guarantee of possibility that minority groups may affect the formation of political opinions and decisions of the community, the decisionmaking of the community by way of majoritarian rules will be given added legitimacy and may be accepted by the minority overwhelmed by the majority. The guarantee of the freedom of assembly by the Constitution is the manifestation of the constitutional resolution toward a pluralistic 'open society' where tolerance and various ideas coexist.

B. Content of the guarantee of the freedom of assembly

(1) The freedom of assembly guarantees the right to autonomously determine the time, place, manner, and the purpose of the assembly. Essential conduct specifically protected under the freedom of assembly includes the preparation, organization, and supervision of the assembly, the participation in the assembly, and the decision of time and place of the assembly. However, it does not protect participation in an assembly for the purpose of interfering with the assembly. The organizer of the assembly may freely determine the subject matter,

purpose, time, and place of the assembly, and the participant in the assembly may freely choose the type and degree of participation and his or her clothes when participating in the assembly.

Although the Constitution does not expressly so state, what is protected under the freedom of assembly is limited to 'peaceful' or 'nonviolent' assemblies. The freedom of assembly is a means of spiritual and ideological debate and discussion in a democratic nation and, as such, it protects expression of opinions through peaceful means, yet does not constitutionally protect coercion of expression by way of violence.

(2) The freedom of assembly is, in its immediate meaning, a basic right providing for a defense against the intrusion of official state power and, as such, is the basic right prohibiting the state from acting to interfere with individuals' participation in an assembly or to force individuals to participate in the assemblies. Therefore, the freedom of assembly not only prohibits the state from forcefully interfering with the participation in the assembly, but also prohibits any and all measures affecting the exercise of the freedom of assembly by way of, for example, interfering with returning home from the place of assembly, interfering with access to the place of assembly by delaying it through inquisition and examination of the participants, or watching individuals' participation in assemblies under guard and collecting information concerning such individuals thereby weakening the potential participants' will to participate in the assembly in fear of prejudice and eventually giving up participation therein.

(3) The place of assembly has a special symbolic meaning. Often, a particular place is chosen for an assembly due to its special relation to the purpose of the assembly. In general, expression of opinion by way of demonstration is conducted in a place where the subject matter or target opposed at the demonstration exists (for example, a detested and protested facility such as a nuclear power plant or a garbage incinerator) or where an incident that has triggered the demonstration occurred (for example, a building hosting the state institution that made the decision at issue). For example, a demonstration protesting against a legislative bill that discriminates against women may not expect to have any significant impact should it be held in a commercial or residential area, yet, it may have a maximum impact should it be held in front of the National Assembly building. That is, as the purpose and content of an assembly and the place of an assembly generally have an intimate internal interrelationship, the choice of the place of assembly in many occasions determines the success and the failure of an assembly.

The importance of the place where an assembly is held in the freedom of assembly is also manifestly indicated in that the protection

of the freedom of assembly as a basic right will be practically meaningless should an assembly be expelled by state authority to a place where it cannot draw any attention from the public or where no one will listen to the opinions expressed at the assembly. As the place of assembly has an important meaning concerning the very purpose and impact of the assembly, the freedom of assembly can be effectively guaranteed only when everyone may freely choose 'in which place' to hold the intended assembly as a matter of principle. Therefore, the freedom of assembly prohibits separation of the place of assembly from the object of the protest, unless it is justified in order to protect other legally protected interests.

C. Essential regulations under the Assembly and Demonstration Act

(1) The Assembly and Demonstration Act distinguishes an outdoor assembly from an indoor assembly and provides that Articles 6 through 12-2 of the Act are applicable only to the outdoor assembly and demonstration.

The Assembly and Demonstration Act distinguishes an outdoor assembly from an indoor assembly on the ground that an outdoor assembly poses a greater danger of the clash between legally protected interests compared with an indoor assembly due to the possible direct contact with the holders of other fundamental rights. In case of an outdoor assembly, the method and procedures concerning exercise of the freedom of assembly should be regulated in more detail, for it may cause inconvenience to the general public such as hindered flow of traffic as it necessarily requires the use of a public place such as a public street, and it may also endanger maintenance of order as it accompanies collective actions of many individuals. This is to have the freedom of assembly substantively exercisable on one hand and, on the other, to sufficiently protect the legal interests of third party individuals that may be in conflict with the freedom of assembly.

(2) The Assembly and Demonstration Act, under Article 6, imposes a notice obligation on the organizer of an outdoor assembly by submitting a report of the intended outdoor assembly to the superintendent of the competent police authority no later than forty-eight hours prior to the intended outdoor assembly.

Pursuant to Article 8(1) of the Assembly and Demonstration Act that provides for the grounds for prohibition of assemblies, the superintendent of the competent police authority that has received the report may serve a notice prohibiting the reported outdoor assembly within forty-eight hours from the reception of the notice when he or she

determines that the reported outdoor assembly is the one "that clearly and directly threatens public safety and order through collective battery, threatening, destruction or arson" (Subdivision 2 of Article 5(1)), that is held during the no outdoor assembly time zone (before sunrise, after sunset) (main provision of Article 10), that is held in the no outdoor assembly zone (Article 11), where the organizer has failed to supplement or amend the reported items (Article 7(1)), or that should be prohibited in order for the flow of the traffic (Article 12). In addition, the Act provides that an assembly for the purpose of opposing the assembly that has already been reported in the same location (Article 8(2)) or an assembly in a residential area against which an injunction is requested by a resident to protect against the possibility of damage to the property (Article 8(3)) may also be prohibited.

Pursuant to Article 18(1) of the Assembly and Demonstration Act, which provides for the grounds for dispersal of assemblies, the superintendent of the competent police authority may order dispersal of an assembly where there is a ground that absolutely prohibits any assembly (Article 5(1)), where an outdoor assembly is held during the nighttime (Article 10) or in a no outdoor assembly zone (Article 11), where there has been no report thereof pursuant to the law (Article 6), or where a prohibition notice has been served as a prohibited assembly (Articles 8 and 12(1)).

(3) The most conspicuous examples of the state action that limits the freedom of assembly are the prohibition of the assembly, the dispersal of the assembly, and the conditional permission of the assembly, provided in the Assembly and Demonstration Act. Limits on the freedom of assembly may be justified only when such limits are unequivocally necessary in order to protect other important legally protected interests, and the prohibition and the dispersal of the assembly may especially be permitted, in principle, only when there exists a clear and present danger directly threatening the public safety and order. The prohibition and the dispersal of the assembly should be the final means that may be considered upon completely exhausting all other possible means restricting less of the freedom of assembly, that is, all possible conditional permission for the assembly (for example, limiting the number of participants, distancing from the target of the demonstration, restriction on manner, time, and duration of demonstration, etc.). In this sense, Subdivision 2 of Article 5(1) of the Assembly and Demonstration Act, which provides for the grounds for absolute prohibition of the assembly, strictly limits the grounds for prohibition of assembly to the one "that clearly and directly threatens public safety and order through collective battery, threatening, destruction or arson."

D. Constitutionality of the provision at issue in this case

(1) The provision at issue in this case as a provision limiting the freedom of assembly

(A) The provision at issue in this case entirely prohibits, without exception, any and all outdoor assembly and demonstration within one-hundred meters from the boundary of the structures hosting a foreign diplomatic institution in the Korean territory (hereinafter referred to as the "location in the vicinity of diplomatic institutions"). In case an outdoor assembly is held at the location in the vicinity of diplomatic institutions, notwithstanding the prohibition under the provision at issue in this case, the superintendent of the competent police authority may order dispersal of such assembly (Subdivision 1 of Article 18(1) of the Assembly and Demonstration Act). Those who hold an assembly in the no outdoor assembly zone are punishable by imprisonment for one year or less or a fine of one-million Won or less, according to the status as an organizer, a supervisor, or a simple participant (Article 20).

As the provision at issue in this case geographically limits free exercise of the freedom of assembly by establishing a no-assembly zone, the provision at issue in this case is a provision restricting the freedom of assembly.

(B) The provision at issue in this case does not prohibit an assembly on particular occasions. Instead, it uniformly prohibits any and all assembly on a specific location on the sole ground that such 'assembly is held on that specific location,' regardless of any particular circumstance that poses danger in a specific case. That is, the legislators have concluded, upon an irrebuttable presumption that an assembly in the vicinity of diplomatic institutions is generally against the performance of business within such diplomatic institutions, that the diplomatic institutions can be effectively protected only by a complete prohibition of assembly in such areas.

(2) Legislative purpose of the provision at issue in this case

As an assembly in the vicinity of diplomatic institutions, compared with other locations, may generally result in a conflict with important legal interests thereby leading to a highly probable intrusion upon such legal interests, the provision at issue in this case entirely prohibits any and all assembly in the vicinity of diplomatic institutions in order to effectively prevent in advance such a highly probable clash between legally protected interests. The legally protected interests presupposed by the provision at issue in this case include the protection of free

entry to and exit from diplomatic institutions stationed in the Korean territory, efficient business performance, and the bodily safety of the diplomats.

On the other hand, it may be questioned whether the legislative purpose of the provision at issue in this case includes prevention of potential damage to the 'amicable relationship with foreign nations' that may be caused by direct face-to-face opposition by a foreign diplomatic institution against an assembly held in its vicinity where negative opinions towards such particular foreign nation are expressed. However, in a free democratic nation where the freedom of expression and of assembly is guaranteed as a basic right of its citizens, the act by the citizens to participate in an assembly in order to collectively express opinions constitutes a normal affair in the life of a democratic citizenry and the value generally accepted. Therefore, exercise of such a basic right in a peaceful manner by a portion of the citizens in the vicinity of diplomatic institutions does not mean damage to the 'amicable relationship with foreign nations.' That is, a legal interest of 'good faith relationship with foreign nations' may not serve as a reasonable ground for prohibiting exercise of a basic right of the citizenry in the vicinity of diplomatic institutions.

Therefore, the legislative purpose of the provision at issue in this case does not include the maintenance of amicable relationship with foreign nations by prohibiting assemblies in the vicinity of a diplomatic institution where negative opinions toward such particular nation are expressed. The legislative purpose of the provision at issue in this case in its essential part deems to lie in the 'guarantee of the function of the diplomatic institutions' and the 'protection of the safety of the official diplomatic facilities.'

(3) Violation of the principle of proportionality

Even if the provision at issue in this case limits the freedom of assembly under the legitimate purpose of protecting important legal interests, any restrictions upon the freedom of assembly should strictly follow the principle of proportionality. Therefore, even when the legislative purpose of the provision is legitimate, restrictions upon the fundamental right may be permitted only to the extent necessary for the achievement of the legislative purpose.

(A) violation of the principle of the least restrictive means

We consider the issue of whether the 'complete prohibition of assembly on specific locations' that the provision at issue in this case has adopted is the means that restricts the least of the basic right of the citizenry among all valid means that may be considered

to achieve the legislative purpose.

1) whether or not a special provision establishing no assembly zone constitutes an excessive restriction

In light of the spirit of the Constitution that guarantees the freedom of assembly as a basic right of the people and the regulatory structure of the Assembly and Demonstration Act that guarantees under such constitutional spirit all assemblies, as a matter of principle, as long as a certain reporting procedure is followed, it would be more desirable to permit assemblies, in principle, even at the location where conflicts among legal interests are especially anticipated.

However, on the other hand, the judgment of the legislators may not be deemed patently wrong when the legislators have concluded that certain locations should be particularly protected due to the importance of the performance of their functions and an effective protection of such important institutions may be provided by prohibiting assemblies, in principle, at such locations. The legislators may regulate in proportion to the effect of an assembly upon public safety and order and to the degree of danger of conflicts among legal interests, on such special circumstances where there is a high probability of intrusion upon other legally protected interests such as an outdoor assembly at nighttime or an outdoor assembly at a particular location (6-1 KCCR 281, 302, 91Hun-Ba14, April 28, 1994).

Therefore, with respect to the protection of major constitutional institutions or diplomatic institutions, the decision of the legislators to enact special provisions in order to protect particular locations does not in itself excessively restrict the basic right of the citizens.

2) whether or not a complete prohibition of assembly with no permitted exception thereto is absolutely necessary

The legislators in regulating the freedom of assembly may enact special provisions in order to protect particular locations. However, when prohibiting assemblies on particular locations, the legislators should follow the principle of proportionality.

a) The legislators should clearly set forth the purview of the no assembly zone to the minimum extent that is absolutely necessary for the protection of the functioning of the protected institutions. In the case of the provision at issue in this case, the legislators delineated the purview of the no assembly zone as the radius of one-hundred meters from the boundary of the official facilities of diplomatic institutions. Such demarcation seems to be permissible as a necessary minimum for the effective protection of the legal interests concerned and is not extremely expansive considering legislation of various foreign nations.

From the perspective of a large-scale protest that is typical of the situation where the interference with the functioning of diplomatic institutions or the threat to the bodily safety of the diplomats is concerned, securing distance from the official facilities of diplomatic institutions concerned by one-hundred meters deems to be appropriate in light of the danger of conflicts of legal interests on general circumstances, neither does it sever the nexus between the location of demonstration and the purpose of it. Therefore, the geographical purview of the no assembly zone established by the provision at issue in this case does not by and in itself excessively restrict the freedom of assembly.

b) However, should the general presumption that an assembly on particular locations causes a direct threat to the legal interests protected under the provision at issue in this case be rebuttable on particular circumstances, the legislators must provide for the possible permission of an assembly as an exception to the general prohibition from the perspective of the 'principle of the least restrictive means.' The anticipatory conclusion by the legislators with respect to the abstract and general danger presupposed by the provision at issue in this case may be rebutted in the following particular cases:

First, in case of an assembly not against a diplomatic institution but targeting an object of protest that coincidentally exists in the location where all assemblies are prohibited, there is less danger of conflicts between the legal interests premised in the provision at issue in this case. The provision at issue in this case poses a problem of over-inclusiveness in prohibiting all assemblies including not merely those assemblies to protest against a diplomatic institution or a particular foreign nation located in the no-assembly zone but also those assemblies for other purposes within that zone. Especially in such cases of large cities as Seoul where major facilities are located close to each other, a single protected structure that coincidentally stands in a particular area practically prohibits as a consequence any and all assembly altogether targeting many other potential objects of demonstration within the radius of one-hundred meters from it.

Second, in case of assemblies of a relatively small size, there is generally less danger of intrusion upon the legal interest protected under the provision at issue in this case. For example, in the case of an intended assembly in front of an embassy of a foreign nation with a small number of participants by way of peaceful picketing without generating noise, unless there is a concern that it will be expanded by subsequent participation of the general public or a danger that it will turn to a violent demonstration, there can hardly be any ground justifying prohibition of such peaceful assembly of a small size.

Third, when an assembly is intended to be and is actually held on a holiday when the diplomatic institution is officially closed for work, there is generally less danger of intrusion upon such legally protected interests as guaranteeing free access to and from the diplomatic institution or smooth performance of administration therein.

c) Therefore, although the legislators may prohibit, in principle, all assemblies on certain locations on the premise of the presumption that an 'assembly in the vicinity of a diplomatic institution has a general tendency of inflicting serious conflicts between legally protected interests,' there should be at the same time those provisions setting forth exceptions to such general prohibition in order to mitigate the possibility of excessive limitation upon the basic right that may result out of such general and abstract provision of law. The provision at issue in this case nonetheless imposes a prohibition without permitting exceptions for those situations where there exists no specific danger premised under the provision at issue in this case. It is an excessive limitation beyond the scope of measures necessary to achieve the legislative purpose. Therefore, the provision at issue in this case is unconstitutional as it excessively limits the freedom of assembly in violation of the principle of the least restrictive means.

When the legislators enact a provision exceptionally permitting assemblies from the perspective of the principle of proportionality, the legislators should provide for the general guidance with respect to the conditions concerning 'in which cases an assembly in the vicinity of diplomatic institutions may be permitted,' thereby removing room for the arbitrary exercise of discretion by the administrative authority in granting permission.

d) There may be a voice of concern that the 'assembly in the vicinity of diplomatic institutions should be entirely prohibited also in the future,' in light of our culture of demonstration that indicates the unfortunate tendency that large-scale demonstrations held by various social and interest groups today often take on violence and unlawfulness. However, such a misdirected culture of demonstration in our society should not determine the exercise of the basic right of the citizens to peaceably exercise their right to assembly. What should be prohibited and expelled from our society is a violent and unlawful demonstration and not legitimate exercise of the basic right by individuals. Therefore, the culture of violent demonstration in our society should not unjustly intrude upon the basic right of the citizens in exercising their basic right by peaceful means within the scope that such exercise harmonizes with the public safety and order. What is anticipated and assumed by the Constitution and the Assembly and Demonstration Act is a peaceful and lawful assembly, and it is the obligation of the Constitutional Court to protect the basic right of the

individuals in exercising their freedom of assembly peaceably and lawfully.

(B) violation of the balance between legally protected interests

In addition, the provision at issue in this case has lost appropriate balance between the freedom of assembly and other legally protected interests. The provision at issue in this case has provided a unilaterally preferred position for the legal interests protected by the provision at issue in this case, without any effort to strike balance among conflicting legal interests by considering specific circumstances in each case of assembly, by entirely prohibiting any and all assembly on particular locations regardless of the threat to the legally protected interests in each case. The provision at issue in this case thereby ignores the important meaning of the freedom of assembly in a democratic nation and especially the importance of the freedom of assembly in supplementing the freedom of expression in a representative democracy. Therefore, also from this perspective, the provision at issue in this case is a provision that excessively restricts the freedom of assembly in violation of the principle of proportionality.

4. Conclusion

Therefore, it is so ordered that the provision at issue in this case is in violation of the Constitution. This decision is based on the unanimous opinion of the participating Justices, with the exception of the opinion of nonconformity to the Constitution of Justice Kim Young-il and the dissenting opinion of Justice Kwon Seong.

5. Opinion of Justice Kim Young-il that the provision at issue in this case does not conform to the Constitution

I am also of the opinion that the provision at issue in this case is of the unconstitutional nature similar to that indicated in the majority opinion. However, I respectfully disagree with the majority opinion on the following grounds, which are explained in the following paragraphs : the provision at issue in this case is only partially unconstitutional as indicated below, and the part thereof that is unconstitutional may not by nature be separated from the part that is constitutional, therefore it is appropriate to render a nonconformity decision indicating such unconstitutionality and ordering tentative application thereof and to have the National Assembly with expansive law making power restore the constitutional order that is constitutional through specific statutory revisions removing the unconstitutionality.

The majority opinion deems that "an assembly in the vicinity of

diplomatic institutions, compared with other locations, may generally result in a conflict with important legal interests thereby leading to a highly probable intrusion upon such legal interests, and the provision at issue in this case entirely prohibits any and all assembly in the vicinity of diplomatic institutions in order to effectively prevent in advance such highly probable clash between legally protected interests," and has concluded that the legally protected interests presupposed by the provision at issue in this case are ultimately the 'guarantee of the functioning of diplomatic institutions' and the 'protection of safety of official facilities of diplomatic institutions.' The majority opinion, premised upon such conclusions, first reasons the general constitutionality of the provision at issue in this case in principle as follows. That is, it presupposes that "the judgment of the legislators may not be deemed patently wrong when the legislators have concluded that certain locations should be particularly protected due to the importance of the performance of their functions and an effective protection of such important institutions may be provided by prohibiting assemblies, in principle, at such locations. Therefore, the decision of the legislators to enact special provisions to protect particular locations with respect to the protection of diplomatic institutions does not, in itself, excessively restricts the fundamental right of the citizens." The majority continues that the "legislators' demarcation of the purview of the no assembly zone as the radius of one-hundred meters from the boundary of the official facilities of diplomatic institutions seems to be permissible as a necessary minimum for effective protection of the legal interests concerned and is not extremely expansive considering legislation of various foreign nations. From the perspective of a large-scale protest that is typical of the situation where the interference with the functioning of diplomatic institutions or the threat to the bodily safety of the diplomats is concerned, securing distance from the official facilities of diplomatic institutions concerned by one-hundred meters deems to be appropriate in light of the danger of conflicts of legal interests on general circumstances, neither does it sever the nexus between the location of demonstration and the purpose of it. Therefore, the geographical purview of the no assembly zone established by the provision at issue in this case does not by and in itself excessively restrict the freedom of assembly."

However, the majority opinion then indicates the unconstitutionality of the provision at issue in this case as follows. Pursuant to the majority opinion, the reasons for establishing a no assembly zone in addition to the abstract dangerous circumstances that serve as the ground for general prohibition of or restriction upon the assembly presupposed by the provision at issue in this case, to rephrase, the public interests to be protected by such special prohibition, lie in the 'guarantee of the functioning of the diplomatic institutions and the

protection of safety of the official facilities of diplomatic institutions' through the guarantee of free access to the diplomatic institutions stationed in the Korean territory, guarantee of efficient performance of business and services, and protection of bodily safety of the diplomats. Then, the majority opinion reasons that, although it is manifest that there exists no danger of intrusion upon the above public interests in the following three cases of ① an assembly not targeting a diplomatic institution but the object of protest, which is coincidentally located in the no assembly zone, ② a small-scale assembly where the conflict against the legally protected interest presupposed by the provision at issue in this case is not a problem, or ③ an assembly held on a holiday when the diplomatic institutions are closed for official business and services, the provision at issue in this case uniformly prohibits any and all assembly thereby excessively restricting the freedom of assembly, therefore the provision at issue in this case is unconstitutional.

First, I discuss the case of an 'assembly held on a holiday when the diplomatic institutions are closed for official business and services,' the third of those cases the majority has presupposed as where the anticipatory conclusion of the legislators presumed in the provision at issue in this case may be rebutted.

Even accepting as is the conclusion of the majority that the legal interests protected under the provision at issue in this case are the 'guarantee of the functioning of the diplomatic institutions and the protection of the safety of the official facilities of diplomatic institutions,' there is no ground for specifically ruling out the case of a holiday. This is due to the fact that the diplomatic institutions or the diplomats represent their respective nations as the existence symbolizing such foreign nations, therefore their performance concerning diplomacy is regarded as the act of their respective nations although they are stationed and perform their functions in the Korean territory. This is the same as the fact that we perform diplomatic activities by stationing diplomatic institutions and dispatching diplomats in various foreign nations and our diplomatic activities should also be likewise protected. As the diplomatic institutions or the diplomats represent their respective nations and are stationed in part of the Korean territory as the representatives of their respective nations, there is no ground for specifically ruling out the case of business holidays for lack of clear danger against the legal interests presupposed by the provision at issue in this case in light of the special nature of the diplomatic institutions as such.

Then, as this case may not be the circumstance where the anticipatory presumption of the legislators with respect to the abstract danger presupposed by the provision at issue in this case is rebutted,

the reasoning for unconstitutionality in the majority opinion concerning this is not persuasive.

Next, the reasoning for unconstitutionality in the majority opinion is more persuasive concerning an assembly not targeting diplomatic institutions but the object of protest, which is coincidentally located in the no assembly zone (the case of ① above) and a small-scale assembly (the case of ② above). However, with respect to the former, it is questionable whether there would be no damage in all such cases to the 'guarantee of the functioning of diplomatic institutions and the protection of the safety of the official facilities of diplomatic institutions' that is presupposed as the legislative purpose of the provision at issue in this case, regardless of the scale or the manner of an assembly or a demonstration. With respect to the latter, it is questionable whether the scale of an assembly to be defined as a small-scale assembly could be clearly determined, even more so as an assembly or a demonstration expects additional participants. Furthermore, it would not be easy to determine, in reality, which standard should be applied in order to decide whether there is a possibility of 'danger that an assembly or a demonstration might expand to a large-scale demonstration or turn into a violent demonstration by the participation of the general public.'

Then, after all, there is merely partial unconstitutionality in the provision at issue in this case as indicated above and also as admitted in the majority opinion. Even when there is unconstitutionality, this is the case where it is difficult for the Constitutional Court to establish an unequivocally clear standard as the line between the part that is constitutional and the part that is unconstitutional is vague. The majority opinion that nonetheless declares in its holding that the provision at issue in this case is unconstitutional *in toto* differently from the stated rationale in its reasoning has deviated from the principle of the presumption of constitutionality and can hardly conform to the principles of the separation of powers and the respect for the legislative power.

Therefore, although the part of the provision at issue in this case with respect to the 'assembly not targeting diplomatic institutions but the object of protest, which is coincidentally located with the no assembly zone' and the 'small-scale assembly' is unconstitutional as discussed above, as the boundary between the part that is constitutional and the part that is unconstitutional is vague, it is appropriate to render a nonconformity decision and to have the National Assembly with its expansive law making power restore the constitutional order that conforms to the Constitution through specific statutory revisions to remove the unconstitutionality.

In addition, the provision at issue in this case merely provides for

the prohibition of conduct at a particular location as it provides for the location that falls within the radius of one-hundred meters from the boundary of the diplomatic institutions of foreign nations stationed in the Korean territory as one of the locations where outdoor assemblies and demonstrations are prohibited, and the underlying litigation in this case is a proceeding where cancellation of the administrative measure of the notice prohibiting assembly taken by the Superintendent of Jongno Police Station is sought. Although Article 20 of the Assembly and Demonstration Act separately provides for possible criminal punishment in case of the violation of the provision at issue in this case, the provision at issue in this case is not a provision of criminal punishment upon which a nonconformity decision is generally inappropriate, in light of the seriousness of the intrusion upon the fundamental right and the rapid recovery of such intrusion, therefore a nonconformity decision can possibly be rendered with respect to the provision at issue in this case. Furthermore, the public interest that may be achieved by maintaining the effect of the provision at issue in this case is relatively greater, and the general grounds for prohibition of assembly set forth in Article 5 of the Assembly and Demonstration Act of the 'assembly or demonstration that poses a clear and direct threat to the public safety and order through collective battery, threatening, destruction, or arson' may not effectively achieve the legislative purposes of the provision at issue in this case of the 'guarantee of the functioning of diplomatic institutions' and the 'protection of the safety of the official facilities of diplomatic institutions,' as the provision of general grounds for prohibition of assemblies of Article 5 of the Assembly and Demonstration Act is intended to maintain domestic order. Therefore, a nonconformity decision is appropriate as such decision allows tentative application of the provision at issue in this case until the statutory revision thereof by the legislators in order to prevent a legal vacuum or confusion which will be caused by nullification of the provision at issue in this case and to maintain harmonious constitutional order.

For the foregoing reasons, I respectfully disagree with the majority opinion and am of the opinion that a nonconformity decision should be rendered.

6. Opinion of Justice Kwon Seong that the provision at issue in this case is constitutional

I am of the opinion that the provision at issue in this case is not unconstitutional. The grounds therefor are stated in the following paragraphs.

A. Three principles of assembly

(1) Principle of peaceful assembly

It is needless to say that the assemblies protected under the Constitution (the term "assembly" is hereinafter used to mean outdoor assemblies only, and to include demonstrations) are limited to peaceful and nonviolent assemblies. This can be referred to as the principle of peaceful assembly or the principle of nonviolent assembly.

(2) Principle of locational distancing of assembly

The assembly is an act that has its counterpart, and inevitably causes tension between the actor and the counterpart (including all of those who the assembly indicates as the other party in conveying expressed opinions, those who oppose the assembly, and those who intend to regulate the assembly). Here, peace can be maintained only by geographical separation between the two parties concerned, either individuals or associations (hereinafter the associations concerned as parties are referred to as associations), that are under such tense relationship. That is, peace demands locational distancing. Any assembly thus has a higher tendency of remaining as a peaceful assembly only when the principle of locational distancing is observed. This also explains why indoor assemblies are given more protection than outdoor assemblies. That is, indoor assemblies are by definition those assemblies where the principle of locational distancing is observed.

The unity of many persons, display of might and vigor, strategic overstatement of opinions, inflammation of mass psychology and the possibility of incidental and successive exercise of influence upon nonspecific multiple targets that may be seen in an assembly is in and by itself an element of unrest toward peace and, further, generates an additional element of unrest by triggering psychological mechanisms of defense and protest in the counterpart. Such elements of unrest may be mitigated or removed by locational separation or distancing.

Therefore, the principle of nonviolent assembly demands, as a matter of course, the principle of locational distancing of the assembly.

(3) Principle of mutual respect

Pluralism is an essential element of democracy, and pluralism can be maintained only when multiple groups with different opinions or interests respect each other. Peaceful coexistence of pluralistic groups under tension is possible only when the principle of mutual respect is observed.

This applies to assembly as well. A peaceful and nonviolent assembly becomes possible only when the principle of mutual respect is observed throughout the assembly between two groups that are under tension.

The principle of mutual respect also requires the principle of locational distancing. When two groups which should respect each other but are under tension contact each other or lie physically close, such contact or close proximity heightens tension leading to increased unrest, and mutual respect might turn into vehement hostility.

Therefore, the degree of observance of the principle of mutual respect affects the extent of locational distancing, and the extent of locational distancing in turn influences the principle of mutual respect. To rephrase, where the principle of mutual respect is well observed, the required extent of locational distancing decreases correspondingly and, to the contrary, where the principle of mutual respect does not operate properly, the required extent of locational distancing increases correspondingly.

B. Legislative discretion of the National Assembly

The question of how much locational distancing is required in order to guarantee peaceful assembly is ultimately a question to be determined by the National Assembly within its legislative discretion considering the totality of the degree of respect toward law and order, the frequency of utilization of assembly for the purpose of competition between different systems, the essential nature of mass psychology, and the atmosphere of society. In exercising such discretion, the cumulative experience and judgment concerning various circumstantial elements described above of the executive branch, which is directly in charge of the actual business of protecting and regulating the assembly, should also be considered as a factor. Should the legislative discretion of the National Assembly be clearly wrong to the extent that it intrudes upon the essence of the basic right, its constitutionality would, as a matter of course, be the subject matter for constitutional review by the Constitutional Court. However, judgment of the Constitutional Court, which is normally isolated from the scene of "boiling water," is subjected to yet additional caution.

C. The instant case

Locational distancing of one-hundred meters under the provision at issue in this case is not clearly digressive of the extent required for the observance of the principles of peaceful assembly, of locational distancing, and of mutual respect, in light of the degree of respect

toward law and order, degree of inflammation of mass psychology, and frequency of utilization of assemblies for the competition between and among different systems, indicated in current days. Therefore, I am of the opinion that the provision at issue in this case is not unconstitutional.

On the other hand, there are certain perceivable problems of ① the inflexibility of the provision at issue in this case that does not permit even small-scale assemblies, and ② the unreasonable consequence that a location where assemblies are normally permitted may incidentally turn into a no assembly zone should it be closely located to a no assembly zone.

However, first, such circumstances as the small scale of an assembly at its initial stage or the geographical location that the target of an assembly coincidentally stands close to other facilities against which assemblies are prohibited, in light of the transformability or uncertainty of the assembly that may be compared to a small piece of ash turning to a far-reaching fire, cannot be the elements in determining the constitutionality of the provision at issue in this case. Second, the specific scope of assembly that is prohibited by the application of the provision at issue in this case is a question that can be, and should be, appropriately determined through reasonable interpretation by the court, therefore this should not lead to the conclusion of unconstitutionality on the premise that the provision at issue in this case is fixed or unchangeable in its scope. Therefore, I am respectfully of the opinion that the provision at issue in this case is not unconstitutional.

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

Aftermath of the Case[6)]

The National Assembly, based on the holding of the Constitutional Court, revised the provision at issue in this case effective January 29, 2004, to permit assemblies as an exception in cases where an assembly is not targeting diplomatic institutions, where an assembly does not tend to turn to a large-scale assembly, or where an assembly is held on a holiday on which diplomatic institutions are

6) Not part of the official opinion of the Court. (translator's note)

closed for official business and services and if found that it does not threaten functioning or safety of such diplomatic institutions.

5. *President's Proposition for National Confidence Referendum*[1] *Case*

[15-2(B) KCCR 350, 2003Hun-Ma694, etc.,(consolidated), November 27, 2003]

Contents of the Decision

Whether the President's public statement during the speech on state affairs delivered at the National Assembly plenary session expressing his intention to hold a national confidence referendum not associated with any policy constitutes a subject matter for a constitutional complaint (negative).

Summary of the Decision

1. Article 68(1) of the Constitutional Court Act provides that any person whose basic rights guaranteed by the Constitution have been infringed due to an "exercise or non-exercise of governmental power" may request an adjudication on constitutional complaint from the Constitutional Court. Therefore, only an "exercise or non-exercise of governmental power" may constitute a subject matter of a constitutional complaint. Considering the totality of the content of the statement of the President, who is the respondent in this case, and the various factors prior and subsequent to such statement, the actual meaning of the respondent's statement was merely to express his design concerning the manner and the time of the intended confidence referendum and, as such, it was merely a political act of preparation or an expression of a political plan in order to initiate a legal process, as it meant that the respondent, should the political circles propose any method out of consensus, would thereunder implement a national referendum.

2. Any legal process for a national referendum begins only when there is a public notice of a national referendum with a specific matter that is the subject matter of the referendum. Therefore, the public power is exercised with any legal effect only when there is an act that can be duly deemed as a legal initiation of the process of referendum such as a public notice of referendum. Any political

---

1) A national confidence referendum is a national referendum through which the President asks voters to decide whether the President should remain in office. (translator's note)

suggestion or internal planning and review of the implementation of a referendum before a legal action is a mere act of preparation and is subject to constant changes or abrogation. The statement of the respondent at issue in this case is not, in and by itself, a decision or measure taken with any legally binding effect concerning the implementation of a referendum and has not influenced the legal status of citizens.

3. Then, even though the respondent made a statement as the President during the speech on state affairs at the National Assembly plenary session expressing his intention to implement a national confidence referendum, as such statement was not an act with any legal effect such as a public notice of referendum but was merely an expression of political proposition, such act cannot constitute an "exercise of governmental power" that may duly be a subject matter of a constitutional complaint. Therefore, the constitutional complaint of the complainants in this case seeking a revocation of the statement or declaratory relief holding the statement unconstitutional is unjusticiable.

Dissenting Opinion of Justices Kim Young-il, Kwon Seong, Kim Kyung-il, and Song In-jun

1. The act of the respondent constitutes an "exercise of governmental power" that may be the subject matter of a constitutional complaint.

A. As it is a matter subject to the respondent's sole discretion to determine to implement a national referendum, the statement of the respondent during the speech on state affairs at the National Assembly plenary session publicly expressing his intention therefor was beyond a simple preparatory act, an expression of opinion, or a political proposition. Despite such indirect expressions as "should there be a political agreement," the statement of the respondent, considered in its general context, manifestly indicated the respondent's determination to implement a national confidence referendum as the requirements for a national referendum under Article 72 of the Constitution, if broadly construed, might permit a referendum for a confidence vote. Therefore, the public statement of the respondent constituted an act of publicly expressing a manifest determination to implement a national referendum under the authority of the President.

B. The public statement of the respondent constitutes an initial stage of the complex and inclusive process of the implementation of a national referendum consisting of a series of constituting elements. As such, to the extent of its seriousness, the statement of the respon-

dent constituted an exercise of public power that may be the subject matter of a constitutional complaint, without a public notice of the referendum having not yet been actually made.

2. The act of the respondent rendering the matter of confidence a subject matter of a national referendum is unconstitutional, and the basic rights of the citizens such as the right to political participation are thereby infringed.

A. The Constitution of the Republic of Korea has, in principle, adopted representative democracy where the President and the members of the National Assembly, who are directly elected by the citizens, determine the state affairs on behalf of the citizens, yet, as an exception, the Constitution has added the element of direct democracy by subjecting the 'important policies relating to national destiny' and the 'revision of the Constitution' to a national referendum under Articles 72 and 130(2) of the Constitution, respectively.

B. Article 72 of the Constitution provides that the "President may submit important policies concerning diplomacy, national defense, unification and other matters relating to national destiny to a national referendum if the president deems it necessary," thereby endowing the respondent with the authority to submit certain matters to a national referendum. At the same time, the same provision limits the subject matter of a national referendum to 'important policies concerning diplomacy, national defense, unification and other matters relating to national destiny.' The 'important policies' here should be interpreted to mean a 'specific and identifiable policy.'

C. In light of such constitutional provisions as Article 70 that absolutely guarantees the term of office of the President and Article 68(2) that limits the vacancy of the presidential office to the enumerated grounds, the confidence held by the citizens toward the performance of the President does not constitute an 'important policy' within the meaning of Article 72 of the Constitution.

D. There have been ample examples in history of various states where a holder of the state authority submitted the question of confidence to a national referendum and then made use of the result thereof to fortify his or her political position. From such lessons, our Constitution expressly limits the subject matter of the national referendum to 'important policies' under Article 72, thereby declaring that a national referendum should not be abused to turn to one that has hindered the development of democracy as in history.

E. Then, the respondent's attempt to reconfirm the confidence of the citizens already indicated in the past presidential election by way of a national referendum is an unconstitutional exercise of the national

referendum mechanism provided under Article 72 of the Constitution in a way that is not permitted by the Constitution. Such act of the respondent prohibits the citizens from legitimately participating in the process of the exercise of the state power by autonomous decisionmaking upon specific state affairs through a national referendum, thereby infringing upon the right to political participation or national referendum and the freedom not to be forced to express political opinions held by the complainants as the citizens.

Parties

Complainants

1. Lee, Gyung-shik (2003Hun-Ma694)
   Counsel of record: Lee, Dong-hyung, appearing as state-appointed counsel
2. Lee, Sang-man (2003Hun-Ma700)
   Counsel of record: Lee, Min-ho and 1 other
3. Lee, Man-seop (2003Hun-Ma742)
   Counsel of record: Dong-Ho Joint Law Services;
   Counsel in charge: Lee, Jin-woo

Respondent:

the President of the Republic of Korea

Holding

The constitutional complaints filed by the complainants are dismissed in the entirety.

Reasoning

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

A. Overview of the Case

The respondent, during a speech on state affairs delivered at the 243rd plenary session of the National Assembly on October 13, 2003, stated that he intended to implement a national referendum on

or around December 15, 2003, asking for the confidence of the citizens toward the President.

The complainants thereupon filed a constitutional complaint seeking declaratory relief holding the above act of the respondent unconstitutional on October 15, 2003 (2003Hun-Ma694), October 17, 2003 (2003Hun-Ma700) and October 28, 2003 (2003Hun-Ma742), respectively, on the ground that an implementation of a national confidence referendum not associated with any important policy was in violation of Article 72 of the Constitution and infringed upon their right to pursue happiness, freedom of conscience, right to vote, property right, and certain other rights.

B. Subject Matter of Review

The subject matter of adjudication in this case is whether or not the public statement made by the respondent during the 243rd plenary session of the National Assembly on October 13, 2003 expressing his intention to implement a national referendum seeking solely for the confidence of the citizens in him and associated with no policy has violated the basic rights of the complainants guaranteed by the Constitution.

2. Grounds for Constitutional Complaints and the Opinions of the Related Parties

A. Grounds for Constitutional Complaints

(1) Under Article 72 of the Constitution, the President may submit those important policies concerning diplomacy, national defense, unification and other matters relating to national destiny to a national referendum, but it is not permitted to submit to a national referendum the confidence of the citizens in the President as it is not a policy matter.

(2) The respondent notwithstanding publicly stated that he would seek a national referendum not associated with any policies in violation of the Constitution, thereby infringing upon the right to pursue happiness, right to vote, suffrage, freedom of conscience, labor right, and the human dignity and value of the complainants.

B. Answer of the Respondent

(1) The constitutional complaint in this case is unjusticiable as the President merely expressed his intention to seek the confidence

held by the public in him and his opinion that a national referendum would be a desirable method to do this, as a national confidence referendum has not been determined to be implemented since the President has yet to take any measure for the implementation thereof such as the public announcement of the date therefor, and as there has been no exercise of public power itself because there exists a mere possibility of the implementation of a national confidence referendum.

(2) The constitutional complaint in this case is unjusticiable as there is no current infringement upon the basic rights of the complainants because there has been no determination to implement a national referendum to ask for the confidence in the President and it is also uncertain whether such referendum will be held in the future.

(3) A national referendum seeking the confidence of the public in the President is not unconstitutional as the confidence of the public in the President constitutes an important policy concerning national destiny within the meaning of Article 72 of the Constitution.

C. Opinion of the Minister of Justice

It is generally the same as the opinion of the respondent.

3. Review

A. Article 68(1) of the Constitutional Court Act provides that any person whose basic rights guaranteed by the Constitution have been infringed due to an "exercise or non-exercise of governmental power" may request an adjudication on constitutional complaint by the Constitutional Court. It, however, does not specifically define the meaning of the "exercise or non-exercise of governmental power." Therefore, whether an act constitutes the "exercise of governmental power" should be determined on a case-by-case basis upon considering the totality of such matters as what effect the act at issue has upon the legal status of the citizens, whether the act assumes a regulatory or formative function or is a mere notice of fact or expression of opinions, whether the act has an effect beyond the holder of the public power or is merely an affair internal to the holder of the public power, and whether the act is an official determination or is a mere preparatory conduct or plan (*See* 4 KCCR 659, 666, 92Hun-Ma68, etc., October 1, 1992; 9-2 KCCR 131, 141, 97Hun-Ma70, July 16, 1997).

Whether the act of the respondent at issue in this case constitutes the "exercise of governmental power" that may be the subject matter of the adjudication upon constitutional complaint should also be deter-

mined by considering altogether such various factors as indicated in the above paragraph.

B. The respondent stated at a press conference on October 10, 2003 that he would "seek confidence of the public," and, subsequently, during the presidential speech on state affairs at the 243rd plenary session of the National Assembly on October 13, 2003, made a statement as follows:

"... I announced last week that I would subject myself to the approval of the public by way of seeking public confidence. ... I now express my opinion upon the manner and the time of the confidence vote in order to avoid unnecessary debates and uncertainty. Although it is not a matter that I can determine, I believe that a national referendum is a correct way. Although there are some legal debates, I think we can implement a national referendum under the current law should there be a political agreement, by more broadly interpreting the matters concerning national destiny. Since both the Grand National Party and the New Millennium Democratic Party requested a mid-term approval or confidence in the past and again remarked that I should be immediately subject to a confidence vote upon my announcement of the intended confidence vote, I think we can reach an agreement with ease. Although there are discussions to associate the confidence vote with a specific policy, I think it will be better not to do that. I think it will be better to seek the confidence or nonexistence thereof, as is, without associating this matter with any of the policies. Should there be a request within the political circle or from the public for a national referendum for a specific policy, such national referendum may be held simultaneously, but I believe that it is necessary to seek the confidence by itself through a national referendum. In terms of the time for such national confidence referendum, December 15th or sometime around that date will be desirable. ... " (*See* the minute of the 243rd plenary session of the National Assembly.)

There have continuously been debates surrounding the respondent's speech at the National Assembly between the proponents and the opponents of the national confidence referendum and upon its constitutionality. However, the respondent has taken no specific subsequent measure to date for the implementation of the national confidence referendum following the above speech.

C. In light of the totality of the content of the respondent's speech and various factors prior and subsequent to such speech, the actual meaning of the respondent's statement was merely to express his ideas concerning the manner and the time of seeking confidence.

As the respondent stated through the speech that, should the political circle present an agreed upon method, he would thereunder implement a national referendum, such statement was merely a political act of preparation or an expression of political ideas or plans, for the initiation of a legal process. Such part of the statement as "although it is not a matter that I can determine" or "although there are some legal debates, ... should there be a political agreement" clearly indicates that the statement of the respondent was merely to appeal to and urge the political circle for a consensus in order to implement the ideas and intentions of the President for a national referendum to seek the confidence.

No determinate expectation of a definitive implementation of a national confidence referendum can be drawn out of the above statement of the respondent by itself. There are ample possibilities for changes in matters subject to a consensus within the political circle or failure to reach any such consensus. Furthermore, should there be no consensus reached within the political circle notwithstanding the desire of the respondent, it is unpredictable whether the respondent would still proceed to implement a national referendum or not.

A process of national referendum may be legally initiated only when the President publicly announces the national referendum by identifying a specific subject matter. Under the current National Referendum Act, a national referendum is to proceed in the order of the public announcement of the proposal of a national referendum (Article 49), the notice upon the proposal of national referendum (Article 22), the campaign on national referendum (Article 26), the preparation of poll books (Article 14(1)), voting (Article 50), ballot counting and final decision (Chapters VIII and IX), the publication of the result and the notification thereof to the President and the Speaker of the National Assembly by the National Election Commission (Article 89), and the promulgation of the final decision by the president (Article 91). Therefore, either under the current National Referendum Act or under any statute that may separately be enacted or revised concerning the national referendum, public power is exercised with legal effect only upon an act that may be deemed to legally initiate the national referendum process such as a public announcement. A political proposal or an advance review upon an internal plan for the implementation of a national referendum prior to any such legal act is merely an act of preparation for a matter that has yet to be officially determined, and the plan therefor or the content thereof may always be subject to a change or abrogation. The act of the respondent that is the subject matter in this case is one of such acts. As such, the statement of the respondent, by and in itself, without further, may not be deemed as a legally binding decision or measure taken concerning

the implementation of a national referendum, nor does such statement affect the legal status of the citizens.

Then, even though the respondent expressed his intention as the President to implement a national referendum to seek the confidence in him during a speech on state affairs delivered at the National Assembly plenary session, as long as such act was a mere expression of a political proposal and not an act with any legal effect such as public announcement of a national referendum, such statement does not constitute an "exercise of governmental power" that may duly be a subject matter of the adjudication upon constitutional complaint.

D. To conclude, each of the constitutional complaints filed by the complainants seeking revocation or declaratory relief holding the act of the respondent unconstitutional is unjusticiable, as the act of the respondent does not constitute an exercise of governmental power that may be the subject matter of the adjudication upon constitutional complaint.

4. Conclusion

The constitutional complaints filed by the complainants are dismissed as inappropriate and unlawful, and it is so ordered. There is a dissenting opinion of Justices Kim Young-il, Kwon Seong, Kim Kyung-il, and Song In-jun as stated in Paragraph 5 below.

5. Dissenting Opinion of Justices Kim Young-il, Kwon Seong, Kim Kyung-il, and Song In-jun

We respectfully disagree. We are of the position that the constitutional complaints in this case should not be dismissed but should instead be determined on the merit; we are further of the position that the act of the respondent in this case is unconstitutional as the act of the respondent publicly expressing, during his speech on state affairs delivered at the 243rd plenary session of the National Assembly on October 13, 2003, his intention to implement a national referendum inquiring solely into the confidence of the public in the respondent without associating the national referendum with any of the policies constitutes an "exercise of governmental power" as a public announcement of a plan for the implementation of the national confidence referendum, thereby infringing upon the basic rights of the citizens guaranteed by the Constitution. The grounds are explained in the following paragraphs.

A. Legal Prerequisites of the Constitutional Complaints

(1) The act of the respondent constitutes the "exercise of governmental power" that may duly be a subject matter of the adjudication upon constitutional complaint.

(A) As the majority indicates, the respondent has the authority to determine, at his sole discretion, whether or not to implement a national referendum. The respondent may initiate a process for the national referendum by publicly announcing the implementation thereof without necessarily consulting other state institutions such as the National Assembly. A public announcement by the respondent before the entire public through the speech on state affairs at the National Assembly of a plan for the national referendum, which the respondent could implement upon his own discretionary decision therefor, was beyond the degree of a mere preparatory act, an expression of the opinion, or a political suggestion.

To begin with, as the respondent publicly stated that he intended to implement a national confidence referendum referring to a specific manner and time thereof at such an important opportunity of the presidential speech on state affairs intended for explicating the directions and the budgets of the nation at none other than the plenary session of the National Assembly, it is deemed that the respondent unequivocally expressed his intention to implement such a plan should there be no special changes in circumstance.

(B) Notwithstanding such an indirect expression as "should there be a political agreement," the general context of the respondent's statement was that a broad interpretation of the prerequisites of the national referendum of Article 72 of the Constitution, although the permissibility of a national referendum for confidence vote being under debates, allowed a national confidence referendum, therefore the respondent was determined to implement a national referendum for confidence vote. The respondent, following the speech on state affairs, has in fact expressed a strong intention on various occasions to implement a national referendum.

The respondent, then, is deemed to have publicly and seriously expressed his intention to implement a national referendum as a means to confirm the public confidence in him. The referendum to seek confidence of the public in the respondent is thus of the nature that it may be implemented without political consensus or agreement of the National Assembly.

There may well be a position, such as the majority opinion in this case, that underscores and provides a greater meaning to the opacity and the uncertainty of the permissibility of a national referendum for

confidence vote at the current stage. However, the Constitutional Court is obligated to adjudicate this matter by judging the legal meaning of the act of the respondent publicly expressing such a significant official matter as the plan to implement a national confidence referendum at the plenary session of the National Assembly, on the premise that the act was a serious, prudent, and afflicted conclusion that had the meaning as expressed on its face, regardless of the actual intention of the respondent or its political ramifications. We are of the opinion that this is the appropriate approach to the question at issue in this case, in light of the weight and the responsibility accompanying the status of the President and the significance of the national referendum for confidence vote.

Therefore, no serious meaning should derive from certain incidental expressions included in the respondent's public announcement such as "although it is not a matter that I can determine," "although there are some legal debates, ... should there be a political agreement," or "I think we can reach an agreement with ease." Then, the public statement of the respondent was an official expression toward the public of an unequivocally determined intention to implement a national referendum by and under the authority of the President.

(C) The implementation of a national referendum is a complex process that consists of a series of conducts at each stage. A series of legal and factual conducts that may occur in a temporal order of the public announcement of a plan for national referendum, political preparation, statutory revisions where necessary, public notice on the proposal of a national referendum, campaign on national referendum, preparation of pollbooks, voting, opening of ballot boxes, ballot counting, totalization of results, publication of the result of ballot-counting by the National Election Commission, notification of the result of the national referendum to the President and the Speaker of the National Assembly, and promulgation of the result of the national referendum by the President are all included in a single process to constitute a single process of implementation of public authority in the implementation of a national referendum. Therefore, each of the conducts at each stage that are included in this process not only constitutes a single exercise of public authority as a whole but also constitutes an exercise of public authority by the actor, by and in itself, unless it is clearly against its nature. Viewed as such, the act of public announcement of the respondent constitutes an exercise of public authority that may duly be the subject matter of the constitutional adjudication upon constitutional complaint as it constitutes the initial stage of the complex and inclusive public process of the implementation of a national referendum that is a single exercise of public authority as a whole, which may be implemented based on the public

authority held by the respondent.

(D) It is not justified to deny the exercise of public authority represented by the act of publicly announcing a plan for a national referendum only because a subsequent procedure of public notice on the proposal of a national referendum has not yet been conducted. A single act in some occasions constitutes an exercise of public authority, yet, in other occasions, multiple acts conducted successively constitute one process that as a whole constitutes an exercise of public authority. In the latter, the exact meaning of each conduct that consists of the inclusive process may not be assessed, by or in itself; instead, it may be correctly understood only when assessed in a broader context as related with the entire process. From this perspective, the public announcement of a plan to implement a national referendum, regardless of the manner of the announcement and without a subsequent public notice on the proposal of a national referendum, is undeniably an exercise of public authority that initiates the official process of a national referendum, at least to the extent that the seriousness of the announcement is affirmed as in this case, for the process of a national referendum may not begin but for this initial step of public announcement.

In conclusion, with respect to the question of at which point we may find the exercise of public authority that triggers the process of a national referendum, the majority in dismissing the matter finds such exercise of public authority at the point of public notice by the President on the proposal of a national referendum, whereas we the dissenters find such exercise of public authority at the point of public announcement by the President of a plan to implement a national referendum. As such, the dissenting opinion puts more emphasis upon the substance over the form.

There may well be a challenge to our position on the ground that the respondent may rescind or withdraw the plan or change his resolution and may not proceed to actually implement a national referendum. However, even if so, this change in circumstance would not retroactively affect the nature of the act at that time of publicly announcing the plan to implement a national referendum as an exercise of public authority; should a non-implementation of the national referendum be confirmed, this subsequent change in circumstance may only render the exercise of public authority to cease to exist from that time onwards, which may only be an issue in constitutional adjudication as the legal interest in protecting particular rights and interests.

(2) There is a probability that the act of the respondent infringes upon the right to political participation or national referendum and

the freedom against forced expression of political opinions of the complainants, which are the basic rights of the complainants guaranteed by the Constitution.

This issue requires a more detailed review, therefore it will be discussed under the separate title in the following.

In sum, as discussed in the following, the national referendum for confidence vote is unconstitutional and infringes upon the right to political participation or national referendum and the freedom against forced expression of political opinions held by the citizens. Therefore, at the stage of reviewing legal prerequisites, there is a *prima facie* probability based on the argument of the complainants of the infringement upon the above basic rights. Therefore, the constitutional complaints in this case meet legal prerequisites and should not be dismissed on procedural grounds.

The Minister of Justice argues that the constitutional complaints in this case are unjusticiable as the basic rights of the complainants have not yet been infringed because it is uncertain whether or not the national confidence referendum will be actually implemented. However, it is the established position of precedents of the Constitutional Court that the requirement of current infringement upon the basic right is satisfied, for the effective redress upon the basic right infringement, when the occurrence of the infringement is currently expected for certain even though the actual infringement occurs in the future (4 KCCR 659, 666, 92Hun-Ma68, etc., October 1, 1992; 8-2 KCCR 167, 175, 95Hun-Ma108, August 29, 1996; etc.). Here, as the intention of the respondent toward the implementation of the national confidence referendum was objectively expressed as indicated above, and the probability of the infringement upon the right to national referendum of the complainants by the implementation of the national confidence referendum thus became significantly high, the requirement of the 'current infringement' upon the basic right is satisfied. Therefore, the above argument of the Minister of Justice is groundless.

B. Whether the National Confidence Referendum Infringes upon the Basic Rights of the Complainants

(1) Method for the realization of the sovereignty of the people under our Constitution

Article 1(2) of the Constitution provides that "the sovereignty of the Republic of Korea shall reside in the people, and all state authority shall emanate from the people," thereby declaring the people as the origin of the state authority and the sovereignty of the people as the

basic constitutional principles on one hand and, on the other hand, expressly stating that the state authority is and should be exercised by the people.

Implementing the principle of the sovereignty of the people imposes a question of 'in which manner the people exercise the state authority.' The manner of exercising the state authority by the people is either by direct democracy or by representative democracy, depending upon whether the people directly or indirectly participate in the formation of the opinion and the position of the state. The Constitution adopts representative democracy, in principle, under which the President and the members of the National Assembly, who are directly elected by the people, determine the opinion and the position of the state on behalf of the people, with the exception of additional elements of direct democracy under Articles 72 and 130(2) by providing for a possible national referendum with respect to an 'important policy matter concerning national destiny and the 'proposed constitutional revisions.'

(2) Legal nature of the national referendum under the Constitution

The Constitution does not provide the citizens with the right to directly propose a national referendum (the so-called right to initiative). Instead, the Constitution provides that a particular policy upon proposition by the respondent under Article 72 or a constitutional revision bill upon the respondent's proposition or the National Assembly resolution under Article 130 may be subject to a national referendum. The national referendum provided under the Constitution is of the most limited nature among various methods of adding the elements of direct democracy to representative democracy, as it excludes the possibility of a national referendum upon citizen proposition or the possibility for the citizens to directly choose the subject matter of the national referendum, and merely allows the citizens to approve or disapprove, under the lead of the state institution, a policy or a constitutional revision bill affirmed by a state institution.

(3) Unconstitutionality of respondent's act of submitting the matter of the public's confidence in him to a national referendum

(A) constitutional issues and standard of review in this case

The issue in this case, as raised by the complainants, is 'whether the act of the respondent submitting the matter of the public's confidence in him to a national referendum is unconstitutional,' or 'whether the respondent is authorized by the Constitution to implement a na-

tional referendum to seek the confidence of the public in him.'

Any and all authority of the constitutional institutions including the respondent as the President derives only from a constitutional provision endowing such authority. The basic structure of the Constitution and the organizations, missions, and authorities of the political constitutional institutions should be regulated by the Constitution itself. That is, as the constitutional reservation applies to the authority of the constitutional institutions, any authority of the respondent to submit certain matters to a national referendum is limited to that expressly provided by the Constitution in Article 72 and nothing else.

Therefore, in reviewing the constitutionality of the subject matter of this case, the constitutional provision that serves as the standard of review is Article 72 of the Constitution, which provides for the authority of the respondent to submit matters to a national referendum.

(B) guidance for interpretation of the 'important policies' within the meaning of Article 72 of the Constitution

Article 72 of the Constitution provides that the "President may submit important policies concerning diplomacy, national defense, unification and other matters relating to national destiny to a national referendum if the President deems it necessary," thereby limiting the subject matter of a national referendum to the 'important policies concerning diplomacy, national defense, unification and other matters relating to national destiny.' The issue in this case is how to interpret the 'important policies concerning the national security and existence.'

Article 72 of the Constitution is a provision setting forth an exception in light of the fact that the Constitution adopts representative democracy, in principle, for the realization of the sovereignty of the people and only very limited elements of direct democracy merely in two cases that exclude the citizen proposition. In light of the relationship between the principle and the exception, a provision setting forth an exception should not be expansively interpreted, but should instead be limitedly and strictly interpreted. Further, such provision of exception should be interpreted in a way alleviating the mutual tension and discord between different constitutional provisions as much as possible for a harmonious interpretation of the Constitution as a whole. Especially in inserting certain elements of direct democracy such as the national referendum into the constitutional structure based on representative democracy, such inserted elements of direct democracy should be harmonized with representative democracy. Therefore, the constitutional provision in the nature of direct democracy such as the one providing for a national referendum should not be in violation of

such fundamental constitutional principles as the authority of the state institutions endowed with the state authority in the separation of powers context and the principle of rule of law. This perspective should also serve as an important guidance in interpreting Article 72 of the Constitution.

In reviewing first the concept of 'national destiny' in Article 72 of the Constitution, matters concerning the national security and existence may be limitedly interpreted to mean a national emergency or a situation equivalent to it in light of the facts that 'national destiny' is generally a concept premised on an emergency situation and that the Constitution refers to the concept of 'national destiny' in relation to the respondent's authority to issue an emergency presidential decree under Article 76(2). It is possible, on the other hand, to more broadly interpret the concept of the national security and existence. However, in this case, there is no necessity to conclusively define the concept of 'national destiny,' as the subject matter of the national referendum under Article 72 of the Constitution is limited to 'important policies' regardless of the interpretation of the concept of 'national destiny.' The 'important policies' under Article 72 of the Constitution should be deemed to mean 'specific and identifiable policies,' for the national referendum is one of the methods to realize direct democracy and its essential nature requires the citizens to participate in making a decision upon a particular matter of state affairs.

(C) whether the 'public's confidence in the respondent' constitutes an 'important policy'

1) Should the confidence of the public in the respondent be interpreted to be included in 'important policies,' a national referendum seeking the public confidence would have legally binding effect. The national referendum set forth in Article 72 of the Constitution is not merely a 'public poll' surveying the opinion of the public for reference purposes, but instead is a 'national ballot' endowing binding effect according to the result of the vote. Therefore, should the result of a national referendum express the public's lack of confidence in the respondent upon submission by the respondent of the confidence of the public in him as the subject matter of a national referendum, the effect of the national referendum would require the respondent's resignation. Therefore, if the 'important policies' within the meaning of Article 72 of the Constitution were to be understood to include the 'public confidence' in the President, this would result in adding one more ground of 'public's lack of confidence upon national referendum' for the resignation of the President by way of constitutional interpretation. However, as the respondent is burdened with extremely significant responsibilities as the head of the state, the ultimately

responsible party in state affairs, and the chief of the executive branch under the Constitution, the Constitution clearly provides for the matters concerning the status of the respondent in the Constitution itself such as the term of office, temporary assumption of authority in case of vacancy thereof or other accidents, and the privileges and obligations *ex officio*, in light of the importance of the constitutional status of the respondent as President. Specifically, the Constitution in Article 68(2) provides for the grounds for vacancy in presidential office, which are conclusively stated, in addition to voluntary resignation or death during the term, as the "disqualification by a court ruling or for any other reason" for an involuntary resignation from office. Furthermore, the Constitution emphasizes politics by the President that is both responsible and responsive unaffected by the confidence of the public during the term of the office, by providing that the term of the presidential office is absolutely guaranteed for five years (Article 70 of the Constitution), that the President shall not be, in principle, indicted for criminal charges during the service in office (Article 84), and that the President may be removed from the office during the term solely by an impeachment adjudication (Article 65).

From this perspective, submission of the public confidence in the President to a national referendum with the ensuing resignation in case of lack of confidence as the result of the national referendum cannot conform to the constitutional provisions such as Article 70 that absolutely guarantees the term of the respondent's office or Article 68(2) that limits the vacancy of the presidential office to the enumerated grounds. Therefore, the confidence held by the citizens in the President is not included in 'important policies' within the meaning of Article 72 of the Constitution.

2) Furthermore, there have been ample examples in history of various nations where a holder of the state authority submitted the question of confidence to a national referendum thereby forcing the citizens concerned with political chaos to express their confidence in their ruler and then made use of the result thereof to fortify his or her political position. From such lessons, our Constitution expressly limits the subject matter of the national referendum to 'important policies' under Article 72, thereby declaring that a national referendum should not be abused to turn to one that has hindered the development of democracy as indicated in history.

(D) Sub-conclusion

To conclude, the respondent lacks the constitutional authority to seek public confidence in him by way of a national referendum, and the respondent's attempt to reconfirm the confidence of the citizens already indicated in the past presidential election by way of a national

referendum is an unconstitutional exercise of the national referendum mechanism provided under Article 72 of the Constitution in a way that is not permitted by the Constitution.

Further, the respondent would place an undue burden in the public's decisionmaking process beyond the constitutional authority endowed in him by relating a particular policy to the matter of confidence and announcing that he 'would resign in case of non-confidence.'

Therefore, the respondent is not allowed by the Constitution to ask the confidence held by the public in him by way of a national referendum. The respondent is not permitted to do so under the Constitution as it is an unconstitutional act.

(4) Whether the act of the respondent infringes upon the basic rights of the complainants

The act of the respondent submitting the matter of public's confidence in him to a national referendum is unconstitutional, and such an act prohibits the citizens from legitimately participating in the process of the exercise of state power by autonomous decisionmaking upon specific state affairs through national referendum, thereby infringing upon the right to political participation or national referendum and the freedom against forced expression of political opinions held by the complainants as citizens.

This issue is discussed in further detail in the following paragraphs.

The right to political participation as a right to participation means in its narrow or traditional meaning the right to vote and the right to hold public office, and in its broader and modern meaning the entirety of the right to participate in the political process. As such, the right to political participation means that the citizens, as the holders of the sovereignty, may have their political opinions justly reflected and represented in state affairs by actively participating in the process of the establishment and the exercise of the state authority through the establishment of political parties, votes, service in the public office, and national referendum.

If the respondent were to implement a national confidence referendum, notwithstanding the fact that it is not permitted by the Constitution, such national confidence referendum would undemocratically distort the opinion of the citizens as voters and would further denigrate the national referendum mechanism to a means to implement authoritarian politics unduly labeled as public legitimacy. Such national confidence referendum then would infringe upon the right of the citizens

as voters to legitimately participate or withdraw to participate in the process of the exercise of state authority by autonomous decisionmaking upon specific state affairs through national referendum, thereby infringing upon the right to political participation or national referendum and the freedom against forced expression of political opinions held by the citizens.

There may be an argument that there is no room for the infringement upon the right to national referendum for the citizens may decide not to participate in the national referendum as the citizens are not forced to participate, even if the national referendum is unconstitutional.

However, unlike general votes for public offices, in a national referendum, withdrawal from participation in the national referendum does not mean severance from its result. Although the Constitution is silent of the quorum for the national referendum for policy matters under Article 72, it requires under Article 130(2) a quorum of the votes of one-half of all voters registered for the election of members of the National Assembly or more and the approval of one-half of the votes or more. Applying the quorum requirement of Article 130(2) to the case of Article 72 by inference, choosing not to vote is counted toward disapproval of the subject matter of the national referendum. For example, when a citizen withdraws from voting believing that a national confidence referendum is unconstitutional, and the instant those who do not participate in the national confidence referendum constitute a majority, such withdrawal has the same effect as voting to express lack of confidence. This would distort the opinion of the citizens who withdraw from voting on the belief that a national confidence referendum is unconstitutional although they approve the performance of the respondent as lack of confidence itself and, further, would distort the opinion of the citizens who withdraw from voting on the belief that it is not appropriate to remove the respondent during his term of office even though they do not approve the performance of the respondent as an agreement to removal during the term.

On the other hand, in order to avoid such distortion of opinions, even those who believe that a national confidence referendum is unconstitutional are forced to participate in the national confidence referendum. Such participation in voting is not a free vote, but is rather an exercise of the right to vote forced by the mechanism and against the conscience, which eventually results in the infringement upon the right to national referendum. Furthermore, such national confidence referendum would distort the opinion of the citizens who vote for approval on a belief that they cannot but vote for approval to prevent chaos in state affairs to be caused by non-confidence in

the respondent although they actually do not approve the performance of the respondent nor they believe the national confidence referendum to be constitutional as genuine confidence in the respondent or approval of the performance of the respondent, which is a double distortion of the opinion of such citizens.

To conclude, an implementation of a national confidence referendum that is not permitted by the Constitution prohibits free exercise of the right to national referendum held by the citizens by practically forcing the citizens to vote who believe that such national confidence referendum is unconstitutional and wish to withdraw from voting. Furthermore, an implementation of such national confidence referendum infringes upon the right to national referendum by resulting in a distortion apart from genuine opinions in considerable part both of the citizens who participate in voting and who withdraw from voting.

This phenomenon, on the other hand, infringes upon the freedom against forced expression of political opinions held by the citizens. Those who vote in an unconstitutional national confidence referendum solely because they do not wish to remove the respondent during the term, although they do not approve the performance of the respondent, are practically forced to express their political opinions. Likewise, those who intend to withdraw from voting on a belief that the national confidence referendum is unconstitutional, although they approve the performance of the respondent, may yet participate in voting in an unconstitutional national confidence referendum solely to avoid distortion of their withdrawal as non-confidence or disapproval, which is also a practically forced expression of political opinions. These are merely part of the recognizable examples, and the political opinions held by the citizens might be practically forced to be expressed in various other forms. This aspect also constitutes an infringement upon the basic rights.

C. Conclusion

Therefore, in this case, the complaints for constitutional adjudication should not be dismissed, and should instead be reviewed on the merits to hold unconstitutional the public announcement by the respondent of the plan to implement a national confidence referendum.

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

---

Aftermath of the Case[2)]

Although the Constitutional Court did not proceed to adjudicate upon the merits of the constitutionality of national confidence referendum, no national referendum seeking confidence of the public in the President has yet been implemented subsequent to this decision.

2) Not part of the official opinion of the Court. (translator's note)

6. *Impeachment of the President (Roh Moo -hyun) Case*

(16-1 KCCR 609, 2004Hun-Na1, May 14, 2004)

Contents of the Decision

1. The subject matter to be adjudicated by the Constitutional Court in the impeachment adjudication proceeding.
2. Whether or not the due process principle is directly applicable in the impeachment proceeding at the National Assembly. (negative)
3. The nature of the impeachment proceeding set forth in Article 65 of the Constitution.
4. The meaning of the grounds for impeachment set forth in Article 65 of the Constitution.
5. The constitutional ground for the obligation of political neutrality by public officials concerning elections.
6. Whether or not the President is a "public official" within the meaning of Article 9 of the Act on the Election of Public Officials and the Prevention of Election Malpractices (hereinafter the "Public Officials Election Act"). (affirmative)
7. Whether or not the statements of the President expressing support for a particular political party at press conferences violate the obligation of political neutrality by public officials. (affirmative)
8. Whether or not the statements of the President expressing support for a particular political party at press conferences are in violation of the provision that prohibits electoral campaigns by public officials set forth in Article 60 of the Public Officials Election Act. (negative)
9. The obligation of the President to abide by and preserve the Constitution.
10. Whether or not the act taken by the President toward the National Election Commission's decision finding the President's breach of the election law violates the constitution. (affirmative)
11. Whether or not the President's act proposing a national referendum on whether he should remain in office violates the Constitution. (affirmative)
12. Whether or not the incidents of corruption involving the President's close acquaintances and associates constitute a violation

of law by the President. (negative)

13. Whether or not the political chaos and economic disruption caused by the unfaithful performance of the official duties and reckless management of the state affairs can be a subject matter for an impeachment adjudication at the Constitutional Court. (negative)
14. Whether or not the "valid ground for the petition for impeachment adjudication" set forth in Section 1, Article 53 of the Constitutional Court Act is limited to a grave violation of law. (affirmative)
15. The standard of review to be applied in determining the "gravity of the violation of law".
16. Whether or not the President should be removed from office where, as in the instant case, there is no finding of the President's active intent against the constitutional order in his specific acts of violations of law. (negative)
17. Whether or not the separate opinions may be disclosed at the impeachment adjudication proceeding. (negative)

Summary of the Decision

1. The Constitutional Court, as a judicial institution, is restrained in principle to the grounds for impeachment stated in the National Assembly's impeachment resolution. Therefore, no other grounds for impeachment than those stated in the impeachment resolution may constitute the subject matter to be adjudicated by the Constitutional Court at the impeachment adjudication proceeding. However, with respect to the 'determination on legal provisions,' the violation of which is alleged in the impeachment resolution, the Constitutional Court in principle is not bound thereby. Therefore, the Constitutional Court may determine the facts that led to the impeachment based on other relevant legal provisions as well as the legal provisions which the petitioner alleges have been violated. Also, the Constitutional Court is not bound by the structure of the grounds for impeachment as categorized by the National Assembly in its impeachment resolution in determining the grounds for impeachment. Therefore, the question of in which relations the grounds for impeachment are legally examined is absolutely for the Constitutional Court to determine.

2. The principle of due process is a legal principle that, before a decision is made by the governmental power, entitles a citizen who might be prejudiced by such a decision to an opportunity to express his or her opinion and thereby influence the process of the proceedings and the result thereof. In this case, the impeachment proceeding at the National Assembly concerns two constitutional institutions of the

National Assembly and the President, and the National Assembly's resolution to impeach the President merely suspends the exercise of the power and authorities of the President as a state institution and does not impede upon the fundamental rights of the President as a private individual. Therefore, the due process principle that has been formed as a legal principle applicable to the exercise of governmental power by a state institution in its relationship with its citizens shall not be directly applicable in the impeachment proceeding that is designed to protect the Constitution against a state institution. Furthermore, there is no express provision of law concerning the impeachment proceeding that requires an opportunity to be heard for the respondent. Therefore, the argument that the impeachment proceeding at the National Assembly was in violation of the due process principle is without merit.

3. Article 65 of the Constitution provides for the possibility of impeachment of high-ranking public officials of the executive branch and of the judiciary for violation of the Constitution or statutes. It thereby functions as a warning to such public officials not to violate the Constitution and thus also prevents such violations. Further, where certain state institutions are delegated with state authority by the citizenry but abuse such authority to violate the Constitution or statutes, the impeachment process functions to deprive such state institutions of their authority. That is, reinforcing the normative power of the Constitution by holding certain public officials legally responsible for their violation of the Constitution in exercising their official duties is the purpose and the function of the impeachment process.

4. An analysis of the specific grounds for impeachment set forth in Article 65 of the Constitution reveals that the 'official duties' as provided in 'exercising the official duties' mean the duties that are inherent in particular governmental offices as provided by law and also other duties related thereto as commonly understood. Therefore, acts in exercising official duties mean any and all acts or activities necessary for or concomitant with the nature of a specific public office under the relevant statutes, orders, regulations, or administrative customs and practices. As the Constitution provides the grounds for impeachment as a "violation of the Constitution or statutes," the 'Constitution' includes the unwritten Constitution formed and established by the precedents of the Constitutional Court as well as the express constitutional provisions; the 'statutes' include the statutes in their formal meaning, international treaties that are provided with the same force as statutes, and the international law that is generally approved.

5. The obligation to maintain political neutrality at the election

owed by public officials is a constitutional request drawn from the status of public officials as 'civil servants for the entire citizenry' as set forth in Article 7(1) of the Constitution; the principle of free election set forth in Articles 41(1) and Article 67(1) of the Constitution; and the equal opportunity among the political parties guaranteed by Article 116(1) of the Constitution. Article 9 of the Public Officials Election Act is a legal provision that specifies and realizes the above constitutional request.

6. 'Public officials' within the meaning of Article 9 of the Public Officials Election Act mean any and all public officials who should be obligated to maintain neutrality concerning elections, that is, more specifically, any and all public officials who are in a position to threaten the 'principle of free election' and 'equal opportunity among the political parties at the election.' Considering that practically all public officials are in a position to exercise undue influence upon the election in the course of exercising official duties, the public officials here include, in principle, all public officials of the national and local governments, that is, all career public officials as narrowly defined, and, further include public officials at offices of political nature who serve the state through active political activities. Here, the exception is that members of the National Assembly and the members of the local legislatures are excluded from 'public officials' within the meaning of Article 9 of the Public Officials Election Act, as no political neutrality concerning elections can be requested from such members of the legislatures due to their status as the representatives of the political parties and the directly interested parties in the political campaign.

Therefore, political neutrality at the election is a basic obligation owed by all public officials of the executive branch and of the judiciary. Furthermore, since the President bears the obligation to oversee and manage a fair electoral process as the head of the executive branch, the President is, as a matter of course, a 'public official' within the meaning of Article 9 of the Public Officials Election Act.

7. If the President makes a one-sided statement in support of a particular political party and influences the process through which the public opinion is formed, the President thereby interferes with and distorts the process of the independent formation of the public's opinion based on a just evaluation of the political parties and the candidates. This, at the same time, diminishes by half the meaning of the political activities continuously performed by the political parties and the candidates in the past several years in order to obtain the trust of the public, and thereby gravely depreciates the principle of parliamentary democracy. The relevant part of the President's statements at issue in this regard repeatedly and actively

expressed his support for a particular political party in the course of performing the President's official duties and further directly appealed to the public for the support of that particular political party.

Therefore, the president's statements toward the entire public at press conferences in support of a particular political party made by taking advantage of the political significance and influence of the office of the President, when political neutrality of public officials is required more than ever before as general elections approach, were in violation of the neutrality obligation concerning elections as acts unjustly influencing the elections and thereby affecting the outcome of the elections by taking advantage of the status of the President.

8. Article 58(1) of the Public Officials Election Act makes it a prerequisite for the electoral campaign 'whether or not a candidate can be specified,' by defining the concept of 'electoral campaign' adopting the standard of 'being elected.' When the statements at issue in this case were made on February 18, 2004 and February 24, 2004, the party-endorsed candidates had not yet been determined. Therefore, the statements in support of a particular political party when the party-endorsed candidates were not yet specified did not constitute an electoral campaign.

Furthermore, considering that the president's statements at issue herein were neither actively made nor premeditated as such statements were made in the form of the President's response to questions posed by the reporters at press conferences, neither was there an active or premeditated element to be found in the President's statements, nor, as a result, a purposeful intention sufficient to find the nature of a political campaign. Therefore, the respondent's statements cannot be deemed as active and intended electoral campaign activities committed with an intention to have a particular candidate or certain identifiable candidates win or lose the election.

9. The 'obligation to abide by and protect the Constitution' of the President set forth in Articles 66(2) and 69 of the Constitution is the constitutional manifestation that specifies the constitutional principle of government by the rule of law in relation to the President's performance of official duties. While the 'obligation to abide by and protect the Constitution' is a norm derived from the principle of government by the rule of law, the Constitution repeatedly emphasizes such obligation of the President in Articles 66(2) and 69, considering the significance of the status of the President as the head of the state and the chief of the executive branch. Under the spirit of the Constitution as such, the President is the 'symbolic existence personifying the rule of law and the observance of law' toward the entire public.

10. The President's acts denigrating the current law as the 'vestige of the era of the government-power-interfered elections' and publicly questioning the constitutionality and the legitimacy of the statute from his status as the President do not conform to the obligation to abide by and protect the Constitution and statutes. The President, of course, may express his or her own position and belief regarding the direction for revising the current statute as a political figure. However, it is of great importance that in which circumstances and in which relations such discussions on possible statutory revisions take place. The President's statements denigrating the current election statutes made as a response to and in the context of the National Election Commission's warning for the president's violation of such election statutes cannot be deemed as an attitude showing respect for the law.

The statements as such made by the President, who should serve as a good example for all public officials, might have significantly negative influence on the realization of a government by the rule of law, by gravely affecting the other public officials obligated to respect and abide by the law and, further, by lowering the public's awareness to abide by the law. To conclude, the act of the President questioning the legitimacy and the normative power of the current statute in front of the public is against the principle of government by the rule of law and is in violation of the obligation to protect the Constitution.

11. The national referendum is a means to realize direct democracy, and its object or subject matter is the 'decision on issues,' that is, specific state policies or legislative bills. Therefore, by the own nature of the national referendum, the 'confidence the public has in its representative' cannot be a subject matter for a national referendum and the decision of and the confidence in the representative under our Constitution may be performed and manifested solely through elections.

The President's suggestion to hold a national referendum on whether he should remain in office is an unconstitutional exercise of the President's authority to institute a national referendum delegated by Article 72 of the Constitution, and thus it is in violation of the constitutional obligation not to abuse the mechanism of the national referendum as a political tool to fortify his own political position. Although the President merely suggested an unconstitutional national referendum on the people's confidence and did not yet actually institute such referendum, the suggestion toward the public of a national confidence referendum[1], which is not permitted under the Constitution,

1) A national confidence referendum is a national referendum through which the President asks voters to decide whether the President should remain in office. (translator's note)

is itself in violation of Article 72 of the Constitution and not in conformity with the president's obligation to realize and protect the Constitution.

12. As Article 65(1) of the Constitution provides 'as the President, ... exercises his or her official duties' and thereby limits the grounds for impeachment to the exercise of the 'official duties,' the above provision, as construed, mandates that only those acts of violation of law performed by the President while holding the office of the President may constitute the grounds for impeachment. The alleged grounds for impeachment concerning the unlawful political funds that involved the Sun & Moon corporation and the respondent's presidential election camp are based on facts that arose before the respondent was elected and sworn in on February 25, 2003 as the President. Therefore, such alleged grounds are clearly irrelevant to the respondent's exercise of his official duties as President and do not constitute grounds for impeachment. With respect to the misconducts of the President's close associates and aides that took place subsequent to the respondent's assumption of the office of President, none of the evidence submitted to the bench throughout the entire proceedings in this case supports any finding that the respondent instructed or abetted the acts of Choi Do-sul and others including receiving unlawful funds or was otherwise illegally involved in such acts. Therefore, the alleged grounds for impeachment based on the above facts are without merit.

13. Article 69 of the Constitution provides for the President's 'obligation to faithfully perform the official duties,' as it provides for the obligation of the President to take the oath of office. Although the 'obligation to faithfully perform the official duties' of the President is a constitutional obligation, this obligation, by its own nature, is, unlike the 'obligation to protect the Constitution,' not the one the performance of which can be normatively enforced. As such, as a matter of principle, this obligation cannot be a subject matter for a judicial adjudication.

As Article 65(1) of the Constitution limits the ground for impeachment to the 'violation of the Constitution or statutes' and the impeachment adjudication process at the Constitutional Court is solely to determine the existence or the nonexistence of a ground for impeachment from a legal standpoint, the ground for impeachment alleged by the petitioner in this case concerning the respondent's faithfulness of the performance of the official duties such as the political incapability or the mistake in policy decisions, cannot in and by itself constitute a ground for impeachment and therefore it is not a subject matter for an impeachment adjudication.

14. Article 53(1) of the Constitutional Court Act provides that,

"when there is a valid ground for the petition for impeachment adjudication, the Constitutional Court shall issue a decision removing the respondent from office." The above provision may be interpreted literally to mean that the Constitutional Court shall automatically make a decision of removal from office in all cases where there is any valid ground for impeachment as set forth in Article 65(1) of the Constitution. However, if every and any minor violation of law committed in the course of performing official duties were to mandate removal from office, this would offend the request that punishment under the Constitution proportionally correspond to the obligation owed by the respondent, that is, the principle of proportionality. Therefore, the 'valid ground for the petition for impeachment adjudication' provided in Article 53(1) of the Constitutional Court Act does not mean any and all incidence of violation of law, but the incidence of a 'grave' violation of law sufficient to justify removal of a public official from office.

15. The question of whether there was a 'grave violation of law' or whether the 'removal is justifiable' cannot be conceived by itself. Therefore, the existence of a valid ground for the petition for impeachment adjudication, that is, the removal from office, should be determined by balancing the 'degree of the negative impact on or the harm to the constitutional order caused by the violation of law' and the 'effect to be caused by the removal of the respondent from office.'

On the other hand, a decision to remove the President from office would deprive the 'democratic legitimacy' delegated to the President by the national constituents through an election during the term of the office and may cause political chaos arising from the disruption of the opinions among the people, that is, the disruption and the antagonism between those who support the President and those who do not, let alone a national loss and an interruption in state affairs from the discontinuity of the performance of presidential duties. Therefore, in light of the gravity of the effect to be caused by the removal of the President, the ground to justify a decision of removal should also possess corresponding gravity.

Although it is very difficult to provide in general terms which should constitute a 'grave violation of law sufficient to justify the removal of the President from office,' a decision to remove the President from office shall be justified in such limited circumstances as where the maintenance of the presidential office can no longer be permitted from the standpoint of the protection of the Constitution, or where the President has lost the qualifications to administrate state affairs by betraying the trust of the people.

16. Considering the impact on the constitutional order caused by the violations of laws by the President as recognized in this case in

its entirety, the specific acts of the President in violation of law cannot be assessed as a threat to the basic order of a free democracy as there is no finding of an active intent to stand against the constitutional order therein.

The acts of the President violating the laws were not grave in terms of the protection of the Constitution to the extent that it would require the protection of the Constitution and the restoration of the impaired constitutional order by a decision to remove the President from office. Also, such acts of the President cannot be deemed as acts that betrayed the trust of the people to the extent that they would require the deprivation of the trust delegated to the President by the people prior to the completion of the presidential term. Therefore, there is no valid ground sufficient to justify a decision to remove the President from office.

17. Article 34(1) of the Constitutional Court Act provides that the deliberation of the Constitutional Court shall not be public. Therefore, the separate opinions of the individual Justices may be noted in the decision only when a special provision permits an exception to such secrecy of deliberation proceedings. With respect to the impeachment adjudication, no provision for the exception to the secrecy of deliberation exists. Therefore, in this impeachment adjudication, the separate opinions of the individual Justices or the numbers thereof may not be noted in the decision.

However, it should be noted that concerning the above position, there was also a position that the 'separate opinions may be noted in the decision as Article 36(3) of the Act should be interpreted to leave the question of whether to note individual opinions in an impeachment adjudication to the discretion of the participating justices.'

Parties

Petitioner

The Chair of the Legislation and Judiciary Committee of the National Assembly of the Republic of Korea, on behalf of the National Assembly of the Republic of Korea
Counsel of Record: Kang Jae-sup and 66 others

Respondent

Roh Moo-hyun, the President of the Republic of Korea
Counsel of Record: Ryu Hyun-seok and 9 others

Holding

The petition for the impeachment adjudication is rejected.

Reasoning

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

A. Overview of the Case

(1) Resolution of the impeachment and the petition for impeachment adjudication

The National Assembly of the Republic of Korea proposed the 'motion for the impeachment of the President (Roh Moo-hyun)' presented by Assembly members Yoo Yong-tae and Hong Sa-deok and 157 others before the second plenary session at the 246th session (extraordinary) on March 12, 2004, and passed the motion by 193 concurrent votes out of the entire Assembly membership of 271. The Chair of the National Assembly Legislation and Judiciary Committee, Kim Ki-chun, acting ex officio as the petitioner, requested an impeachment adjudication against the respondent by submitting the attested original copy of the impeachment resolution to the Constitutional Court on the same date pursuant to Article 49(2) of the Constitutional Court Act.

The full text of the National Assembly's impeachment resolution against the respondent is attached hereto as Appendix 3.

(2) Summary of the grounds for the impeachment resolution of the National Assembly

(A) Corrupting the national law and order

1) Act of supporting a particular political party

A) The respondent violated Articles 9(1), 60(1), 85(1), 86(1) and 255(1) of the Public Officials Election and Election Malpractice Prevention Act (hereinafter referred to as the 'Public Officials Election Act'), in (i) stating, at a joint press conference with six news media organizations in the Seoul-Incheon region on February 18, 2004 , that "I simply cannot utter what will follow should the quorum to resist the constitutional revision be destroyed; and (ii) stating, as an invited guest at a press conference with the Korean Network

Reporters Club on February 24, that "the public will make it clear whether I will be backed to do it well for the four years to come or I cannot stand it and will be forced to step down," "I expect that the public will overwhelmingly support the Uri Party at the general election," and "I would like to do anything that is legal if it may lead to votes for the Uri Party."

B) The respondent violated Articles 9(1), 59, and 87 of the Public Officials Election Act and Article 69 of the Constitution, in (i) stating, on December 19, 2003, when he participated in an event entitled "Remember 1219" hosted by the so-called "Roh-Sa-Mo,"[2] that "The citizens revolution is still going on. Let's step forward once again"; and (ii) stating, at a meeting with the journalists in the Gangwon-Do region on February 5, 2004, that "the 'Citizen Participation 0415(Kook-Cham 0415)' members' participation in politics should be permitted and encouraged legally and politically."

C) Pursuant to the report in Joong-Ang Ilbo on February 27, 2004, the document entitled 'the strategic planning of the Uri Party for the 17th General Election' states that it is necessary to 'establish the control tower where the party, the administration, and Cheong Wa Dae (the Office of the President) together participate' in order to invite the candidates for the general election, and lists 'the party-Cheong Wa Dae-the administration' in the order of importance in the administration of the state affairs for the general election. This confirms the organizational intervention into the election by Cheong Wa Dae, and the command of the strategy of a particular political party for the general election by the respondent was in violation of Articles 9(1) and 86(1)(ii) of the Public Officials Election Act.

D) The respondent violated Article 9(1) of the Public Officials Election Act and Articles 8(3) and 11(1) of the Constitution, in (i) stating, at a beginning-of-the-year press conference on January 14, 2004, that "there was a split because there were those who supported reform and those who did not support reform fearing it, and I would like to go together with the Uri Party as those who supported me at the presidential election are running the Uri Party"; and (ii) stating, at a gathering with the close associates on December 24, 2003, that "if you vote for the New Millennium Democratic Party, you are helping the Grand National Party."

E) The respondent violated Article 237(1)(iii) of the Public Officials Election Act and Articles 10, 19 and 24 of the Constitution, in inducing the support for a particular political party by threatening the public and in repeatedly making remarks affecting the public's mind concerning the general election.

---

2) An activist group of President Roh Moo-hyun supporters (translator's note).

2) Act in contempt of the constitutional institutions

A) The respondent violated Articles 66(2), 69 and 78 of the Constitution and Article 7(1) of the National Intelligence Service Act, in ignoring the impropriety recommendation by the National Assembly Confirmation Hearing Committee on April 25, 2003, for Ko Young-gu, as the head of the National Intelligence Service.

B) The respondent violated Articles 66(2) and 69 of the Constitution, Article 63 of the National Public Official Act, and Article 311 of the Criminal Code, in describing the then incumbent members of the National Assembly as 'weeds to be mowed' in his open letter to the public via the Internet on May 8, 2003.

C) The respondent violated Articles 63(1), 66(2) and 69 of the Constitution, in taking the position that seemed to refuse the National Assembly resolution of September 3, 2003 that proposed the removal of Kim Doo-kwan from the office of the Minister of Government Administration and Home Affairs, by postponing the acceptance of such resolution.

D) The respondent violated Articles 40, 66(2), and 69 of the Constitution, in (i) expressing regrettableness on March 4, 2004 towards the National Election Commission's decision requesting the President to observe the neutrality obligation concerning elections, through the Senior Secretary to the President for Public Information; (ii) denigrating the current election laws, on the same date, as the 'vestige of the era of the government-power-interfered-elections'; and, (iii) on March 8, devaluating his violation of Article 9 of the Public Officials Election Act as 'miscellaneous' and 'minor and equivocal.'

E) The respondent violated Articles 65(1), 66(2) and 69 of the Constitution, in stating on March 8, 2004 that the National Assembly's moving forward on the impeachment proposal was an 'unjust oppression.'

F) The respondent violated Articles 66(2), 69 and 72 of the Constitution, in stating at a press conference on October 10, 2003 that, with respect to the suspicion as to Choi Do-sul's reception of the secret fund from the SK Group, "when the investigation closes, I will ask the public the confidence in the President concerning the public distrust accumulated during the past including this matter"; and stating at the policy speech on the state affairs at the National Assembly on October 13 that "the vote of confidence will be feasible even under the current law upon reaching a political agreement although there are some legal arguments upon it," "although a way to associate the vote of confidence with certain policies is under discussion, it would rather not be done that way and none of the conditions will be attached," and "if I win the vote of confidence, I

plan to reorganize the cabinet and Cheong Wa Dae within this year and to carry out reform to state affairs."

(B) Power-engendered corruption

1) Act of receiving illegal political funds concerning the Sun & Moon Group

A) In June 2002, the respondent had Ahn Hee-jung request the National Tax Service to reduce the taxes for the Sun & Moon Group (CEO, Moon Byung-wook), whereby the taxes for the Sun & Moon Group was reduced to 2.3 billion Korean Won from 17.1 billion Korean Won. This was in violation of Article 129(2) of the Criminal Code and Article 3 of the Enhanced Punishments for the Specified Crimes Act.

B) The respondent had a breakfast meeting with Moon Byung-wook on November9, 2002 at Riz Carlton in Seoul, for which Lee Gwang-jae acted as an agent. Immediately after the respondent left the breakfast meeting, Lee Gwang-jae received 100 million Korean Won from Moon Byung-wook. This was in violation of Article 30 of the Political Fund Act (hereinafter referred to as the 'Fund Act') and Article 32 of the Criminal Code.

C) The respondent violated Article 129 of the Criminal Code, Article 61 of the State Public Officials Act, and Article 30 of the Fund Act, in receiving two packages of money (presumed to be approximately 100 million Korean Won) from Moon Byung-wook at Kimhae Tourists Hotel on July 7, 2002 and forwarding it to his accompanying secretary Yeo Taek-soo.

2) Receiving illegal political fund concerning the presidential election camp

In Roh Moo-hyun's presidential election camp, Chung Dae-chul, the chief of the Joint Election Strategy Committee, received 900 million Korean Won, Lee Sang-soo, the General Affairs Director, received 700 million Korean Won, and Lee Jae-jung, the Campaign Headquarter Director, received 1 billion Korean Won, of illegal political fund, all of which was forwarded to Roh Moo-hyun's presidential election camp. The respondent's involvement in the above transactions was in violation of Article 30 of the Fund Act.

3) Involvement in the corruption of close associates

A) Corruption concerning Choi Do-sul

Choi Do-sul (i) embezzled 250 million Korean Won and delivered the funds to Sun Bong-sul, the CEO of the Jang-Soo-Cheon company, in May 2002, which were the remaining funds in the account belonging to the New Millennium Democratic Party Election Committee Busan

Branch as the balance from the local elections, in order to pay the obligation owed by the respondent concerning the Jang-Soo-Cheon company; (ii) collected illegal funds in the amount of 500 million Korean Won and delivered such funds to Sun Bong-sul for the period of December 2002 to February 6, 2003, in order to pay the obligation owed to Jang-Soo-cheon; (iii) received illegal funds in the amount of 100 million Korean Won through an account under an assumed name for the period of March to April of 2002, in order to create funds for the presidential candidacy nomination of the respondent; (iv) received illegal funds in the amount of 296.5 million Korean Won from the Nexen Tire company and others after the presidential election; (v) received 47 million Korean Won from Samsung and others during his office as the General Affairs Secretary for the President; (vi) received negotiable certificates of deposits from the SK Group in the amount of approximately 1.1 billion Korean Won immediately after the presidential election. The above acts of Choi Do-sul were impossible without the respondent's direction or tacit permission. Therefore, such acts of the respondent were in violation of Article 61(1) of the State Public Officials Act, Article 30 of the Fund Act, Article 3 of the Act of Regulation and Punishment for the Concealment of Criminally Gained Profit, and Articles 31, 32, 129 and 356 of the Criminal Code.

B) Corruption concerning Ahn Hee-jung

(i) Between August 29, 2002 and February 2003, Kang Geum-won provided 1.9 billion Korean Won of illegal funds by way of a disguised sale and purchase of real estate owned by Lee Gi-myung; (ii) Ahn Hee-jung collected 790 million Korean Won of illegal funds from September through December of 2002 and delivered such funds to Sun Bong-sul and others; and (iii) Ahn Hee-jung received 50 million Korean Won of illegal funds at the time of the presidential candidacy nomination process, 3 billion Korean Won of illegal funds from Samsung at the time of the presidential election, and 1 billion Korean Won of illegal funds between March and August of 2003. The respondent violated Article 2 of the Enhanced Punishments for the Specified Crimes Act, Article 61(1) of the State Public Officials Act, Article 30 of the Fund Act, and Articles 31 and 32 of the Criminal Code, as the respondent directed and abetted the above acts.

C) Corruption concerning Yeo Taek-soo

Yeo Taek-soo received 300 million Korean Won of illegal funds from the Lotte Group and provided 200 million Korean Won out of such funds for the formation of the Uri Party during his office as an administrative officer at Cheong Wa Dae. The respondent violated Article 61(1) of the State Public Officials Act, Article 30 of the Funds Act, and Articles 31, 32 and 129 of the Criminal Code, as the respondent was involved in such acts.

D) Corruption concerning Yang Gil-seung

Yang Gil-seung, who was the Chief of Personal Secretary Office for the President, was arrested in June of 2003 for allegedly having requested to suspend the investigation in return for a lavish entertainment at the expense of Lee Won-ho, who was then under investigation for an alleged tax evasion.

4) Public remarks as to the retirement from politics

The respondent publically made remarks at the party representative meeting at Cheong Wa Dae on December 14, 2003 that the respondent would retire from politics should the amount of illegal political funds on the part of the respondent exceed one-tenth of that of the Grand National Party. The respondent, however, ignored such public promise of political retirement although the result of the public prosecutors office's investigation indicates that the amount reached one-seventh as of March 8, 2004. The respondent thereby violated Article 69 of the Constitution, Article 63 of the State Public Officials Act, and Article 30 of the Fund Act.

(C) Disruption of the National Administration

The respondent violated Articles 10 and 69 of the Constitution in disrupting the public and drowning the economy into a rupture, notwithstanding his constitutionally mandated obligation as the head of the state and the ultimately responsible party of the national administration to sincerely endeavor to protect the public's right to pursue happiness and to increase the public welfare by uniting the public and consolidating the whole capacity for the nation's development and economic growth, by failing to maintain integrity in the policy goals between growth and distribution, by increasing uncertainty at the industry from oscillating without clear policy directions regarding the right-obligation relationship of the labor and the management, by exacerbating economic instability from causing confusion and theoretical enmity among the policy administrators, by having unfaithfully performed his office in, for example, pouring all his authority and effort in for a particular political party's victory at the general election, and by irresponsibly and recklessly administering the national affairs in, for example, making a remark that "the presidency is too damn much trouble to do," proposing a confidence vote, and declaring his retirement from politics.

B. Subject Matter of Review

(1) The subject matters of review in the instant case are whether the President violated the constitution or statutes in performing his duties and whether the President should be removed from office by the issuance of the Constitutional Court's order as such.

(2) The Constitutional Court, as a judicial institution, is restrained in principle to the grounds for impeachment stated in the National Assembly's impeachment resolution. Therefore, no other grounds for impeachment except those stated in the impeachment resolution constitute the subject matter to be adjudicated by the Constitutional Court at the impeachment adjudication proceeding.

However, with respect to the 'determination on legal provisions,' the violation of which is alleged in the impeachment resolution, the Constitutional Court in principle is not bound thereby. Therefore, the Constitutional Court may determine the facts that led to the impeachment based on other relevant legal provisions as well as the legal provisions which the petitioner alleges have been violated. Also, the Constitutional Court is not bound by the structure of the grounds for impeachment as categorized by the National Assembly in its impeachment resolution in determining the grounds for impeachment. Therefore, the question of in which relations the grounds for impeachment are legally examined is absolutely to be determined by the Constitutional Court.

2. Summary of the Impeaching Petitioner's Argument and the Respondent's Answer

A. Summary of the Argument of the Impeaching Petitioner

(1) Not only an act of a public official in violation of the provisions of the Constitution or statutes in the performance of his or her official duties, but also immorality concerning the performance of the office or the political incapability and the error in political decisionmaking, constitutes the grounds for impeachment. The grounds for impeachment are "all" acts in violation of the Constitution and statutes in the performance of his or her official duties and are not limited to only "grave" violations. Even if it is necessary to limit the grounds for impeachment to an 'act of grave violation' in order to prevent abuse of the impeachment system, it is manifest that a violation of the constitutionally mandated obligation or an unfaithful performance of the official duties by the President, unlike other acts

of violation, constitutes a grave violation of the Constitution or statutes. Also, an act prior to inauguration as President may constitute a ground for impeachment.

(2) The authority to determine whether an act of the President in violation of the Constitution or statutes in the performance of his or her official duties is of such gravity to justify the removal from the office lies in the National Assembly directly constituted by the national constituents. The scope of the subject matter in the impeachment adjudication proceeding at the Constitutional Court is limited to the question of the constitutionality and legality of the impeachment procedures and to the question of whether or not the specific violations that allegedly constitute the grounds for impeachment in fact exist.

(3) The respondent, both prior to and following the inauguration as President, continuously and repeatedly made remarks that cast a doubt on his qualification as President and his will to preserve the basic order of free democracy and instigated the disintegration of the national opinions. Also, the respondent impeded the political neutrality and independence of the public prosecutors' office by intervening into or pressuring the investigation process. The respondent continuously performed an illegal election campaign for a particular political party, upon which the constitutional institution of the National Election Commission determined, as unprecedented in the constitutional history for an incumbent president, that the respondent was in violation of the Public Officials Election Act, and the decision and the accompanying warning were announced to the respondent on March 3, 2004. Notwithstanding, ignoring such warning, the respondent has taken an anti-constitutional position directly denying the rule of law by declaring that he would also publicly support a particular political party in the future irrespective of the election law.

Also, the respondent violated various statutes such as Article 30 of the Political Funds Act (punishing the act of receiving illegal political funds), Articles 123 (abuse of office) and 129 (bribery) of the Criminal Code, in getting directly and indirectly involved with numerous incidents of receiving illegal funds and embezzlement by his close associates prior to and following his winning the presidential election. The respondent violated the Constitution and statutes such as Article 69 of the Constitution (obligation to abide by the Constitution), in suggesting, concerning certain corruption matters involving his close associates, a national referendum whether he should remain in office, which is not permitted under the Constitution, and, concerning illegal funds for the presidential election, in publicly declaring that he would retire from politics had such illegal funds been in excess of certain amount and then ignoring such promise.

Furthermore, although the respondent, as the president of a nation, should endeavor to unify the nation, to develop economy, and to promote public welfare, the respondent, abandoning such constitutionally mandated obligations, disintegrated the national opinions by making statements that instigated antagonism and jealousy among various classes in our society, exacerbated economic instability by uncertain policy goals between 'growth and distribution' and confusion among the policy administrators, and led the national economy and the people's livelihood into distress by causing economic stagnation and large-scale unemployment among the younger generation thus returning to the public agony and misery harsher than that during the IMF foreign-currency crisis, thereby violated Articles 10 (the obligation to protect the public's right to pursue happiness) and 69 (the obligation to faithfully perform the office in order to promote the public welfare) of the Constitution.

The National Assembly, as the above can no longer be tolerated, unavoidably, in order for the happiness of the public and the future of the nation, reached the resolution to impeach the President, which is the sole means under the current Constitution to directly hold responsible and check the President against misrulings in violation of the Constitution and statutes.

B. Summary of the Respondent's Answer

(1) On the Question of Legal Prerequisites

It is the abuse of the impeachment authority by the National Assembly that, in the instant case, the National Assembly hastily resolved to impeach the President while no sufficient grounds or evidence for impeachment existed, thereby suspending the authority of the President, and it attempts to inquire into the grounds and the evidence for impeachment through the adjudication procedure at the Constitutional Court.

The Grand National Party and the New Millennium Democratic Party threatened to oust party-member assemblypersons should they not participate in the impeachment resolution. The assemblypersons who participated in the resolution process did a public vote with no curtain hung at the voting booth, with certain assemblypersons showing their marked votes to the whip of the party to which they belonged. Also, the Speaker of the National Assembly voted by proxy.

The Speaker of the National Assembly unilaterally changed the time when the general meeting would open from 2 o'clock in the afternoon to 10 o'clock in the morning, without consulting the representa-

tive member of the Uri Party, which is a negotiating party[3] of the National Assembly.

The Speaker of the National Assembly impeded the voting rights of the assemblypersons who were members of the Uri Party, by hastily declaring the closure of the vote upon completion of vote by the assemblypersons belonging to the Grand National Party, the New Millennium Democratic Party and the United Liberal Democrats, without cautiously assessing the circumstances regarding whether the assemblypersons belonging to the Uri Party would participate in voting.

The Speaker of the National Assembly impeded the right of assemblypersons to inquire and discuss in violation of Article 93 of the National Assembly Act, by foregoing the procedure of explaining the purpose but instead distributing the printed materials, and by forcing the vote without any procedure for inquiry and discussion, in the deliberation process for the impeachment motion.

The National Assembly violated the Constitution by impeding the right of assemblypersons to inquire and discuss, in passing the impeachment motion as a single measure by way of a single vote, without going through the procedures to inquire and discuss and to vote individually on each of the three stated grounds for impeachment, while the impeachment resolution in the instant case contains three distinct grounds for impeachment against the respondent.

The resolution on the impeachment is in violation of due process as the respondent was not provided with any notice or opportunity to state his opinion at the impeachment process in the National Assembly.

(2) On the Merit of the Case

The authority to impeach the President and the authority to adjudicate thereon should be exercised with utmost caution within the boundary of checks and balances under the principle of separation of powers. The 'violation of the Constitution or statutes in performing official duties' provided in Article 65(1) of the Constitution is too vague to indicate which types of act of violation rendered in which method are subject to impeachment. Considering the systematic and practical dynamics surrounding the constitutional institutions and the fundamental order and the value ordained by the Constitution, the grounds for impeachment against the President should correctly be

3) Any political party having in the National Assembly a certain number (currently twenty or more) of members who belong to it should organize a negotiating party, and it is entitled to particular privileges and benefits according to law. (translator's note)

limited to 'grave and apparent violation of the Constitution and statutes deemed to impede upon the constitutional values and the constitutional fundamental order.'

The impeachment resolution in the instant case was reached by a National Assembly that has practically lost democratic legitimacy, with the termination of its term fast approaching, in pursuit of party interest and impulse beyond its authority delegated by the public; and was hastily processed even though there was no substantive ground that would justify impeachment, without careful investigation and deliberation, democratic discussion, or any process to persuade the public.

With respect to the first alleged ground for impeachment entitled the 'violation of the election law,' the President is a public officer of a political nature who is permitted to be a member of a political party and Article 9 of the Public Officials Election Act cannot be applied to the President. Even if not, the statements at issue herein are not deemed to be in violation of the Public Officials Election Act.

With respect to the second alleged ground for impeachment entitled the 'corruption of the respondent's close associates and aides,' many of the alleged facts occurred prior to the respondent's inauguration as President, and the respondent was neither involved in the alleged corruption by, for example, directing or abetting such alleged acts, nor has the respondent's involvement been proven, therefore, such alleged acts under this count do not constitute a ground for impeachment.

With respect to the third alleged ground for impeachment entitled the 'disruption of the national administration,' the allegation is different from the fact, and, even if true, the political incapacity or the misjudgment in policymaking of the President does not constitute a ground for impeachment.

3. Review of the Legality of the National Assembly's Impeachment

A. National Assembly's Authority to Self-Regulate its Deliberation Proceedings

The National Assembly, as the representative of the public and as the legislative body, possesses vast authority to self-regulate its administration, including its deliberation process and internal regulation. This self-regulating authority should be respected in light of the doctrine of separation of powers and the status and the function of the National Assembly, as long as there is no clear violation of the Constitution or statutes in the deliberative or legislative process of

the National Assembly. Therefore, it is not desirable for other state institutions to intervene and judge the legitimacy of a decision reached by the National Assembly upon matters that fall within the scope of its self-regulating authority, and no exception thereto applies to the Constitutional Court (*See* 10-2 KCCR 74, 83, 98Hun-Ra3, July 14, 1998).

Also, the Speaker of the National Assembly is, in principle, vested with the general and inclusive authority and responsibility concerning the deliberation process of the National Assembly, pursuant to Article 10 of the National Assembly Act. Therefore, in cases of disputes as to the deliberation process at the general meeting or where the normal deliberative process otherwise cannot apply, the method of deliberation and of resolution is to be determined by the Speaker of the National Assembly within the above authority endowed to the Speaker. Such authority of the Speaker to preside over the deliberation process is, widely interpreted, part of the self-regulating authority of the National Assembly, and should be respected as such unless exercised in a way clearly beyond its limit. As a principle, such authority may not be impeded upon by the Constitutional Court (*See* 12-1 KCCR 115, 128, 99Hun-Ra1, February 24, 2000).

B. On the argument that the proceedings at the National Assembly lacked sufficient investigation and deliberation

The respondent argues that in order for the National Assembly to petition for the impeachment of the President, the National Assembly must sufficiently investigate the grounds for impeachment and the evidence thereto, to the extent that the Constitutional Court in its impeachment adjudication can readily determine the validity of the alleged grounds for impeachment. It is desirable, as a matter of course, that the National Assembly thoroughly investigate the stated grounds for impeachment prior to its reaching a resolution to impeach. However, Article 130(1) of the National Assembly Act provides that, "upon proposal for the impeachment resolution, ... the National Assembly may, by resolution at the plenary session, assign the matter to the Legislation and Judiciary Committee for investigation," thus subjects the investigation to the discretion of the National Assembly. Therefore, even if the National Assembly did not perform a separate investigation in the instant case, this was not in violation of the Constitution or statutes.

C. On the arguments of the forced voting, the non-secret vote, and the proxy vote for the Speaker of the National Assembly

(1) Even if the Grand National Party and the New Millennium Democratic Party publicly declared that they "will oust from the party those assemblypersons who will not participate in the vote for the impeachment measure," this cannot be deemed as pressure or threat substantively preventing the assemblypersons from exercising their voting right pursuant to their conscience (Article 46(2) of the Constitution, and Article 114-2 of the National Assembly Act) beyond the boundaries of the party control permissible under today's party democracy.

(2) Even if it was true that the screen at the voting booth was not pulled down at the time of voting or certain assemblypersons disclosed the content of their votes to the party whip of their respective party membership, the question of the effect of such on the validity of the voting at the National Assembly is a matter for which the decision of the National Assembly, with its self-regulating authority regarding the deliberation process, should be respected. The Speaker of the National Assembly confirmed the validity of the votes, thereby, declaring the passing of the impeachment resolution, and there is no clear basis or materials indicating a patent violation of the Constitution or statutes. Therefore, the Constitutional Court may not deny the effect of the votes on or the passing of the impeachment resolution, solely on these alleged facts.

(3) With respect to the argument that the Speaker of the National Assembly voted by proxy, voting by proxy means that 'someone does not mark the vote and, instead, has a third party mark the vote on his or her behalf.' The acknowledged facts here merely indicate that the Speaker of the National Assembly, pursuant to the custom within the National Assembly, marked the vote himself from the seat reserved for the Speaker, folded the voting paper to secure the content of the vote from disclosure to others, and forwarded such voting paper to an officer so that the officer put the vote into the ballot box. Therefore, there was no vote by proxy.

D. On the argument that the opening time for the National Assembly general meeting was arbitrarily changed

The National Assembly Act, with respect to the opening time for its meetings and sessions, provides in Article 72 that the "meeting of

the plenary session shall be opened at two o'clock p.m. (on Saturday, at ten o'clock a.m.): provided, That the Speaker may change the opening time after consulting with the representative assemblyperson of each negotiating party," thereby providing that a change of the opening time shall be subject to the consultation with the representing assemblyperson of each negotiation party.

The 'consultation' here may occur in various forms, by its nature, as the process for exchanging and receiving opinions, and the Speaker of the National Assembly makes the final judgment and decision upon matters regarding such consultation. In the instant case, considering that a normal deliberation process pursuant to the National Assembly Act was hardly anticipated due to the continuous occupation of the floor for the general meeting by the assemblypersons of the Uri Party notwithstanding the fact that the impeachment motion was to be discarded past March 12, 2004 for the expiration of the time limit, and further considering that the prevailing majority of the assemblypersons, including the assemblypersons of the Uri Party, were present at the designated venue when the general meeting at issue was opened at approximately 11:22 on March 12, 2004, the mere fact that the Representative Assemblyperson of the Uri Party and the Speaker of the National Assembly did not directly discuss the opening time cannot, by itself, be deemed as a violation of Article 72 of the National Assembly Act or as an infringement on the right of assemblypersons of the Uri Party membership to examine and vote.

E. On the argument that the voting was unilaterally declared to be closed

The respondent alleges that the Speaker of the National Assembly unilaterally declared that the voting was closed disregarding whether or not the assemblypersons of the Uri Party would intend to participate in voting. However, the minutes of the National Assembly general meeting for March 12, 2004 indicate that the Speaker, at that time, urged two or three times those who had not yet voted to participate in voting and declared that the voting would be closed should there be no more votes. It cannot be, then, deemed that the Speaker of the National Assembly obstructed the Uri Party assemblypersons from exercising their voting rights by unilaterally closing the voting.

F. On the argument that the inquiry and discussion process was lacking

The respondent argues that the forcefully performed voting with a mere distribution of the printed materials instead of the explanation of the purpose by the assemblyperson who proposed the impeachment motion, without any inquiry or discussion process, in violation of Article 93 of the National Assembly Act, impeded the assemblypersons' right to inquire and discuss.

Article 93 of the National Assembly Act provides that, 'with respect to such subject matters which have not been examined by a committee, the proponent of such matter should explain its purpose.' The above minutes of the National Assembly general meeting indicate that, in the deliberation process for the impeachment motion in the instant case, a 'document' was substituted for the proponent's explanation of the purpose. There is no legal ground to deem this method as inappropriate.

Next, on the argument that the inquiry and discussion process was lacking, as Article 93 of the National Assembly Act provides that the 'general meeting, in deliberating the subject matters before it, shall vote upon inquiry and discussion,' it would have been desirable, in light of the significance of the impeachment, if the National Assembly had rendered sufficient inquiry and discussion within the National Assembly. However, with respect to the proposed impeachment motion not sent to the Legislation and Judiciary Committee, Article 130(2) of the National Assembly Act stipulating that "a secret vote shall be taken to determine whether to pass an impeachment motion between 24 and 72 hours after the motion is reported to the plenary session" can be deemed as a special provision concerning the impeachment procedure and may be interpreted to mean that the 'impeachment motion may be put to a vote without inquiry and discussion.' With the self-regulating authority and the legal interpretation of the National Assembly to be respected, such interpretation of the law cannot be deemed as arbitrary or incorrect.

G. On the argument that each ground for impeachment was not separately voted on

In voting to decide whether to pass an impeachment resolution, it would be desirable to vote on each of the stated grounds for impeachment separately, in order to appropriately protect the right to vote of the assemblypersons. However, the National Assembly Act does not contain any express provision regarding such and merely

provides in Article 110 that the Speaker of the National Assembly should declare the title of the subject matter that is to be voted on. Pursuant to the above provision, the scope of the subject matter to be voted on varies depending upon how the title of the subject matter is determined. Thus, whether or not more than one ground for impeachment may be voted on as a single matter is, basically, up to the Speaker of the National Assembly who has the authority to determine the title of the subject matter that is to be voted on. Therefore, the argument raised by the respondent in this regard lacks merit.

H. On the argument that the principle of due process was violated

The respondent argues that the impeachment resolution in the instant case was in violation of the principle of due process since the respondent had not been officially notified of the facts allegedly constituting the grounds for impeachment nor had the respondent been provided with an opportunity to state his own opinions.

The principle of due process here, as the respondent argues, is the legal principle that before the state authority makes a decision prejudicing its citizen, such citizen should be provided with an opportunity to state his or her own opinions, and should thereby be able to affect the progress of the procedure and the result thereof. The citizen is not a mere object of the state authority but the subject of the process and only when a citizen may state his or her own opinions prior to a decision concerning his or her own right can an objective and fair procedure be guaranteed and the equality of status in the procedure between the parties realized.

In the instant case, however, the impeachment procedures at the National Assembly concern the relationship between two constitutional institutions, the National Assembly and the President, and the impeachment resolution by the National Assembly merely suspends the exercise of the authority vested in the President as a state institution and does not infringe the basic rights of the President as a private individual. Therefore, the due process principle that has been formed as a legal principle applicable in the exercise of the governmental power by the state institution in its relationship with its citizens shall not be directly applicable in the impeachment proceeding that is designed to protect the Constitution against a state institution. Furthermore, there is no express provision of law concerning the impeachment proceeding that requires an opportunity to be heard for the respondent. Therefore, the argument that the impeachment proceeding at the National Assembly was in violation of the due

process principle is groundless.

4. Nature of the impeachment adjudication procedure in Article 65 of the Constitution and the grounds for impeachment

A. The impeachment adjudication procedure is a system designed to protect and maintain the Constitution from infringement by high-ranking public officials of the executive and judicial branches.

Article 65 of the Constitution provides for the possibility of impeachment of high-ranking public officials of the executive branch and the judiciary for violation of the Constitution or statutes. It thereby functions as a warning to such public officials not to violate the Constitution and thus also prevents such violations. Further, where certain public officials are delegated with state authority by the citizenry but abuse such authority to violate the Constitution or statutes, the impeachment process functions to deprive them of such authority. That is, reinforcing the normative power of the Constitution by holding certain public officials legally responsible for their violation of the Constitution in exercising their official duties is the purpose and the function of the impeachment adjudication process.

Article 65 of the Constitution includes the President in the definition of public officials who are subject to impeachment, memorializing a discerned position that even the President elected by the public and thereby directly endowed with democratic legitimacy may be impeached in order for the preservation of the constitutional order and that the considerable political chaos that may be caused by a decision to remove the President from office should be deemed as an inevitable cost of democracy in order for the national community to protect the basic order of free democracy. The system subjecting the President to the possibility of impeachment, thus realizes the principle of the rule of law or a state governed by law that every person is under the law and no possessor of the state power, however mighty, is above the law.

Our Constitution, in order to fulfill the function of the impeachment adjudication process as a process dedicated to the preservation of the Constitution, expressly provides in Article 65 that the ground for impeachment shall be a 'violation of the Constitution or statutes' and mandates the Constitutional Court to take charge of the impeachment adjudication, thereby indicating that the purpose of the impeachment system lies in the removal of the President 'not for political grounds but for violations of law.'

B. The Constitution, in Article 65(1), provides for the grounds of impeachment that "the National Assembly may resolve to impeach the President, ... upon violation of the Constitution or statutes by the President, ... in performing official duties."

(1) All state institutions are bound by the Constitution. Especially, the legislator should abide by the Constitution in the legislative process and the executive branch and the judicial branch are bound by the Constitution in exercising the state authority vested by and under the Constitution. Article 65 of the Constitution reemphasizes that the state institutions of the executive and the judicial branches are bound by the Constitution and statutes, and, on this very ground, sets forth the grounds for impeachment to be the violation of the Constitution and statutes, not limiting the grounds merely to the violation of the Constitution. The question of whether the executive branch and the judicial branch abide by the statutes formed by the legislative branch is directly related to the question of their compliance with the doctrine of separation of powers and the principle of the rule of law under the Constitution. Therefore, observance of the statutes by the executive and the judicial branches means, in turn, their compliance with the constitutional order.

(2) An analysis of the specific grounds for impeachment set forth in Article 65 of the Constitution here reveals that the 'official duties' as provided in 'exercising the official duties' mean the duties that are inherent in particular governmental offices as provided by law and also other duties related thereto as commonly understood. Therefore, acts in exercising official duties mean any and all acts or activities necessary for or concomitant with the nature of a specific public office under the relevant statutes, orders, regulations, or administrative customs and practices. Thus, the act of the President in exercising official duties is a concept not only including an act based on pertinent statutes, orders, or regulations, but also encompassing any act performed by the President in his or her office as President with respect to the implementation of state affairs,' and includes any such acts, for example, visiting various organizations and industrial sites, participating in various events such as a dedication ceremony and an official dinner, appearing through the broadcasting media to explain government policies in order to seek the public understanding thereof and to efficiently implement national policies, and agreeing to hold a press conference.

The Constitution sets forth the grounds for impeachment as a "violation of the Constitution or statutes." The 'Constitution' here includes the unwritten constitution formed and established by the precedents of the Constitutional Court as well as the express constitutional provisions; the 'statutes' include not only the statutes in

their formal meaning, but also, for example, international treaties that are provided with the same force as statutes, and the international law that is generally approved.

5. Whether the respondent violated the Constitution or statutes in exercising his official duties

Article 53(1) of the Constitutional Court Act provides that the "Constitutional Court shall issue a decision removing the respondent from office should the grounds for the impeachment petition be valid." Therefore, in order to determine whether to issue a decision to remove the President from office, an examination should precede upon the existence of the grounds for impeachment set forth in the Constitution, i.e., whether the 'President violated the Constitution or statutes in the performance of his official duties.' In the immediately following paragraphs, we will examine each of the grounds for impeachment stated in the impeachment resolution of the National Assembly under the respective categories.

A. Act of supporting a particular political party at a press conference (the statements at the press conference with six of the Seoul-Incheon area news media organizations on February 18, 2004, and as an invited guest at the press conference with the Korean Network Reporters Club on February 24, 2004)

Pursuant to the acknowledged facts, the President stated, at a press conference on February 18, 2004 with six of the Seoul-Incheon area news media organizations, that "... I simply cannot utter what will follow should the quorum to resist the constitution revision be destroyed"; and, at a press conference with the Korean Network Reporters Club, as an invited guest, which was broadcasted nationwide on February 24, 2004, in response to a question posed by a reporter concerning the upcoming general election that 'how the respondent would run the political affairs if the Uri Party would remain as a minority party unlike the anticipation of Chung Dong-young, the Chairman of the Uri Party, projecting about 100 seats as a goal,' the respondent stated that "I expect that the public will overwhelmingly support the Uri Party," "I would like to do anything that is legal if it may lead to the votes for the Uri Party," and "when they elected Roh Moo-hyun as the President, the public will make it clear whether I will be backed to do it well for the four

years to come or I cannot stand it and will be forced to step down."

On the other hand, no arbitrary amendment to the impeachment resolution by the impeaching party in order to add new facts not stated in the original resolution is permitted in the impeachment adjudication proceeding. The statement of the President made on March 11, 2004 that 'connected the general election to the matter of confidence of the President' is a fact not included in the original impeachment resolution of the National Assembly and merely stated in the impeaching party's brief submitted to the Court as an additional ground for impeachment subsequent to the National Assembly's resolution of impeachment and, as such, the Court does not examine such additionally stated ground.

(1) Obligation of a public official to maintain political neutrality concerning elections

The political neutrality obligation concerning elections owed by public officials is a constitutional request drawn from the status of public officials set forth in Section 1, Article 7, of the Constitution; the principle of free election set forth in Section 1, Article 41, and Section 1, Article 67, of the Constitution; and the equal opportunity among the political parties guaranteed by Section 1, Article 116 of the Constitution.

(A) Article 7(1) of the Constitution provides that "all public officials shall be servants of the entire people and shall be responsible to the people," thereby setting forth that the public officials shall perform their official duties for the welfare of the public as a whole and should not serve the interest of a particular political party or organization. The status and the responsibility of the state institutions as the servant for the entire citizenry is, in the area of election, realized in concrete terms as the 'obligation of the state institutions to maintain neutrality concerning elections.' The state institutions should serve the entire population, therefore, should act neutrally in the competition among the political parties or political factions. Thus, Article 7(1) of the Constitution mandates that no state institution should exercise influence in the free competition among political factions by identifying itself with a particular political party or a candidate or taking sides with a particular political party or a candidate in electoral campaigns by use of the influence and authority vested in the office.

(B) Articles 41(1) and 67(1) of the Constitution provide for the principles applicable to the general election for members of the National Assembly and the presidential election, respectively. Although such provisions do not expressly mention the principle of free election, in order for any election to properly represent the political will of

the public, the voters should be able to form and decide their own opinions through a free and open process without undue extraneous influence. Therefore, the principle of free election is part of the fundamental principles of election as a basic premise to provide legitimacy for the state institutions constituted by and through an election.

The principle of free election not only means that the voters should be able to vote without forceful or undue influence from the state or the society, but also that the voters should be able to make their own judgment and decisions in a free and open process to form their own opinions. The principle of free election, in turn, in the context of state institutions, means the 'obligation of public officials to maintain neutrality,' that is, the prohibition against the state institutions from supporting or opposing any particular political party or candidate by identifying themselves with such particular political party or candidate.

(C) The obligation of public officials to maintain neutrality concerning elections is mandated by the Constitution also from the standpoint of equal opportunity among the political parties. The principle of equal opportunity among the political parties is a constitutional principle derived from the interrelationship of Article 8(1) of the Constitution that guarantees the freedom to form a political party and the multi-party system and Article 11 of the Constitution that sets forth the principle of equality. Particularly, Article 116(1) of the Constitution provides that "an equal opportunity should be guaranteed ... in the electoral campaign," thereby specifying the 'principle of equal opportunity among the political parties' concerning the political campaign. The principle of equal opportunity among the political parties requires state institutions to act neutrally in the competition among political parties at the elections, thus prohibiting the state institutions from either favoring or prejudicing any particular political party or candidate in the electoral campaign.

(2) Whether the respondent violated Article 9 of the Public Officials Election Act (neutrality obligation of a public official)

Article 9 of the Public Officials Election Act provides that "no public official or no one obligated to maintain political neutrality should act in a way unduly influencing the election or otherwise affecting the outcome of the election," and thereby provides for the 'obligation of public officials to maintain neutrality concerning elections.'

(A) Whether the President is a 'public official' within the meaning of Article 9 of the Public Officials Election Act

The issue here is whether the officials at certain political offices

such as the President fall within the definition of a 'public official or anyone obligated to maintain political neutrality' of Article 9 of the Public Officials Election Act.

1) Article 9 of the Public Officials Election Act is a statutory provision that specifies and realizes the constitutionally requested 'obligation of public officials to maintain neutrality concerning elections,' derived from Article 7(1) (status of a public official as a servant for the public as a whole), Article 41, Article 67 (principle of free election) and Article 116 (principle of equal opportunity among the political parties) of the Constitution. Therefore, the 'public official' within the meaning of Article 9 of the Public Officials Election Act means any and all public officials who should be obligated to maintain neutrality concerning elections, that is, more particularly, any or all public officials who are in a position to threaten the 'principle of free election' and 'equal opportunity among the political parties at the election.' Considering that practically all public officials are in a position to exercise undue influence upon the election in the course of exercising through exercise of their official duties, public officials here include, in principle, all public officials of the national and local governments, that is, all career public officials as narrowly defined, and, further include public officials at offices of political nature who serve the state through active political activities (for example, the President, the Prime Minister, the ministers of the administration, and the chief executive officer at various levels of local government such as the governor, the mayor, and the county magistrate).

The possibility of affecting the public's open opinion formulation process and distorting the political parties' competitive relationship through the function and influence of the official duties is particularly greater for the executive institutions at the national or local governments. Therefore, political neutrality concerning elections is even more greatly requested than other public officials for the President and the chief executive officers at the local governments.

2) Obligating public officials to maintain neutrality concerning elections in Article 9 of the Public Officials Election Act is a mere specification of the constitutional request of the principle of free election, the principle of equal opportunity among the political parties, and the 'obligation of public officials to maintain neutrality concerning elections' derived from Article 7(1) of the Constitution, made applicable to public officials in the area of election law. Thus, such provision is constitutional as long as it is interpreted to exclude the members of the National Assembly and the members of the local legislatures from whom political neutrality concerning elections cannot be requested.

The members of the National Assembly and the members of the local legislatures are not 'public officials' within the meaning of Article

9 of the Public Officials Election Act, due to their status as political party representatives and as active figures at the electoral campaign. The state institutions bear the obligation to maintain neutrality concerning elections, in order to provide a 'forum for free competition' where the political parties can compete fairly at the election. In such 'free competition among the political parties' guaranteed by the state's neutrality obligation, the members of the National Assembly play an active role at the electoral campaigns as the representatives of their respective political parties. That is, whereas the state institutions administrate the election and should not affect the election as the institutions that are mandated to guarantee a fair election, the political parties, on the other hand, are premised on the mission to affect the election.

3) Also, a systematic analysis of the meaning of 'public officials' in Article 9 of the Public Officials Election Act in its interrelationship with other provisions of the Public Officials Election Act or with other statutes mandates an interpretation that the concept of 'public officials' in the Public Officials Election Act includes all public officials at political offices with the exception of the members of the National Assembly and of the local legislatures. For example, the Public Officials Election Act uses 'public officials' as a general term to include public officials at political offices in its Article 60(1)(iv) that prohibits, in principle, the political campaign of public officials and also in Article 86(1) that prohibits the acts of public officials influencing the election. Furthermore, in such other statutes as the State Public Officials Act (in Article 2 and other provisions) and the Political Party Act (in Article 6 and other provisions), the term 'public official' is used inclusive of public officials at political offices.

4) Therefore, political neutrality concerning elections is a basic obligation of all public officials of the executive branch and the judiciary. Furthermore, since the President bears the obligation to oversee and manage a fair electoral process as the head of the executive branch, the President is, as a matter of course, a 'public official' within the meaning of Article 9 of the Public Officials Election Act.

(B) The President as a 'constitutional institution of a political nature' and the 'obligation to maintain neutrality concerning elections'

The fact that the President is a 'constitutional institution of a political nature' is a distinct matter and should thus be distinguished from the question of whether the President bears the 'obligation to maintain political neutrality concerning elections.'

The President, in ordinary circumstances, is elected through the electoral campaign endorsed and supported by a political party, as a

party member. Therefore, the President generally maintains party membership after being elected as the President and also retains an affiliation with such particular political party. Current law also provides that the President may maintain party membership (Article 6(1) of the Political Party Act) and thus permits party activities, unlike in the case of other career public officials who are not allowed to be a member of a political party.

However, the President is not an institution that implements the policies of the ruling party, but instead, the President is the constitutional institution that is obligated to serve and realize the public interest as the head of the executive branch. The President is not the President merely for part of the population or a certain particular political faction that supported him or her at the past election, but he or she is the President of the entire community organized as the state and is the President for the entire constituents. The President is obligated to unify the social community by serving the entire population beyond that segment of the population supporting him or her. The status of the President as the servant of the entire public is specified, in the context of election, as the status of ultimately overseeing a fair election, and the Public Officials Election Act therefore prohibits a political campaign by the President (Article 60(1)(iv) of the Public Officials Election Act).

Therefore, neither the fact that the President is a public official of a political nature who is elected through nomination and support by a political party nor the fact that certain political and party activities of the President are permitted can serve as a valid ground for denying the obligation owed by the President to maintain political neutrality concerning elections.

(C) The President's 'obligation of political neutrality' concerning elections and 'freedom to express political opinions'

Every person in public office is obligated to maintain political neutrality concerning elections; on the other hand, at the same time such person is a citizen of the state and is subject of basic rights who may assert his or her own basic rights against the state. Likewise, in the case of the presidency, the status of the President as a private citizen who may perform party activities for the party of his of her membership and the status of the President as a constitutional institution bearing the obligation to serve the entire population and the public welfare should be distinguished as two distinct concepts.

The mandate that the President should maintain political neutrality concerning elections does not require no political activities or indifference to party politics on the part of the President. Unlike other public officials who are prevented from any party activities, the

President, as a member or an officer of a political party, may not only be involved with the internal decisionmaking process of the party and perform ordinary party activities, but also may participate in the party convention to express his or her political opinions and express support for the party of his or her membership. However, at the same time, even when the President exercises his or her freedom of expression as a political figure, the President should restrain and limit himself or herself in light of the significance of the office of the presidency and the potential reflections of his or her remarks and acts, and should not make an impression towards the public that the President may no more fairly exercise presidential duties due to his or her political activities outside the presidential duties. Furthermore, since the ultimate noticeability of the President obscures the President's 'exercise of basic rights as a private citizen' and 'activity within the boundary of the presidential duties,' the President, even in the case where the President is exercising the freedom of speech as a private citizen and performing party activities, should do so in a way appropriate to a harmonious implementation of the presidency and the maintenance of the functions thereof, that is, in accordance with the request of Article 7(1) of the Constitution that the President should serve the entire public.

Therefore, the President should, in principle, restrain himself or herself from expressing his or her personal opinions towards party politics when exercising duties as the head of the state or the chief executive officer. Furthermore, when the President makes statements concerning elections as the state institution of president and not as a party member or as a mere political figure, the President is bound by the obligation to maintain political neutrality concerning elections.

(D) Violation of Article 9 of the Public Officials Election Act

Article 9 of the Public Officials Election Act provides that "no public official shall exercise undue influence upon the election or otherwise affect the outcome of the election," thereby setting forth acts to be prohibited in order to realize the obligation of public officials to maintain neutrality concerning elections. Specifically, Article 9 of the Public Official Act provides the 'act affecting the outcome of the election' as the violation of the neutrality obligation, and mentions the 'exercise of undue influence upon the election' as a typical example therefor.

Therefore, the question of whether the President violated the neutrality obligation concerning elections depends upon whether the President 'exercised undue influence upon the election,' and should a public servant affect the election by taking advantage of the political weight and influence vested in the official duties in a way not appropriate for the mission to serve and be held responsible for the entire public or residents, such is beyond the boundaries of political activities per-

mitted for a public official at the election, thus constituting an act of exercising undue influence upon the election.

Thus, if a public official is acting in the status of a public servant and taking advantage of the influence vested in the public duties, undue influence upon the election is found to be exercised, thus constituting a violation of the neutrality obligation concerning elections.

(E) Whether the statements of the President violated the neutrality obligation owed by public officials

Whether the statements of the President violated Article 9 of the Public Officials Election Act depends upon the judgment as to 'whether the President affected the election through his statements by taking advantage of the political weight and influence of the public office of presidency in a way that was not appropriate for his status to serve the entire national public' in light of the specific contents of the statements, their timing and frequency, and the specific circumstance thereof.

1) The statements of the President at issue herein should be deemed to have been made in the president's status as a public servant and in implementing the official duties of the President or in relation thereto. The President held the above press conferences not as a private citizen or a mere political figure, but as the President, and the President, in such course, made the statements supporting a particular political party by taking advantage of the political weight and influence vested in his status as the President. Therefore, the statements made by the President at the above press conferences constitute an act 'in the performance of his official duties' within the meaning of Article 65(1) of the Constitution.

2) In the case of the general election to constitute the National Assembly, general parliamentary activities of the individual assemblypersons, the political parties, and the negotiating parties during the four-year term function as an important and meaningful indicator for the voters to form their judgment at the next election. Especially during the period designated for the electoral campaign under the Public Officials Election Act, the political parties, the negotiating parties and the individual candidates are involved in a feverous competition in order to obtain the trust and a vote from the voters in every possible legitimate way, by presenting their policies and political designs and criticizing the policies of the opposing parties or candidates in competition.

Here, if the President makes a statement unilaterally supporting a particular political party and influences the process by which the public forms its opinions, the President thereby intervenes and distorts the process of the independent formation of the public's opinions based

on a just evaluation of the political parties and the candidates. This, at the same time, diminishes by half the meaning of the political activities continuously done by the political parties and the candidates in the past several years in order to obtain the trust of the public, and thereby gravely depreciates the principle of parliamentary democracy. An electoral campaign in a democratic country is a free and open competition for multiple parties and candidates, with a goal to obtain political power, to seek a vote, by emphasizing their political activities and achievements during the past and by convincing the voters of the legitimacy of the policy they pursue. Such free competition relationship among the political parties to obtain the votes through the voters' judgment upon the policies and political activities is significantly perverted by one-sided intervention of the President supporting a particular party.

The relevant part of the President's statements at issue repeatedly and actively expressed his support for a particular political party in the course of performing his official duties and further directly appealed to the public for the support of that particular political party. Therefore, the President's taking advantage of his political weight and influence vested in his public office through the above statements favoring a particular political party, by way of identifying himself with such political party, was an exercise of undue influence in a way not appropriate for his responsibility as a servant for the entire public by the use of his status as a state institution. The President thereby violated his obligation to maintain neutrality concerning elections.

3) The judgment upon whether there was undue influence on the election may also vary depending upon the timing certain statements supporting a particular party were made. Should a statement as such be made at a time where there is no temporally intimate relation to an election, there is only a remote or limited possibility for such statements to affect the outcome of the election. However, as the election approaches, the possibility for the President's statement supporting a particular political party to affect the outcome of the election increases, therefore the President bears during such time period, as a state institution, an obligation to restrain, as much as possible, any and all acts that may unfairly influence the election.

Although it is not possible to clearly discern when an one-sided act of the state institution begins to particularly affect the election, the statements by the President at issue herein were made on February 18, 2004 and February 24, 2004, with approximately two months remaining before the general election for the National Assembly on April 15, 2004. Thus, at that time, there existed a temporal intimacy between the statements and the election as the preparation for the

electoral campaign had practically begun and the probability of the act of a state institution to influence the election was relatively high, and there was an increased demand for the political neutrality of state institutions at least during that period of time.

4) The President, then, violated the obligation to maintain neutrality concerning elections, by making the statements at the press conferences toward the entire public in support of a particular political party by taking advantage of the political weight and influence of the presidency, when the political neutrality of public official was highly demanded more than ever due to the temporal proximity to the election, while the President is ultimately responsible to oversee a fair administration of election, since such statements constituted acts performed using the respondent's status as the President unduly influencing the election and thereby affecting the outcome of the election.

(3) Whether the respondent violated Article 60 of the Public Officials Election Act (prohibition of electoral campaign by public official)

(A) Definition of electoral campaign

Article 58(1) of the Public Officials Election Act defines the term 'electoral campaign' as an 'activity for winning an election or for having another person be or not be elected.' The Public Officials Election Act, in a proviso in the same provision, lists certain 'acts not deemed to constitute electoral campaign,' which are: mere expression of opinion toward election, preparatory activity to register as a candidate and for electoral campaign, mere expression of opinion in agreement or disagreement toward the parties' recommendation of the candidates, and ordinary party activities.

Pursuant to the precedents of the Constitutional Court, the 'electoral campaign' under Article 58(1) of the Public Officials Election Act is any and all active and premeditated deeds for a specific candidate's winning the election and obtaining the votes therefore, or any and all active and premeditated deeds to have a specific candidate lose the election, among which there is an objective intent to win or to have win or lose the election (6-2 KCCR 15, 33, 93Hun-Ka4, July 29, 1994; 13-2 KCCR 263, 274, 2000Hun-Ma121, August 30, 2001).

The important standard in determining whether a specific act falls within the definition of electoral campaign is the existence of the required 'intent,' whereas other nature of 'activeness' or 'premeditatedness' is a secondary element that contributes to an objective finding and analyzing of the required 'intent' of the electoral campaign. Since the 'purposeful intent' of the actor is a highly subjective element

and it is difficult to discern such element, such element may be found to a certain extent of objectivity through other 'subjective elements that can be objectified' in relative terms of the 'activeness' of the deed or the 'premeditatedness' thereof.

(B) Whether the statements of the President constituted electoral campaign

1) Article 58(1) of the Public Officials Election Act makes it a prerequisite for the electoral campaign 'whether or not a candidate can be specified,' by adopting the standard of 'being elected' in defining the concept of 'electoral campaign.' Therefore, the concept of electoral campaign is premised upon that it should be an activity to have win or lose a 'specific' or at least 'discernible' candidate. Although a statement supporting a specific political party may satisfy the definition of electoral campaign since an activity intended to obtain votes for a specific political party inevitably means an activity intended to have the candidate nominated by that party in a certain district, even in such circumstances, a candidate intended to have win through such statement must be discernible.

When the statements at issue in this case were made on February 18, 2004 and February 24, 2004, the party-endorsed candidates had not yet been determined. Therefore, the statement supporting a particular political party when the party-endorsed candidates were not specified did not constitute an electoral campaign.

2) Also, whereas an activity requires a 'purposeful intent' to have a certain candidate win or lose an election in order for such activity to constitute an electoral campaign, there was no such purposeful intent in the statements at issue in the instant case.

A) In order for an election to properly represent the political will of the public, the voters should be able to make their decisions in a free and open process to form their own opinions. At the same time, the voters may make truly free decisions as voters only when they are aware of which candidates advocate and intend to implement the policies they support and are correctly informed of the candidates and the policy directions among which they can choose. Therefore, in terms of the public's right to know, it is required, as the election approaches, to provide certain information that may form the basis of the voters' decision or the information as to the parties and the candidates, through various means such as press conferences.

Therefore, strictly including all of the statements at a press conference in the definition of the electoral campaign would excessively limit the freedom of expression of a political figure. Especially, when the current Public Officials Election Act permits electoral campaigns

only during a short period designated for such, and even additionally limits the electoral campaigns in various terms such as their subjects and means, defining the term 'electoral campaign' too loosely might mean an even further shrinking of the scope of freedom of political activities given to the public.

Then, a statement at a press conference does not, in itself, constitute an electoral campaign and likewise is not, in itself, excluded from the activities constituting an electoral campaign. Rather, more than anything else, whether a 'purposeful intent of a considerable degree to perform an electoral campaign by taking advantage of such opportunities as press conferences can be found' should be determined on a case-by-case basis, considering the totality of the specific aspects of the activity, such as the timing of the statement, its content, venue, and context. Here, the activeness and the premeditatedness of the statement operates as an important standard in perceiving 'purposeful intent.'

B) In the instant case, although the statements at issue were made in a close temporal proximity to the approaching general election of April 15, 2004, such statements, in terms of the content and the specific circumstance of the statements, were made in the form of a response to the question posed by the reporters at the press conferences, thus in a passive and unintentional way. Considering this, no element of activeness or premeditatedness towards an electoral campaign is found in the statements of the President. Therefore, such statements lacked any purposeful intent of a considerable degree sufficient to constitute an electoral campaign.

3) Therefore, although the statements of the respondent pleaded to the public for their support of the Uri Party, such statements cannot be deemed as an act of an active and intentional electoral campaign to have specific or discernible candidates win or lose the election. Thus, the respondent's act in relevant part did not violate Article 60(1) of the Public Officials Election Act or its punishment provision of Article 255(1) of the Act.

(4) Whether the respondent violated Articles 85(1) or 86(1) of the Public Officials Election Act

Article 85(1) of the Public Officials Election Act prohibits public officials from conducting electoral campaigns using their status as such, and deems electoral campaigns by public officials toward other officers of the same public office or the employees and officers of a particular institution or business as an electoral campaign by way of his or her status as a public official.

However, as discussed above, the statements of the respondent at issue herein do not constitute electoral campaign activities, and therefore such statements did not violate Article 85(1) of the Public Officials Election Act without further reviewing the same.

Article 86(1) of the Public Officials Election Act prohibits various election-related activities of a public official. First, Subdivision (i) prohibits an act publicizing the achievements of a specific party or a candidate towards other officers of the same public office or the constituents within the election district. The respondent's statements do not contain any that publicized the achievements of the Uri Party, thus Subdivision (i) does not apply herein. Next, Subdivisions (ii) through (vii) are clearly inapplicable to the respondent's statements in terms of the constituting elements in themselves. Therefore, there was no violation of Article 86(1) of the Public Officials Election Act.

B. Other remarks concerning the general election

(1) Remark at the Remember 1219 event on December 19, 2003

Pursuant to the acknowledged facts, the President on December 19, 2003, participated in the event entitled "Remember 1219" hosted by the reform netizen front such as the Roh-Sa-Mo,[4] and stated that "your revolution is yet to be concluded," "The citizen revolution is still going on at this very moment," and that "my dear respected members of Roh-Sa-Mo, and citizens, let's step forward once again."

The above statements were made at an event to celebrate the one-year anniversary of President Roh's election as the President, while invited to the event. It was hosted by certain associations that supported President Roh at the election such as Roh-Sa-Mo. Reviewed in the whole context, the above statements were to plead for participation in election reform ('fair election where money is not required') or political reform, or simply to 'generally ask for the support of the President himself,' and, as such, can hardly be deemed as statements seeking the support for a particular political party concerning the election or inciting illegal an electoral campaign by the citizen organizations. Therefore, the above statements of the President were not beyond the boundaries of permissible expression of opinions toward politics and did not constitute a violation of the political neutrality obligation concerning elections or an electoral campaign activity prior to the

4) *See* above note 2. (translator's note)

permitted time period. Also, such statements did not constitute a violation for any other statutes.

However, such an one-sided act of the President toward a specific citizen organization might well cause a division between the groups of citizens supporting the President and the groups of citizens not supporting the President and, thereby, does not conform to the obligation of the President to unify the national community as the President of the entire public, which might lead to the public's distrust against the administration as a whole.

(2) Remark at the luncheon with former presidential aides on December 24, 2003 at Cheong Wa Dae

Pursuant to the acknowledged facts, the President on December 24, 2003, at a luncheon at Cheong Wa Dae with nine others including his former presidential aides who had resigned in order to run for the general election, stated that "the next year's general election will have a polarized structure between the Grand National Party and the President with the Uri Party on the other side," and that "a vote for the New Millennium Democratic Party at next year's election will be conceived as support for the Grand National Party."

In this case of a luncheon at Cheong Wa Dae hosted by the President and the first lady for the former Cheong Wa Dae aides and the administrative officers, the nature of the meeting was private rather than one hosted by the President in his official status as the President. The content of the statements can hardly be deemed as statements intended by the President to unduly influence the election by taking advantage of the political influence of his official status. The above statements of the President, considering altogether the other party of the speech, the context thereof and the motive therefor, were acts justified by the freedom of expression under the Constitution as an exercise of the freedom to express opinion towards politics, and did not exceed the limits on the political activities permitted for public officials of political offices.

(3) Remark at the beginning-of-the-year press conference on January 14, 2004

Pursuant to the acknowledged facts, the President at the beginning-of-the-year press conference on January 14, 2004, stated that "there was a split because there were those who supported reform and those who did not support reform fearing it, and I would like to go together with the Uri Party as those who supported me at the presidential election are running the Uri Party."

The above statement was made as a response to a reporter's question asking 'when the President would join the Uri Party,' and, as such, was a mere expression by the President, who is permitted to have party membership, stating the party that he supported and his position as to whether he would join such party and, if so, when. Therefore, since the President did not intend through the above statements to support a particular political party concerning the election or thereby to influence the election, the above statement did not constitute a violation of the neutrality obligation concerning elections owed by public officials or an electoral campaign activity.

(4) Remark at the meeting with the Gangwon-Do region journalists on February 5, 2004

Pursuant to the acknowledged facts, the President at the meeting with the journalists in the Gangwon-Do region on February 5, 2004, stated that "the Citizen Participation 0415 (Kook-Cham 0415) members' participation in politics should be permitted and encouraged both legally and politically."

The above statement was made as a response to the question asking the "President's opinion as to the debate concerning the Citizen Participation 0415's activities declaring to have certain candidates win the election as illegal intervention into the election." As such, the statement is understood to mean that, 'in order to be an advanced electoral culture, we should encourage voluntary participation and activities of the citizenry, and in order to achieve this goal the citizen participation in politics should be legally permitted as widely as possible, and at the least a generous legal interpretation is required as long as it is not against the law.' Therefore, the above statement was a mere expression of the respondent's personal opinion upon the aspect of the public participation in politics, and thereby did not constitute a violation of the neutrality obligation concerning elections or the prohibition of electoral campaign activities.

(5) The "Uri Party Strategy for the 17th General Election" reported in Joong-Ang Ilbo dated February 27, 2004

The Joong-Ang Ilbo reported with respect to a classified document entitled "Uri Party Strategy for the 17th General Election" on February 27, 2004, which posed suspicion as to the organizational intervention of Cheong Wa Dae into the election. However, even under the entire evidence submitted and accepted during the proceedings in this case, there is no finding that the respondent directed or was involved in the election strategy of the Uri Party. Therefore, there is no valid

ground for impeachment in this regard.

(6) Act interfering with free election by threatening the public

With respect to the ground for impeachment under this count, there is no specific facts alleged in this regard, instead, the impeachment resolution merely alleges that the respondent interfered with the public's free election by 'inducing support for a particular political party by threatening the public and by repeatedly making statements affecting the public's will concerning the general election.' There is no factual basis to find that the respondent's statements concerning the election had a pervasive effect in the general community of public officials thereby actually affecting negatively upon the neutrality of public officials at the election, that the executive organization of which the respondent is the chief officer intervened in the election for a particular political party, or that the function of the election management commission was impeded upon. Nor is it plausible to deem that the respondent thereby interfered with or distorted the unbridled formation of the public's will concerning the election or interfered with the free exercise of voting rights.

Therefore, the respondent's statements neither interfered with free election nor did such statements violate Article 237(1)(iii) of the Public Officials Election Act providing for the crime of interfering with the election.

C. Acts at issue with respect to the obligation to abide by and protect the Constitution (Articles 66(2) and 69 of the Constitution)

(1) The President's obligation to abide by and protect the Constitution

Article 66 of the Constitution, in Section 2, 'obligates' the President 'to protect the independence of the state, the preservation of the territorial integrity, the continuity of the state, and the nation's Constitution,' and in Section 3 'obligates' the President 'to faithfully endeavor for the peaceful reunification of the nation.' Article 69 of the Constitution obligates the President to take an oath of office, the content of which corresponds to such obligations. Article 69 of the Constitution not only sets forth the obligation of the President to take an oath of office, but also functions as a substantive provision specifying and emphasizing the constitutional obligations of the Pres-

ident under Article 66(2) and Article 66(3) of the Constitution.

The 'obligation to abide by and protect the Constitution' of the President set forth in Articles 66(2) and 69 of the Constitution is the constitutional manifestation that specifies the constitutional principle of government by the rule of law in relation to the President's performance of official duties. Expressed only in summary, the fundamental element of the principle of the rule of law, which is a basic constitutional principle, is that any and all operation of the state shall be by the 'Constitution' and the 'statutes' enacted by the legislature consisting of the representatives of the people and that any and all exercise of the state authority shall be the object of the judicial control in the form of administrative adjudication for the executive function and constitutional adjudication for the legislative function. Accordingly, the legislature is bound by the constitution, and the executive and the judicial branches of the government implementing and applying the law, respectively, are bound by the Constitution and the statutes. Therefore, the President, as the chief of the executive branch, is constitutionally mandated to respect and abide by the constitution and the statutes.

While the 'obligation to abide by and protect the Constitution' is a norm derived from the principle of government by the rule of law, the Constitution repeatedly emphasizes such obligation of the President in Articles 66(2) and 69, considering the significance of the status of the President as the head of the state and the chief of the executive branch. Under the spirit of the Constitution as such, the President is the 'symbolic existence personifying the rule of law and the observance of law' toward the entire public. Accordingly, the President should not only make every possible effort to protect and realize the Constitution, but also abide by the law and perform no act in violation of any of the valid law. Furthermore, the President should do all acts in order to implement the objective will of the legislator. The obligation of the executive branch of the government to respect and implement the law is equally applicable to the statutes that the executive branch deems unconstitutional. Since the Constitutional Court alone is vested with the authority under the Constitution to remove a statute that is unconstitutional, even if the executive branch suspects a particular statute to be unconstitutional, the executive branch should make every possible effort to respect and implement the law unless and until the Constitutional Court holds such statute unconstitutional.

(2) Acts of the President to the National Election Commission's decision that the President violated the election law

(A) Pursuant to the acknowledged facts, President Roh Moo-hyun stated through Lee Byung-wan, the Senior Secretary to the President for Public Information, on March 4, 2004, as the position of Cheong Wa Dae concerning the National Election Commission's decision warning him of his undue intervention into the election that "I would like to make it clear that the decision of the National Election Commission at this time is not convincing," "Now we should change both the institution and the custom under the standard of advanced democracy," "The election-related law of the past when the president mobilized ... the state institutions should now be reformed rationally," and "The interpretation of the election law and the decision concerning the election law should also be adjusted in conformity with such different culture surrounding the state authority and new trend of the time." Although the above stated position of Cheong Wa Dae on March 4, 2004 to the National Election Commission's decision was, internally, a position reached at a meeting of senior presidential secretaries, all of the positions of Cheong Wa Dae that are publicly announced revert, in principle, to the President. Particularly in this case, the acknowledged facts indicate that the Office of the President reported the outcome of the meeting to the President and held the briefing at issue upon the President's approval. Therefore, the above statements made by the Senior Secretary to the President for Public Information should be deemed as acts of the President himself. The purport of the above statements announced by the Senior Secretary to the President for Public Information is that the President expressed unsatisfaction toward the National Election Commission's decision and denigrated the current election law as the 'vestige of the era of the government-power-interfered elections.'

(B) The President's acts denigrating the current law as the 'vestige of the era of the government-power-interfered elections' and publicly questioning the constitutionality and the legitimacy of the statute from his status as the President do not conform to the obligation to abide by and protect the Constitution and statutes. Should the President suspect the constitutionality of a bill passed by the National Assembly or suspect that such a bill can be improved, the President should ask for reconsideration by returning such bill to the National Assembly (Article 53(2) of the Constitution), and should the President doubt the constitutionality of a current statute, the President should perform his or her obligation to implement the Constitution by, for example, having the administration review the constitutionality of such statute and

thereby introduce a bill to revise such statute or revising the statute in a constitutional manner through the support of the National Assembly (Article 52 of the Constitution). Even if the President suspects the constitutionality of a statute, questioning the constitutionality of such statute itself in front of the national public constitutes a violation of the President's obligation to protect the Constitution. The President, of course, may express his or her own position and belief regarding the direction for revising the current statutes as a political figure. However, it is of great importance that in which circumstances and in which relations such discussions on possible statutory revisions take place. The President's statements denigrating the current election statutes by comparing them to the equivalent foreign legislations as a response to and in the context of the National Election Commission's warning for the violation of such election statutes cannot be deemed as an attitude respecting the law.

The statements as such made by the President, who should serve as a good example for all public officials, might have significantly negative influence on the realization of a government by the rule of law, by gravely affecting the other public officials obligated to respect and abide by the law and, further, by lowering the public's awareness to abide by the law. Namely, it cannot be denied that an obscure attitude or a reserved position of the President toward government by the rule of law gravely affects the nation as a whole and the constitutional order. When the President himself or herself fails to respect and abide by the law, no citizen, let alone no other public officials, can be demanded to abide by the law.

(C) To conclude, the act of the President questioning the legitimacy and the normative power of the current statute in front of the public is against the principle of government by the rule of law and is in violation of the obligation to protect the Constitution.

(3) Act of suggesting a confidence vote in the form of a national referendum on October 13, 2003

Since the National Assembly's impeachment resolution specifically mentions the President's 'unconstitutional suggestion to have a confidence referendum' with respect to its third stated ground for impeachment of 'unfaithful performance of official duties and reckless administration of state affairs' and the National Assembly further specified on this issue in its brief submitted subsequent to the initiation of the impeachment adjudication, we examine this issue as a subject matter of this impeachment adjudication.

(A) The President, during 'his speech' at the National Assembly on October 13, 2003 'concerning the budget for fiscal year of 2004,'

stated that "I announced last week that I would submit myself for public confidence. ... Although it is not a matter that I can determine, I think a national referendum is a correct way to do this. Although there are disputes as to legal issues, I think it is feasible even under the current law by interpreting the 'matters concerning national security' more broadly, should there be a political agreement," thereby suggesting a confidence vote to be instituted in December of 2003. Debates concerning the constitutional permissibility of a confidence vote were thereby caused. Finally, such debates upon the constitutionality of a confidence referendum reached the Constitutional Court through a constitutional petition, but the Constitutional Court, in its majority opinion of five Justices in 2003Hun-Ma694 (issued on November 27, 2003), dismissed such constitutional petition on the ground that the 'act of the President that is the subject matter of the case was not an act accompanying legal effect but an expression of a mere political plan, therefore did not constitute an exercise of governmental power.'

(B) Article 72 of the Constitution vests in the President the authority to institute national referendum by providing that the "President may submit important policies relating to diplomacy, national defense, unification and other matters relating to the national destiny to a national referendum if he or she deems it necessary. Article 72 of the Constitution connotes a danger that the President might use national referendum as a political weapon and politically abuse such device by employing it to further legitimize his or her policy and to strengthen his or her political position beyond as a mere means to confirm the will of the public toward a specific policy, as the President monopolizes the discretionary authority to institute national referendum including the authority to decide whether to institute a national referendum, its timing, and the specific agendas to be voted on and the questions to be asked at the referendum, under Article 72 of the Constitution. Thus, Article 72 of the Constitution vesting within the President the authority to institute a national referendum should be strictly and narrowly interpreted in order to prevent the political abuse of national referendum by the President.

(C) From this standpoint, the 'important policy matters' that can be subjected to a national referendum under Article 72 of the Constitution do not include the 'trust of the public' in the President.

An election is for the 'decision on persons,' that is, an election is to determine the representatives of the public as a premise to make representative democracy possible. By contrast, the national referendum is a means to realize direct democracy, and its object or subject matter is the 'decision on issues,' that is, specific state policies or legislative bills. Therefore, by the own nature of the national re-

ferendum, the 'confidence the public has in its representative' cannot be a subject matter for a national referendum and the decision of and the confidence in the representative under our Constitution may be performed and manifested solely through elections. The President's attempt to reconfirm the public's trust in him that was obtained through the past election in the form of a referendum constitutes an unconstitutional use of the institution of a national referendum provided in Article 72 of the Constitution in a way not permitted by the Constitution.

The Constitution does not permit the President to ask the public's trust in him by way of national referendum. The constitution further prohibits as an unconstitutional act the act of the President subjecting a specific policy to a referendum and linking the matter of confidence thereto. Of course, when the President institutes a referendum for a specific policy and fails to obtain the consent of the public concerning the implementation of such policy, the President may possibly resign by regarding such outcome as public's distrust in him or her. However, should the President submit a policy matter to a referendum and declare at the same time that "I shall regard the outcome of the referendum as a confidence vote," this act will unduly influence the decisionmaking of the public and employ the referendum as a means to indirectly ask confidence in the President, therefore will exceed the constitutional authority vested in the President. The Constitution does not vest in the President the authority to ask the confidence in him or her by the public through a national referendum, directly or indirectly.

(D) Furthermore, the Constitution does not permit a national confidence referendum in any other form than the national referendum that is expressly provided in the Constitution. This is also true even when a confidence referendum is demanded by the people as the sovereign or implemented under the name of the people. The people directly exercise the state power by way of the election and the national referendum, and the national referendum requires an express basis therefor within the Constitution as a means by which the people exercise the state power. Therefore, national referendum cannot be grounded on such general constitutional principles as people's sovereignty or democracy, and, instead, can only be permitted when there is a ground expressly provided in the Constitution.

(E) In conclusion, the President's suggestion to hold a national referendum on whether he should remain in office is an unconstitutional exercise of the President's authority to institute a national referendum delegated by Article 72 of the Constitution, and thus it is in violation of the constitutional obligation not to abuse the mechanism of the national referendum as a political tool to fortify his own political po-

sition. Although the President merely suggested an unconstitutional national referendum for confidence vote and did not yet actually institute such referendum, the suggestion toward the public of a confidence vote by way of national referendum, which is not permitted under the Constitution, is itself in violation of Article 72 of the Constitution and not in conformity with the President's obligation to realize and protect the Constitution.

(4) Act of disregarding the opinion of the National Assembly

Pursuant to the acknowledged facts, the President disregarded the conclusion of the National Assembly appointment hearing held on April 25, 2003 that Ko Young-gu was inappropriate for the position as the Director of National Intelligence Service, and did not accept immediately the resolution of removal by the National Assembly of September 3, 2003 to dismiss the Minister of Government Administration and Home Affairs.

(A) The President possesses the authority to appoint and remove the members of the executive branch of the government under his or her direction and supervision (Article 78 of the Constitution). Therefore, the appointment of the head of the Director of National Intelligence Service is part of the President's exclusive authority and the President does not bear any obligation to accept the opinion concluded at the appointment hearing at the National Assembly. Thus, the President did not violate the Constitution by impeding upon the authority of the National Assembly or infringing upon the constitutional doctrine of separation of powers, in disregarding the decision of the National Assembly's appointment hearing.

(B) Notwithstanding the authority of the National Assembly to recommend removal of the Prime Minister or other ministers of the administration (Article 63 of the Constitution), such recommendation is a mere suggestion to remove such public official from office with no legally binding effect, and not the authority to determine the removal binding the President thereto. The meaning of the 'authority to recommend removal from office' is that the President may be subject to an indirect check and control by holding politically responsible the Prime Minister or other ministers of the administration serving the President's administration, instead of the President who may not be held politically responsible during the presidential term. An interpretation understanding the authority to recommend removal of certain public officials of Article 63 of the Constitution as the authority to determine removal of such public officials does not conform to the constitutional provision itself, nor can such interpretation be harmonized with the current constitutional separation of powers order that does

not authorize the President to dissolve the National Assembly.

(C) In conclusion, the question of whether the President accepts the conclusion reached at the National Assembly appointment hearing or the National Assembly's recommendation to remove a certain public official is a question of political reverence towards the decision of the National Assembly as the institution representing the public will, and not one of a legal nature. Therefore, the acts of the President herein were the President's legitimate exercise of his authority within the separation of powers structure under the Constitution, or were in conformity with constitutional norms, thus did not constitute acts in violation of the Constitution or statutes.

(5) Remark disparaging the National Assembly, etc.

(A) Pursuant to the acknowledged facts, the President in his open letter to the public via the Internet dated May 8, 2003 stated that "The farmer, when the time comes for weeding, roots out the weed from the field. ... certain politicians who fall to personal greed and interest and wrongful group selfishness ... certain politicians who disregard the will of the majority of the public for reform and instead hamper such reform effort and harm the future of the nation...." (note that the President, unlike the allegation of the impeaching petitioner, did not describe the then incumbent members of the National Assembly as the 'weed to be rooted out') and described the movement at the National Assembly of March 8, 2004 to impeach the President as 'unjust abuse of power.'

The above statements fall within the definition of the expression of opinion toward politics permitted to the President as the constitutional institution of a political nature and, as such, were not in violation of the Constitution or statutes, apart from the possibility of such statements serving as the ground for political criticism notwithstanding.

(B) Although the impeaching petitioner alleges that the President, in his 'address commemorating the 85th anniversary of the March 1st Independence Movement' of March 1, 2004, stated, concerning the move of the U.S. military base out of Yong-San, that "The symbol of interference, invasion, and dependence will return to the bosom of the citizens of the Republic of Korea as a true independent state," such allegation was not included in the original National Assembly impeachment resolution and is thus deemed to have been added subsequent to the National Assembly's resolution to impeach the President. Therefore, such allegation cannot properly be a subject matter in this impeachment adjudication.

D. Political power-based corruption involving the President's intimate associates and aides

(1) Temporal scope of the proximity to the implementation of official duties

Since Article 65(1) of the Constitution limits the ground for impeachment as arising out of the implementation of 'official duties' in providing 'the President, ... , in the performance of the official duties,' the interpretation of the above provision urges that only certain acts violating the law committed while the President was in the office of the President may constitute the ground for impeachment. Therefore, even those acts committed by the President between the time of election and the time of inauguration do not constitute the ground for impeachment. Although the legal status during this period as the 'president-elect' pursuant to the Act on Presidential Succession provides the president-elect with certain authority to perform preparatory acts necessary for the succession of the office of the president, such status and authority of the president-elect is fundamentally different from the official duties of the President and an act violating the law committed during this period by the president-elect such as receiving illegal political funds is subject to criminal prosecution. Therefore, there is no basis to adopt a different interpretation concerning the act of violation committed during this period in terms of the ground for impeachment under the Constitution.

(2) Reception of illegal political funds concerning the Sun & Moon Group and the presidential election camp

The alleged grounds for impeachment in this regard arose out of the facts that occurred prior to the respondent's inauguration as the President on February 25, 2003, and are thus clearly irrelevant to the respondent's performance of official duties as the President. Therefore, such alleged grounds are invalid without further reviewing the facts as to whether the respondent was involved in the reception of such illegal funds.

(3) Corruption of the respondent's intimate associates and aides

Among the alleged grounds for impeachment in this regard, those based on the facts that occurred after the president's inauguration as President are that Choi Do-sul received 47 million Korean Won from Samsung and others during his office as the General Affairs Secretary

for the President, that Ahn Hee-jung received 1 billion Korean Won of illegal fund from March through August of 2003, and the allegations of Yeo Taek-su and Yang Gil-seung.

However, none of the evidence submitted throughout the proceedings in this case supports the allegation that the respondent directed or abetted the above Choi Do-sul and others in receiving the illegal funds or was otherwise illegally involved therein. Therefore, the alleged grounds for impeachment premised on the above are meritless.

The rest of the alleged grounds for impeachment are based on facts that occurred prior to the respondent's inauguration as President and are thus clearly irrelevant to the respondent's performance of official duties as President. Therefore, such alleged grounds are invalid without further reviewing the facts as to whether the respondent was involved in the alleged reception of illegal funds.

(4) Publicly declaring retirement from politics

Pursuant to the acknowledged fact, the respondent publicly declared, at the party representative meeting at Cheong Wa Dae on December 14, 2003, that the respondent would retire from politics should the amount of illegal political funds received by his election camp exceed one-tenth of that received by the Grand National Party at the time of the presidential election.

However, such statement was made risking his political trustworthiness facing a political situation and, as such, can hardly be deemed as a statement creating any legal obligation or responsibility. The question of whether to keep such promise is merely a matter for political and moral judgment and responsibility on the part of the President as a politician and cannot constitute an act of violating the Constitution or statutes in the President's performance of his official duties.

(5) Remark relating to the investigation by the prosecutors' office

The alleged ground for impeachment contending that the respondent interfered with and obstructed the investigation by the prosecutors' office by, for example, making a statement at the year-end luncheon at Cheong Wa Dae on December 30, 2003 that "I would have been able to twice grind up the prosecution had I meant to kill the prosecution, but I did not." However, this allegation was not included in the National Assembly's original impeachment resolution and is thus deemed to have been added subsequently, therefore it cannot be a subject matter in this impeachment adjudication.

E. Political chaos and economic collapse caused by unfaithful performance of official duties and reckless administration of state affairs

(1) The ground for impeachment in this regard is that the respondent, since his inauguration as President to date, has created extreme hardship and pain on the entire citizenry by breaking down the national economy and the state administration, allegedly caused by the President's unfaithful performance of official duties and reckless administration of state affairs lacking any sincerity or consistency, such as the President's repeatedly improper statements, expression of an anti-war position following the declaration to dispatch military to Iraq, proposition of an unconstitutional confidence referendum, and declaration to retire from politics, and unjust acts such as an illegal electoral campaign pouring all his efforts into the general election prior to the permitted time period therefor. It is alleged that the respondent thereby impeded the right to pursue happiness of the public under Article 10 of the Constitution and violated his 'obligation to faithfully perform official duties as president' as expressly provided under Article 69 of the Constitution.

As various statistical indicators relating to the 'economic breakdown' are presented in this case, although it is true that household debt increased, the unemployment rate among younger generations grew, and the state debt increased in the past year, it would be irrational to hold the respondent entirely responsible for such economic aggravation. Also, there is no evidence in this case that would otherwise support a judgment that the economy of the nation fell to an irrecoverable state or that the administration of state affairs was broken down.

(2) Article 69 of the Constitution stipulates the 'obligation to faithfully perform the official duties' as President while it provides for the oath of office for the President. As stated previously, Article 69 is not a provision that merely obligates the President to take the oath of office, but is a provision that reemphasizes and specifies the obligation mandated by the Constitution in Articles 66(2) and 66(3) for the office of presidency by expressively setting forth the content of such oath of office.

Although the 'obligation to faithfully perform the official duties' of the President is a constitutional obligation, this obligation, by its own nature, is, unlike the 'obligation to protect the Constitution,' not the one the performance of which can be normatively enforced. As such, as a matter of principle, this obligation cannot be a subject matter for a judicial adjudication. Whether the President has faith-

fully performed his official duties may become the object of the judgment by the public at the next regularly held election. However, under the current Constitution that limits the presidential term to a single term, there is no means to hold the President directly responsible, even politically, let alone legally, toward the public and the President's faithfulness or unfaithfulness in performing his or her official duties may only be politically reflected favorably or unfavorably on the ruling party of which the President is a member.

As Article 65(1) of the Constitution limits the ground for impeachment to the 'violation of the Constitution or statutes' and the impeachment adjudication process at the Constitutional Court is solely to determine the existence or the nonexistence of aground for impeachment from a legal standpoint, the ground for impeachment alleged by the petitioner in this case concerning the respondent's faithfulness of the performance of the official duties such as the political incapability or the mistake in policy decisions, cannot in and by itself constitute a ground for impeachment and therefore it is not a subject matter for an impeachment adjudication.

F. Sub-conclusion

(1) The President's statements at the press conference with six news media organizations in the Seoul-Incheon region on February 18, 2004 and the statements at the press conference with the Korean Network Reporters' Club on February 24, 2004 were in violation of the neutrality obligation owed by public officials provided in Article 9 of the Public Officials Election Act.

(2) The act of the President in response to the National Election Commission's March 4, 2004 decision that found a breach of election law by the President was in violation of the President's obligation to protect the Constitution as not in conformity with the principle of the rule of law. The act of the President on October 13, 2003 that proposed a confidence referendum violated the obligation to protect the Constitution as not in conformity with Article 72 of the Constitution.

6. Whether to remove the respondent from office

A. Interpretation of Article 53(1) of the Constitutional Court Act

Article 65(4) of the Constitution provides that the "effect of the decision of impeachment is limited to the removal of the public official

from office," and Article 53(1) of the Constitutional Court Act provides that the "Constitutional Court shall issue a decision removing the public official from office when there is a valid ground for the petition for impeachment adjudication." Here, the issue is how to interpret the phrase of "when there is a valid ground for the petition for impeachment adjudication."

One possible literal interpretation is that Article 53(1) of the Constitutional Court Act provides that the Constitutional Court shall automatically issue a decision removing the public official from office as long as there is any valid ground for impeachment set forth in Article 65(1) of the Constitution. However, under such interpretation, the Constitutional Court is bound to order removal from public office upon finding any act of the respondent in violation of law without regard to the gravity of illegality. Should the respondent be removed from his office for any and all miscellaneous violations of law committed in the course of performing his official duties, this would be against the principle of proportionality that requests constitutional punishment that corresponds to the responsibility given to the respondent. Therefore, the existence of the 'valid ground for the petition for impeachment adjudication' in Article 53(1) of the Constitutional Court Act means the existence of a 'grave' violation of law sufficient to justify removal of a public official from his or her office and not merely any violation of law.

B. Standard to be adopted in judging the 'gravity of violations'

(1) The question of whether there was a 'grave violation of law' or whether the 'removal is justifiable' cannot be conceived by itself. Thus, whether or not to remove a public official from office should be determined by balancing the 'gravity of the violation of law' by the public official against the 'impact of the decision to remove.' As the essential nature of the impeachment adjudication process lies in the protection and the preservation of the Constitution, the 'gravity of the violation of law' means the 'gravity in terms of the protection of the constitutional order.' Therefore, the existence of a valid ground for the petition for impeachment adjudication, that is, the removal from office, should be determined by balancing the 'degree of the negative impact on or the harm to the constitutional order caused by the violation of law' and the 'effect to be caused by the removal of the respondent from office.'

(2) The President is in an extremely significant status as the head of the state and the chief of the executive branch (Article 66

of the Constitution). Also, the President is an institution representing the public will directly vested with the democratic legitimacy in that the President is elected through a national election (Article 67 of the Constitution). In these regards, there is a fundamental difference in political function and weight between the President and other public officials subject to impeachment. This difference is exhibited as a fundamental discrepancy in the 'impact of the removal.'

A decision to remove the President from office would deprive the 'democratic legitimacy' delegated to the President by the national constituents through an election during the term of the office and may cause political chaos arising from the disruption of the opinions among the people, that is, the disruption and the antagonism between those who support the President and those who do not, let alone a national loss and an interruption in state affairs from the discontinuity of the performance of presidential duties. Therefore, in the case of the President, the 'directly delegated democratic legitimacy' vested through a national election and the 'public interest in continuity of performance of presidential duties' should be considered as important elements in determining whether to remove the President from office. Therefore in light of the gravity of the effect to be caused by the removal of the President from office, the ground to justify a decision of removal should also possess corresponding gravity.

As a result, a grave violation of law is required for a decision to remove the President from office that can overwhelmingly outweigh the extremely significant impact of such decision of removal, whereas even a relatively minor violation of law may justify the removal from office of public officials other than the President as the impact of removal is generally light.

(3) Although it is very difficult to provide in general terms which should constitute a 'grave violation of law sufficient to justify the removal of the President from office,' that the impeachment adjudication process is a system designed to protect the Constitution from the abuse of public officials' power on one hand and that the decision of removal of the President from office would deprive the public's trust vested in the President on the other hand, can be presented as important standards. That is, on one hand, from the standpoint that the impeachment adjudication process is a procedure ultimately dedicated to the protection of the Constitution, a decision to remove the President from office may be justified only when the President's act of violating law has a significant meaning in terms of the protection of the Constitution to the extent that it is requested to protect the constitution and restore the impaired constitutional order by a decision of removal. On the other hand, from the standpoint

that the President is an institution representing the public's will directly vested with democratic legitimacy through election, a valid ground for impeaching the President can be found only when the President has lost the public's trust by the act of violation of law to the extent that such public trust vested in the President should be forfeited while the presidential term still remains.

Specifically, the essential content of the constitutional order ultimately protected by the impeachment adjudication process, that is, the 'basic order of free democracy' is constituted of the basic elements of the principle of government by the rule of law which are 'respect for basic human rights, the separation of powers, and the independence of the judiciary,' and of the basic elements of the principle of democracy which include 'the parliamentary system, the multi-party system, and the electoral system' (2 KCCR 49, 64, 89Hun-Ka113, April 2, 1990). Accordingly, a 'violation of law significant from the standpoint of protection of the Constitution' requiring the removal of the President from office means an act threatening the basic order of free democracy that is an affirmative act against the fundamental principles constituting the principles of the rule of law and a democratic state. An 'act of betrayal of the public's trust' is inclusive of other patterns of act than a 'violation of law significant from the standpoint of protection of the Constitution,' and, as such, typical examples thereof include bribery, corruption and an act manifestly prejudicing state interest, besides an act threatening the basic order of free democracy.

Therefore, for example, in case of the President's act of corruption by abuse of power and status given by the Constitution such as bribery and embezzlement of public funds, the President's act manifestly prejudicing state interest despite the President's obligation to implement public interest, the President's act of impeding upon the authority vested in other constitutional institutions such as the National Assembly by abuse of power, the President's act of infringing upon the fundamental rights of the public such as oppression of the citizenry by way of state organizations, or the President's act of an illegal electoral campaign or fabricating the election by using the state organizations in elections, it may be concluded that the President can no longer be entrusted to implement state affairs since the President has lost the trust of the public that the President will protect the basic order of free democracy and faithfully implement state administration.

In conclusion, a decision to remove the President from his or her office shall be justified in such limited circumstances as where the maintenance of the presidential office can no longer be permitted from the standpoint of the protection of the Constitution, or where the President has lost the qualifications to administrate state affairs by betraying the trust of the people.

C. Whether to remove the President from office in this case

(1) Summary of the violation of law by the President

As confirmed above, the acts of violation of law by the President at issue in this case can be categorized into the violation of the 'obligation to maintain neutrality' concerning elections owed by public officials by making statements in support of a particular political party at press conferences, and the violation of the obligation to protect the Constitution owed by the President against the principle of rule of law and Article 72 of the Constitution by expressing unsatisfaction towards the National Election Commission's decision that the President violated the election law and making statements denigrating the current election law and by proposing a confidence referendum.

(2) Gravity of the violation of law

(A) The President violated the 'obligation to maintain neutrality concerning elections' by making statements supporting a particular political party, thereby infringing the constitutional request that the state institution should not affect the process through which the public freely forms the opinion or distort the competitive relations among the political parties.

However, such acts by the President do not constitute affirmative acts of violation against the 'parliamentary system' or 'electoral system' constituting basic order of free democracy and, accordingly, it cannot be deemed that the negative impact of the acts in violation of the Public Officials Election Act upon the constitutional order was grave, considering that the above acts of violation of the President were not committed in any affirmative, active or premeditated way by, for example, attempting to have administrative authority intervene through state organization. Instead, they took place in a way that was unaggressive, passive, and incidental, during the course of expressing the president's political belief or policy design in the form of a response to the question posed by the reporters at the press conference. It should also be considered that the boundary between the 'expression of opinion toward politics' constitutionally permissible for the President who is allowed to do political and party activities and the impermissible 'acts of violating neutrality obligation concerning elections' is blurred and there has not been any established clear legal interpretation as to 'in which circumstances it is beyond the scope of political activities permitted for the President with respect to elections.'

(B) The President's statement and act that causes suspicion to

the President's willingness to abide by law, even if minor, may greatly affect the legal conscientiousness and the observance of the law of the public. Thus, the President's statement disrespectful of the current election law cannot be deemed as a minor violation of law on the part of the President who bears an obligation to make all the efforts to respect and implement the law.

However, the statement of the President denigrating the current election law as the 'vestige of the era of government-power- interfered election' does not constitute an affirmative violation of the current law. Instead, such statement is an act of violation of law committed during the course of reacting, in an unaggressive and passive way, towards the decision of the National Election Commission. The President, of course, may well deserve criticism as such statement was an expression of disrespectfulness toward the current law, therefore it was in violation of the President's obligation to protect the Constitution. However, considering the totality of the specific circumstance where such statement was made, such statement was made with no affirmative intent to stand against the basic order of free democracy, nor was it an act of grave violation of law fundamentally questioning the principle of the rule of law.

(C) The acts of the President intending to seek sanctuary in direct democracy through directly appealing to the public by proposing a confidence referendum in the state of minority ruling party and majority opposing party rather than administering state affairs in conformity with the spirit of the presidential system and parliamentary system of the Constitution, were not only in violation of Article 72 of the Constitution, but also against the principle of the rule of law.

Also, however, in this regard, the above acts of the President did not constitute an affirmative violation of law against the fundamental rules of the Constitution forming the principle of democracy and accordingly, there was no grave negative impact upon the constitutional order, considering that the President merely proposed an unconstitutional confidence referendum and did not attempt to enforce such and that the interpretation as to whether the 'important policy concerning national security' of Article 72 of the Constitution includes the issue of confidence in the President has been subject to academic debates.

(3) Sub-conclusion

(A) To conclude, reviewing the totality of the impact the violation of law by the President has upon the constitutional order, specific acts of violation of law by the President cannot be deemed as a threat to the basic order of free democracy since there was no affirmative intent to stand against the constitutional order therein.

Therefore, since the act of violation of law by the President does not have a significant meaning in terms of the protection of the Constitution to the extent that it is requested to protect the Constitution and restore the impaired constitutional order by removing the President from office and, also, since such violation of law by the President cannot be deemed to evidence the betrayal of public trust on the part of the President to the extent that the public trust vested in the President should be deprived of prior to the completion of the remaining presidential term, there is no valid ground justifying removal of the President from office.

(B) The power and political authority of the President is vested by the Constitution and a president who disrespects the Constitution denies and destroys his or her own power and authority. Especially, the importance of a resolute position of the President to protect the Constitution cannot be emphasized enough in today's situation where the constitutional awareness among the public has just begun to sprout in a brief history of democracy and the respect for the Constitution has yet to be firmly established in the consciousness of the general public. As the 'symbolic existence of the rule of law and the observance of law,' the President should make the best effort in order to realize the rule of law and ultimately protect the basic order of free democracy by, not only respecting and abiding by the Constitution and statutes, but also taking a decisive stand toward unconstitutional or unlawful acts on the part of other state institutions or the general public.

7. Conclusion

A. The petition for impeachment adjudication is hereby rejected as the number of the Justices required to remove the President from office under Article 23(2) of the Constitutional Court Act has not been met. It is so ordered, pursuant to Articles 34(1) and 36(3) of the Constitutional Court Act.

B. Article 34(1) of the Constitutional Court Act provides that the deliberation at the Constitutional Court shall not be disclosed to the public, whereas the oral argument and the pronouncement of the decision shall be disclosed. Here, non-disclosure of the deliberation by the Constitutional Court Justices means that neither the separate opinions of the individual Justices nor the numbers thereof shall be disclosed, as well as the course of the deliberation. Therefore, the opinions of the individual Justices may be noted in the decision only when a special provision permits an exception to such secret deliberation procedure. While there is such special provision permitting an exception to the secrecy of deliberation in Article 36(3) of the

Constitutional Court Act applicable to the proceedings of constitutional review of a law, competency dispute among state institutions, and constitutional petition, there is no provision permitting exception to the secrecy of deliberation with respect to the impeachment adjudication. Therefore, in this impeachment adjudication, the separate opinions of the individual Justices or the numbers thereof may not be pronounced in the decision.

It should be noted that, concerning the above position, there was also a position that separate opinions may be pronounced and disclosed in the decision, interpreting Article 34(1) of the Constitutional Court Act as a provision merely providing for non-disclosure of the deliberative proceedings in that only the external proceeding or the content of the opinions exchanged therein to reach the conclusion should not be disclosed and the final opinion of the individual participating Justices reached through such deliberative process may be disclosed, and interpreting Article 36(3) of the Constitutional Court Act as a provision permitting disclosure of separate opinions since such provision is based on the consideration to prevent the problem of indiscriminately mandating disclosure of separate opinions where it is improper to disclose separate opinions in impeachment adjudication or political party resolution proceeding, thus leaving the decision to disclose separate opinions in impeachment adjudication to the discretion of the participating Justices.

Justices Yun Young-chul (Presiding Justice), Kim Young-il, Kwon Seong, Kim Hyo-jong, Kim Kyung-il, Song In-jun, Choo Sun-hoe (Assigned Justice), Jeon Hyo-sook, and Lee, Sang-kyung

Appendix 1. List of Counsel representing Petitioner: Omitted.
Appendix 2. List of Counsel representing Respondent: Omitted.
Appendix 3. National Assembly's Impeachment Resolution: Omitted.

Aftermath of the Case[5)]

By its decision on May 14, 2004 to reject the petition for impeachment adjudication, the Constitutional Court brought an end to the political and legal debates for and against the impeachment of the President that lasted for over two months, and President Roh Moo-hyun thereby returned to his office in sixty-three days from suspension

5) Not part of the official opinion of Court. (translator's note)

of presidential authority and power.

Through this case, the public newly recognized that even the President is subject to possible removal from office for violating the Constitution and statutes, and yet, the removal process should also proceed pursuant to the Constitution and statutes. In this regard, it is the analysis within the legal profession that the 'impeachment adjudication of the President served as a precious opportunity for the public to learn the importance of the rule of law and democracy.'

The Constitutional Court's decision in this case mainly received positive review throughout the media as the 'decision committed to both the spirit of the Constitution and the will of the public reflecting the Court's completed mission as the final bulwark of the Constitution,' and the 'historic decision that set a new landmark of constitutionalism and the rule of law.' The announcement of the decision in this case was televised nationwide by live broadcasting.

II. Summaries of Opinions

1. *Jurisdiction over Determination of Extradition* (15-1 KCCR 69, 2001Hun-Ba95, January 30, 2003)

Held, the provision of the Extradition Act that endows exclusive jurisdiction over review and determination of extradition to the Seoul High Court and provides for no further procedure to challenge such judicial decision is not unconstitutional.

A. Background of the Case

The Extradition Act provides that the Seoul High Court and the Seoul High Public Prosecutors' Office have the exclusive jurisdiction over matters concerning the review and determination of extradition of criminals and the request therefor. On the other hand, there is no provision in the Extradition Act that allows challenge to the decision of the Seoul High Court upon review over the extradition of criminals, and the Supreme Court of the Republic of Korea has maintained the position that a request for appeal pursuant to Article 415 of the Criminal Procedure Act is not permitted with respect to the decision to extradite criminals. Therefore, the provision of the Extradition Act for the jurisdiction over review and determination of extradition of criminals implicitly provides that challenges to the decision over the extradition of criminals by the court of exclusive jurisdiction are not permitted.

The complainant in this case is a citizen of the United States of Korean ethnicity, who was prosecuted for and found guilty at a jury trial of rape and other crimes in the State of California, and then fled to Korea before sentencing. The court in the United States sentenced the complainant during his nonappearance a prison term of two-hundred and seventy-one years in a sentencing in default. The Department of Justice of the United States of America requested extradition of the complainant on June 4, 2001.

The prosecutor belonging to the Seoul High Public Prosecutors' Office thereupon filed a request with the Seoul High Court for a review and determination of extradition of the complainant pursuant to the Extradition Act. The Seoul High Court issued a decision to extradite the complainant on September 25, 2001.

B. Summary of the Decision

The Constitutional Court has held, by the majority of eight out of nine Justices, that the provision for jurisdiction over review and determination of extradition does not infringe upon the due process or the right to trial. Summary of the rationale for holding is stated in the following paragraphs.

(1) Summary of the Majority Opinion

Determination of extradition of criminals bears an intimate relationship to the freedom from bodily restraint. Therefore, due process should be observed in reviewing and determining matters of extradition of criminals. The right to trial under Article 27 of the Constitution does not include, as a matter of right, a right to trial by appellate procedure in any and all cases. Whether a judicial decision is appealable and, if so, upon which grounds, is a question of legislative policy should there be no extraordinary circumstances.

Review and determination over extradition of criminals by the court is not a typical procedure that is an object of judicial proceedings. Such review and determination procedure is by its nature distinguishable from the criminal procedure that aims to establish and realize the state authority to criminal punishment. Rather, such procedure is a special procedure acknowledged and set forth pursuant to the Extradition Act.

Pursuant to the Extradition Act, the court of competent jurisdiction applies *mutatis mutandis* the provisions of the Criminal Procedure Act in reviewing and determining over extradition within the scope compatible with its nature, provides an opportunity to be heard for the individual subject to the extradition procedure, may decide against extradition when the individual subject to the extradition procedure is a Korean national, provides for special protection such as not to extradite where the individual subject to the extradition procedure may be punished or prejudiced as a political dissident or on the ground of race or religion, and may decide to extradite only when the subject crime is a crime not only in the nation requesting extradition thereinto but also under Korean law.

Thus, the provision of the Extradition Act at issue in this case guarantees at least one trial by the judge and the law and satisfies the requirements of rationality and legitimacy of due process in the procedure for review and determination over extradition of criminals. Therefore, the provision of the Extradition Act at issue in this case, even if it does not permit a challenge to the court's decision to extradite, does not infringe upon the freedom from bodily restraint, the

human dignity and value, or the right to trial, nor does it violate the principle of due process.

(2) Summary of the Dissenting Opinion

The principle of protection of nationals under the Constitution should be respected and observed also in the procedure for extradition of criminals as part of the international cooperation in criminal justice. The procedure for extradition of criminals, considering its substance, is undeniably to secure the state authority to domestic criminal punishment held by a foreign nation, therefore it cannot but be ultimately categorized as a procedure of criminal punishment. Furthermore, the criminal procedure as a judicial process should as a matter of course include a procedure to challenge a judicial decision at the higher court and, therefore, in principle, challenge to the High Court's decision to extradite at the higher court, i·e, the Supreme Court, should be permitted. However, because the provision at issue in this case is understood to have an established meaning that challenges to the original decision are not permitted, there is no possibility of correction by way of appellate review by the higher court when there is an intervention of the subjective discretion of individual judges and the decision lacks review over evidence necessary to determine whether the individual subject to the extradition proceeding fits the definition of criminal to be extradited, whether the subject offense is a crime to be subjected to extradition, or whether there is a sufficient ground to support the prosecution for the alleged crime or consideration of the degree of human rights protection in the nation that has requested extradition. This indicates a loss of balance to be maintained between the obligation to cooperate for international realization of criminal justice as a member of the global community and the obligation to protect human right of the individual criminal. Therefore, the provision at issue in this case infringes upon the right to trial of the complainant.

2. *Nondisclosure of Investigation Record* (15-1 KCCR 282, 2000Hun-Ma474, March 27, 2003)

Held, a decision not to disclose information prohibiting an attorney from inspecting or photocopying letter of complaint or suspect interrogation report in a case under police investigation where the attorney is representing the suspect is unconstitutional.

A. Background of the Case

The complainant is an attorney retained by a suspect detained for alleged fraud to represent the suspect to request a review on legality of detention. On May 29, 2000, the complainant requested that the respondent, the Superintendent of the Western District Incheon Police, allow the complainant to inspect and photocopy the letter of complaint and the suspect interrogation report among the investigation records pertaining to the suspect. The police superintendent denied the above request on the ground that the requested documents for inspection and photocopying contained information subject to nondisclosure pursuant to the Criminal Procedure Act and the Act on Disclosure of Information by Public Agencies (hereinafter referred to as the 'Information Disclosure Act'). The complainant thereupon filed a constitutional complaint with the Constitutional Court on the ground that the decision not to disclose information by the police superintendent was unconstitutional as it violated the basic right of the complainant.

B. Summary of the Decision

The Constitutional Court has held, by the majority of six out of nine Justices, that the above decision not to disclose information is unconstitutional.

(1) Summary of the Majority Opinion

(A) The Constitution explicitly affirms as a basic right the right of the detainee to assistance of counsel. With respect to the attorney's right to assist the detainee, the essential part thereof without which the assistance of counsel for the detainee becomes meaningless is one side of the coin the other side of which consists of the 'basic right of the detainee to receive assistance of counsel.' Therefore, the right of the attorney to provide assistance for the detainee with respect to such essential part must also be protected as a basic right under the Constitution.

In a detention legality review proceeding in a criminal case initiated by a letter of complaint, as in this case, it is manifest that an attorney may not sufficiently assist the detainee in a detention legality review proceeding if the attorney cannot properly understand the content of the letter of complaint and the suspect interrogation report concerning the detainee through the inspection thereof. Therefore, inspection of the above documents is an essential element that should be guaranteed for the complainant who is an attorney in

order to sufficiently assist the detainee and, as such, is part of the basic right of the complainant.

On the other hand, the Constitutional Court recognizes that the right of a person who has legitimate interest with respect to the information retained by the government to request disclosure thereof is the right to know and has declared that such right to know is a basic right that is as a matter of course included in the freedom of expression.

As seen above, an attorney may not sufficiently assist the detainee's defense without first properly understanding upon which alleged grounds the letter of complaint attacks the detainee or on which grounds the investigative authority has determined to place the detainee in custody. Therefore, the complainant in this case who is an attorney is a person who has legitimate interest and has the right to know the content of the letter of complaint and the suspect interrogation report. Thus, the complainant is entitled to request disclosure of the above documents by exercising the complainant's right to know.

(B) The Information Disclosure Act provides that disclosure may be denied for such 'information pertaining to the investigation, prosecution, and maintenance thereof that its disclosure may on sufficiently justifying grounds conspicuously deter the performance of official duties or infringe upon the right of the criminal defendant to a fair trial.' In this case, there is no ground to support the allegation that disclosure of the letter of complaint and the suspect interrogation report would cause the dangers of destruction of evidence, threatening of the witness, conspicuous hindrance in investigation, or unfair trial.

On the other hand, the Criminal Procedure Act provides that the documents pertaining to criminal litigation shall not be disclosed prior to trial except for the public interest or other justifying grounds, thereby prohibiting disclosure of documents pertaining to criminal litigation prior to trial. The legislative purpose thereof is to prevent in a criminal proceeding infringement upon the basic rights of the suspect who is presumed innocent until guilty verdict by the disclosure of the investigation records at the investigation stage and is not to restrict exercise of the suspect's right to defend in the pre-trial criminal proceeding. In addition, as the Criminal Procedure Act allows a review on legality of detention only prior to an official charge or official prosecution, if the attorney could not inspect the letter of complaint and the suspect interrogation report in advance, this would inevitably injure the spirit of the Constitution directly guaranteeing the detention legality review system within the Constitution thereby requesting such system to substantively function to advocate the human rights of the detainee. Then, the above provision of the Criminal Procedure Act should not be interpreted to mean that it

entirely prohibits an attorney from assisting a detainee's right to defense by inspecting the letter of complaint and the suspect interrogation report at the detention legality review stage.

Therefore, the decision not to disclose information by the respondent that denied inspection or photocopying of the letter of complaint and the suspect interrogation report is unconstitutional as an infringement upon the right to assist the detainee and the right to know of the complainant.

(2) Dissenting Opinion of One Justice

I agree with the majority that the decision not to disclose information by the respondent with respect to the suspect interrogation report is unconstitutional. However, I respectfully disagree with the majority with respect to the letter of complaint.

In many cases, a letter of complaint that initiates criminal investigation states important evidence and major methods of proof in addition to the factual occurrences. Disclosure of the letter of complaint from the initial stage of investigation would as the result thereof disclose to the suspect those methods of proof not yet investigated or examined by the investigative authority. Discovery of substantive truth would be prejudiced and the exercise of the state authority to criminal punishment would be conspicuously hindered should an important witness become missing or evidence incriminating the suspect be destroyed as a result thereof. Therefore, there is a legitimate ground for the respondent's nondisclosure of the letter of complaint at the initial stage of investigation to avoid such danger.

Therefore, the argument of the complainant that nondisclosure of the letter of complaint is unconstitutional is groundless.

(3) Dissenting Opinion of Two Justices for Dismissal of the Constitutional Complaint

The majority opinion has concluded that the constitutional complaint in this case, although filed without previously resorting to the procedure for challenge provided under the Information Disclosure Act, meets legal prerequisites on the ground that it is highly probable that the right of the complainant will not be protected in light of the normal period of time consumed to follow the above procedure for challenge and that it would therefore be inappropriate to demand the complainant to observe the above procedure as a coercion of unnecessary bypass procedure.

However, with respect to the respondent's decision not to disclose

information at issue in this case, the Information Disclosure Act provides a procedure for redress by the court. Therefore, filing of the constitutional complaint in this case notwithstanding such redress procedure, which must be followed first, should be dismissed as unjusticiable, as it violates the rule of exhaustion of prior remedies.

C. Aftermath of the Case

Following this decision, the Supreme Public Prosecutors' Office decided to permit inspection and photocopying of the defendant's investigation record, in principle, subsequent to the official charge or prosecution, except when disclosure should be necessarily prohibited for the protection of a witness or the investigation of accomplices.

3. *Preference for Candidates with Previous Experience at the Election of Local Education Board Members*

(15-1 KCCR 319, 2002Hun-Ma573, March 27, 2003)

Held, relevant provisions of the Local Education Autonomy Act allotting up to one-half of the seats at the local education board at the election for its members for those candidates with previous experience in education or educational administration for ten years or longer are constitutional.

A. Background of the Case

The Local Education Autonomy Act provides that if, at the election for the members of the local education board, those with experience in education or educational administration for ten years or longer (hereinafter referred to as the 'candidates with previous experience') occupy less than one-half of the entire number of seats open for election in terms of the absolute number of votes, the candidates with previous experience shall be elected by the number of votes obtained compared solely among such candidates regardless of the absolute rate of the obtained votes, until such candidates occupy one-half of the seats open for election.

The complainant ran for the seat at the city and province education board held on July 11, 2002 for the North Gyongsang Province First Election District where three seats were open for election. The complainant obtained the third-most number of the votes at the

election, but was not elected to be an education board member due to the above provisions of the Act. The complainant thereupon filed a constitutional complaint in this case arguing that the above provisions of the Act violated the right to hold public office, the right to equality, and the right to pursue happiness, among others, of the complainant, guaranteed by the Constitution.

B. Summary of the Decision

The Constitutional Court issued a decision dismissing the constitutional complaint of the complainant on the ground that a required quorum for a decision of unconstitutionality had not been reached, as there was a split upon the above provisions at issue in this case between an unconstitutionality opinion of the mere plurality of five Justices and a constitutionality opinion of four Justices. The summary of each of these opinions is stated in the following paragraphs.

(1) Summary of the Opinion of Four Justices that the Provisions at Issue are Constitutional

(A) The legislative purpose of the provisions at issue in this case is to realize the constitutional ideals of autonomy and expertise in education by allotting a certain portion of the membership of the education board for the candidates with previous experience in education. Such legislative purpose is legitimate, and the means employed is also appropriate as allotting one-half or more of the seats at the education board to the candidates with previous experience, who are the education experts, is an effective means to achieve such legislative purpose.

In addition, beyond the ratio of one-half of the entire membership of the education board for which the candidates with previous experience receive preferential treatment for election, there is a road open for those candidates who lack previous experience to be elected as members of the education board by a majority rule under democratic principles. Also, in adjusting to satisfy all three of the constitutional values of 'democracy, local autonomy, and autonomous education' demanded for autonomy in local education, it is never an easy task to find and employ other legislative means that are less restrictive than the means adopted in the provisions at issue in this case. Considering the above, the provisions at issue in this case may not be deemed to violate the principle of least restrictive means.

Although democratic legitimacy slightly recedes and the right to hold public office of the candidates without preferred previous experience is restricted by a certain degree under the provisions at issue in this case, the public interest advanced by the achievement of

autonomy and expertise in education is never lesser than the interests restricted thereby. Therefore, the provisions are not violative of the principle of balance between the legal interests concerned.

Therefore, the provisions do not violate the principle of proportionality or the principle against excessive restrictions, and do not thus infringe upon the right to hold public office that is a basic right of the citizenry guaranteed by Article 25 of the Constitution.

(B) The provisions at issue in this case discriminates against the candidates without experience for the candidates with previous experience at the election for the members of the education board, thereby significantly restricting the right to hold public office by causing some of the candidates without experience to lose at the election despite more votes obtained. Therefore, strict scrutiny under the principle of proportionality that is an exacting standard concerning the right to equality applies here.

However, even under strict scrutiny, the differential treatment under the provisions at issue in this case is to guarantee autonomy and expertise of education protected by the Constitution and, as such, the legislative purpose thereof is legitimate. Further, such differential treatment is appropriate as a proper means to achieve the legislative purpose, and the proportionality requirement is also met between the public interest served and the interests restricted by the differential treatment. Thus, the provisions do not violate the principle of equality under the Constitution.

(C) Therefore, for the foregoing reasons, the provisions at issue in this case do not infringe upon the right to hold public office or the right to equality of the complainant. The right to pursue happiness and human dignity and value asserted by the complainant does not bear a substantive relationship to the provisions at issue in this case. Thus, in turn, the provisions may not be deemed to infringe upon such basic rights.

(2) Summary of the Opinion of Five Justices that the Provisions at Issue are Unconstitutional

The legislative purpose of the provisions at issue in this case is to achieve expertise and autonomy in education in realizing the autonomous local education system and, as such, the legislative purpose is legitimate.

However, allotting under the provisions at issue in this case one-half or more of the seats at the education board to candidates with previous experience to achieve the above legislative purpose thereby causing in certain situations the candidates without preferred experi-

ence to lose at the election despite a greater number of votes obtained is against the basic principles of election and, as such, egregiously damages the values of democracy and conspicuously injures the harmony of three of the constitutional values of democracy, local autonomy, and autonomous education pursued in seeking autonomy in local education. Therefore, it lacks appropriateness as a means to achieve the legislative purpose.

Even though it is necessary to secure a certain portion of the education board membership for the candidates with previous experience as a means to guarantee educational expertise, there exist less restrictive methods not infringing upon the right to hold public office of the candidates without preferred previous experience, such as a separate voting for candidates with previous experience and for the candidates without preferred previous experience. Therefore, employing the means as in the provisions at issue in this case is against the principle of the least restriction upon basic rights.

Furthermore, the provisions lack the required balance between the legal interests concerned, as the effect of securing autonomy and expertise of the members of the education board by the provisions at issue in this case is greatly outweighed by the prejudice caused by the damage to democracy and the infringement upon the basic rights such as the right to hold public office of the candidates without preferred previous experience.

Therefore, the provisions at issue infringe upon the right to hold public office of the complainant in violation of the principle of proportionality or the principle against excessive restriction. Furthermore, the discriminatory treatment against the candidates without preferred previous experience at the election of the members of the education board lacks appropriateness of the discriminatory treatment as it is hardly effective in achieving the legislative purpose and can hardly be constitutionally permissible as a means. Furthermore, the public interest advanced by such discriminatory treatment is greatly outweighed by the interests prejudiced thereby, therefore there is no proportionality between the legal interests concerned. Therefore, the provisions at issue in this case violate the right to equality under the Constitution of the candidates without preferred previous experience. Thus, for the foregoing reasons, the provisions are unconstitutional.

4. *Prior Mandatory Arbitration for Labor Dispute*
(15-1 KCCR 484, 2001Hun-Ka31, May 15, 2003)

Held, the provision of the Trade Union and Labor Relations Adjustment Act providing that the Chairman of the Labor Relations Commission may *ex officio* decide to submit to an arbitration a labor dispute at a necessary public interest industry is not unconstitutional.

A. Background of the Case

The Trade Union and Labor Relations Adjustment Act defines the necessary public interest industry to include those industries and businesses, among general public interest industries and businesses bearing intimate relationship with the daily life of the general public or significantly affecting the national economy, the suspension or closure of whose operation manifestly endangers the daily life of the general public or manifestly hinders the national economy and the substitution for whose operation is difficult to obtain (for example, railroad industry, intra-city bus transportation industry, water and electricity supply service, hospitals, banks and communications industry), and provides that the Chairman of the Labor Relations Commission may *ex officio* decide to submit to an arbitration a labor dispute at such necessary public interest industry (hereinafter collectively referred to as the 'provision at issue in this case').

The National Health and Medical Service Industry Labor Union (hereinafter the 'Health and Medical Service Union') is a nationwide industry labor union whose members are the hospital employees nationwide. The Health and Medical Service Union engaged in collective bargaining with the Central Hospital of Catholic University to enter into a wage agreement and a collective bargaining agreement for the year of 2001 for the period of April 25, 2001 through May 25, 2001, which, however, failed. The Chairman of the National Labor Relations Commission thereupon decided to submit the labor dispute between the Health and Medical Service Union and the Central Hospital of Catholic University to arbitration. The Health and Medical Service Union filed a lawsuit with the Seoul Administrative Court seeking to nullify the above decision *ex officio* to submit to arbitration. The Seoul Administrative Court filed a request with the Constitutional Court for constitutional review of the provision at issue in this case based on its conclusion that the provision at issue in this case might possibly be interpreted to be unconstitutional.

B. Summary of the Decision

The Constitutional Court held by a majority of five out of nine Justices that the provision at issue in this case is not unconstitutional.

(1) Summary of the Majority Opinion

(A) The legislative purpose of the provision at issue in this case is to maintain the daily life of the general public and preserve the national economy by making it possible to resolve labor disputes in the necessary public interest industries through arbitration by the Labor Relations Commission instead of agreement between the labor and the management since failure to resolve labor disputes and frequent labor strikes in the necessary public interest industries may paralyze daily life of the general public and disrupt the national economy. Such legislative purpose is legitimate.

(B) An abrupt interruption in the supply of goods and services indispensable for the maintenance of daily life of the general public due to labor disputes at the places of necessary public interest industries may cause significant social crisis, greatly harm basic everyday life or, if at a greater degree, the life and the bodily integrity of the citizens and, further, manifestly endanger the national economy. When it becomes necessary to sustain public interest and national economy by preventing such dangerous situations, having certain labor disputes subject to a prior arbitration under the authority of the Labor Relations Commission can be an effective means to resolve such labor disputes on their way to extreme rapidly and amicably in a reasonable direction without exacerbating mutual emotional confrontations.

(C) In addition, the industries whose labor disputes are subject to mandatory arbitration under authority are limited to the industries of railroad, water supply, gas supply, oil refinery and supply, hospitals, the Bank of Korea, and communication. Therefore, under the current labor relations conditions in Korea, employing the mandatory arbitration system to rapidly and amicably resolve labor disputes prior to an actual act of labor dispute in the limited scope of necessary public interest industries is a means minimally necessary in order to maintain and preserve the public interest and the national economy.

(D) The public interests that the provision at issue in this case intends to protect are those with the most important individual values of the life, bodily integrity, and health of the citizens and are significant public interests in maintaining and preserving the national economy in its entirety. Such public interests are not of lesser weight compared with the countervailing private interest of the guarantee of the right to collective action to protect the rights and interests of the employees

of a particular industry where a dispute has arisen. Thus, there is a balance between the above two legal interests.

Therefore, the provision at issue in this case is not in violation of the constitutional principle of proportionality or the principle against excessive restriction.

(2) Summary of the Dissenting Opinion of Four Justices

A decision to submit to arbitration simultaneously places a ban on the acts of labor dispute for a period of fifteen days therefrom. Should an arbitration award be rendered within this period, no labor dispute is allowed any further. Therefore, mandatory submission to arbitration is not merely a prior restriction, but instead an important restriction upon the basic right as it practically eliminates the possibility of acts of labor dispute. On the other hand, the process of making a decision to submit a labor dispute to arbitration provides insufficient procedural guarantees for the interested parties concerned in that there is no opportunity for the employees to participate and present their opinions nor is there any provision for the arbitration process for sufficient examination of facts or a hearing therefor. In addition, challenge to the arbitration award is permitted solely on the ground that the arbitration award is acknowledged to be 'unlawful or in excess of discretion,' and is not permitted when it is alleged that the arbitration award is unjustifiable or unreasonable as it prejudices either the labor or the management. Therefore, the interested parties concerned are deprived of any means for judicial review by challenging the arbitration award on the ground that the arbitration award is unjustifiable. This has the same practical effect as coercion upon the employees of the labor conditions discretionally set forth by the Labor Relations Commission, and is on its face in violation of the spirit of Article 33(1) of the Constitution that guarantees three fundamental labor rights for the employees for the improvement of the conditions of labor.

Furthermore, the provision at issue in this case condones uniform prohibition of all activities of labor dispute by way of an administrative measure of decision to submit to arbitration and punishment in case of the violation thereof upon presumption of illegal labor dispute, regardless of specific circumstances and significance of individual activities of labor dispute. As the result, the provision at issue in this case indiscriminately restricts any and all activities of labor dispute of a minor degree such as partial strike, slow-down, partial and temporary occupation of workplace, and picketing, as well as overall strike in the necessary public interest industries that is originally intended to be regulated under the legislative purpose. This is against

the principle of least restriction. The provision at issue in this case is also against the principle of balance between the legal interests concerned, in that the provision at issue in this case protects the public interests that it intends to protect to an unreasonably excessive extent, whereas room for the employees' exercise of their right to collective action is reduced to an unnecessarily excessive extent.

C. Aftermath of the Case

Upon constitutional complaint with respect to the provisions of the former Labor Disputes Adjustment Act that included almost identical content to that of the provision at issue in this case, the Constitutional Court held that such provisions were constitutional (based on the opinion of four out of nine Justices that the provisions were constitutional and the opinion of five out of nine Justices that the provisions were unconstitutional; held that the provisions were constitutional as the unconstitutionality opinion did not obtain, although majority, the required quorum of six. 90Hun-Ba19, etc., December 20, 1996).

5. Legislative Omissions with respect to Civilian Massacre during The Korean War

[15-1 KCCR 551, 2000Hun-Ma192, etc.,(consolidated), May 15, 2003]

Dismissed, on procedural grounds, constitutional complaint of the families of the victims seeking declaration that legislative omissions by the National Assembly for factfinding and compensation with respect to the civilian massacre committed by those presumed to be members of the Korean Army at Moongyung-Kun, North Gyungsang Province, and Hahmpyung-Kun, South Jeolla Province, during the period of the Korean War (June 1950 - July 1953), was unconstitutional.

A. Background of the Case

The complainants are the surviving heirs to the residents massacred by those presumed to be members of the Korean Army during the Korean War at Moongyung-Kun, North Gyungsang Province, and Hahmpyung-Kun, South Jeolla Province (hereinafter this incident is referred to as the 'civilian massacre'). The complainants had requested the government to conduct factfinding and compensation with respect to the above incident, but, no measure was taken by the government

prior to the constitutional complaint.

The complainant thereupon filed a constitutional complaint in March and August of 2000 seeking declaration that such legislative omissions were unconstitutional, on the ground that the legislative omissions by the National Assembly failing to enact any special act for factfinding, restoration of reputation, and compensation with respect to the subject civilian massacre infringed upon the human dignity, the right to pursue happiness, the right to know, the right to seek compensation, and the right to equality, *inter alia*, of the complainants.

B. Summary of the Decision

The Constitutional Court, by a decision of eight out of nine Justices, dismissed the constitutional complaint in this case as lacking procedural requirements. The summary of the grounds therefor is stated in the following paragraphs.

(1) Summary of the Majority Opinion

(A) Legislative omissions can be subject matters of constitutional complaints only when the Constitution expressly delegates legislation by the National Assembly for the protection of basic right, but the National Assembly nonetheless fails to act pursuant thereto, or when it is clear through constitutional interpretation that the government is obligated to enact for the protection of basic rights of specific persons, but the legislators nonetheless fail to take any legislative measure therefor.

Since the inaugural Constitution throughout the current Constitution, the Constitution of the Republic of Korea has delegated to the National Assembly to enact a state compensation act to compensate for damage caused by government officials, and the State Compensation Act, which is a general law concerning the state compensation enacted under the above delegation, has been in operation. However, the Constitution does not expressly delegate to enact a law such as a special act with respect to the subject civilian massacre in this case.

(B) The second provision of Article 10 of the Constitution provides that the "state shall recognize and guarantee the inviolable basic human rights." The state shall not infringe upon the basic rights of the citizens and shall protect such basic rights to the maximum degree. When the state unlawfully intrudes upon the basic rights of the citizens, the state is obligated to act in order to protect such basic rights.

However, as long as there are the investigatory system set forth in the Criminal Procedure Act and the state compensation system under the State Compensation Act, an additional state obligation to enact a law for factfinding and compensation concerning the incident at issue in this case is not generated by constitutional interpretation, as argued by the complainants. It would be desirable for the legislators to enact a separate special law for factfinding and compensation under the legislative formative discretion considering the significance and specificity of damage caused by the civilian massacre and various objective circumstances that prohibited the victims in this case from timely requesting factfinding or compensation. However, such obligation to enact is not and cannot be derived through constitutional interpretation.

(C) The complainants argue that their right to equality is violated in that no law has been enacted with respect to the incident at issue in this case despite the enactment of special laws for factfinding and compensation with respect to similar incidents in other areas.

However, the precedent of the Constitutional Court is that the principle of equality of Article 11(1) of the Constitution does not constitutionally assign to the legislators any specific obligation to enact and that, instead, in case of enactment by the legislators of a law that is violative of the principle of equality, the party injured may dispute whether or not such statutory provisions violate the principle of equality. Therefore, the argument of the violation of right to equality in a constitutional complaint for legislative omissions as in this case is groundless.

(D) A constitutional complaint on the ground that legislative omissions of failing to enact a special law for factfinding and compensation with respect to the civilian massacre at issue in this case is unconstitutional is unjusticiable, apart from an affirmative constitutional complaint with respect to the incomplete statutory provision itself on the ground that an effective investigation may not be conducted and the right to seek compensation may not be properly exercised in such a special case as the civilian massacre by the state authority at issue in this case due to an excessively short or incomplete statute of limitations under the Criminal Procedure Act or request period under the State Compensation Act.

(2) Summary of the Dissenting Opinion

In a situation of nonexistence of law where a special infringement upon the basic right caused by the state organization in the period of peril such as a war cannot be appropriately redressed by way of the normal system of law, an obligation arises for the National

Assembly to enact a special law to guarantee the basic rights of the citizens. Such constitutional interpretation conforms to the spirit of the Constitution for the guarantee of the basic right.

In this case, the fact that many unarmed and innocent civilians were killed by those presumed to be members of the Korean Army in Moongyung and Hahmpyung during the period of the Korean War is acknowledged and confirmed. Although it was clearly an infringement by the state organization of the basic rights of private individuals, the state has attempted to cover up the case instead of trying to find the fact of the case or compensate for the harm caused. The victims even have acknowledgedly been deprived for a long period of time of an opportunity to raise their argument before the state. In such a circumstance, it is difficult to expect the victims to timely file a lawsuit against the state for restitution or compensation.

Especially in this case, the state under the obligation to protect its citizens is suspected to have killed, in an organized fashion, innocent civilians by way of military power during the war. If proven to be true, such conduct would be a genocide-like act and, as such, would duly be treated similarly to a genocide or treated as a crime against humanity.

Then, a normal system of law such as the statute of limitations under the State Compensation Act is not applicable in this case. In such a situation of nonexistence of law, a special obligation to enact law to redress (especially an obligation to effectively guarantee the right to request state compensation) arises for the National Assembly through constitutional interpretation based on the obligation to guarantee basic rights under the second provision of Article 10 of the Constitution.

C. Aftermath of the Case

Following the issuance of the decision in this case, the National Human Rights Commission of Korea advised the Speaker of the National Assembly and the Prime Minister to enact an integrated special act for nationwide factfinding and restoration of the reputation of the victims with respect to civilian losses and sacrifices surrounding the period of the Korean War.

6. *Surcharge Imposed by the Fair Trade Commission* (15-2(A) KCCR 1, 2001Hun-Ka25, July 24, 2003)

Held, the provision of the Monopoly Regulation and Fair Trade Act providing that the Fair Trade Commission may impose a sanction of surcharge upon a business operator found to have conducted an unjust act of support within the scope of 2% of its gross revenue is not unconstitutional.

A. Background of the Case

(1) The provision of the Monopoly Regulation And Fair Trade Act (hereinafter referred to as the "Fair Trade Act") at issue in this case provides that the Fair Trade Commission may impose a sanction of surcharge upon a business operator who conducted an unjust act of support, which is a type of unfair transactions, within the scope of 2% of its gross revenue. Such sanctionable act of unjust support as originally defined for the law's application includes the act of unjust support between individual business operators. However, what frequently becomes an issue is an act of unjust support among related business entities belonging to one business conglomerate. An act of unjust support among related business entities within a single conglomerate means an act of one business entity within a conglomerate business structure that unjustly supports another such related business entity by providing, free of charge or on a conspicuously beneficial condition, goods, services, capital, assets, and human resources.

(2) In this case, the Fair Trade Commission imposed a large sum of surcharge pursuant to the above provision of the Fair Trade Act (hereinafter referred to as the "provision at issue in this case") upon related business entities of a conglomerate that had conducted acts of unjust support. The related business entities subjected to the above surcharge thereupon filed a lawsuit seeking to void the measure imposing surcharge, and the court during the pendency of this lawsuit requested *sua sponte* a constitutional review upon the provision at issue in this case on which the surcharge was based.

B. Summary of the Decision

The Constitutional Court, by the majority of five out of nine Justices, held that the provision at issue in this case is constitutional as it is not in violation of the principle against double jeopardy, the principle of proportionality, or the principle of due process. The

summary of the ground for this decision is stated in the following paragraphs.

(1) Summary of the Majority Opinion

(A) Unjust internal transactions among the related business entities within a single business conglomerate generate monopolistic and oligopolistic profits among them, thereby causing the harm of concentration of economic power by reinforcing the monopolistic power of the related business entities belonging to the conglomerate, and result in the danger that the business conglomerate simultaneously falters in its entirety as the competitiveness of superior business entity decreases through dispersion and outflow of the core capability of the superior business entity to the faltering business entity. The provision at issue in this case is a provision intended to inhibit such harm.

(B) Article 13(1) of the Constitution provides that "no citizen shall be subject to double jeopardy for the same crime," thereby declaring the principle against double jeopardy. The Constitutional Court, in its precedents, has repeatedly declared, with respect to the meaning of the principle against double jeopardy, that double jeopardy prohibited by Article 13(1) of the Constitution is the repeated exercise of the state authority to criminal punishment, but it does not prohibit imposition of any and all sanction or disadvantageous measure in addition to the exercise of authority to criminal punishment.

The administrative law intends to achieve certain administrative purposes by ordering obligations or establishing prohibitions. In order to secure effectiveness thereof, it is necessary to induce to no further violation by a party in violation of the obligation or by others under the same obligation through imposition of disadvantages such as administrative punishment, non-penal fines or civil penalties, cancellation or suspension of business licenses, and surcharge. Such 'prevention and inhibition through sanction' is the original function of administrative regulations.

The surcharge to be imposed for unjust internal transactions pursuant to the provision at issue in this case, considering its purpose and function and the subject and procedure of its imposition, is of the nature of administrative pecuniary sanction imposed for the violation of the administrative purpose of inhibition of unjust internal transactions for the realization of the same purpose. Thus, the surcharge pursuant to the provision at issue in this case is not punishment as the exercise of the state authority to criminal punishment prohibited by Article 13(1) of the Constitution, and is not in violation of the principle against double jeopardy.

(C) Permitting simultaneous imposition of criminal punishment and surcharge for one act of unjust support does not mean that the state is permitted to impose repeated sanctions for a single unlawful act without restrictions. As the functioning of the state power burdening the citizens may not be free from the restriction of the constitutional principle of proportionality, the aggregate of various sanctions should not be excessively grave compared with the unlawful act that is being sanctioned.

The provision at issue in this case provides that the amount of surcharge should be within the scope of 2% of the gross revenue of the business operator found to have conducted an act of unjust support. The legislators concluded that the gross revenue of a business operator would be an indicator to measure the increase of economic profit through the unlawful conduct, and determined to use the amount of the gross revenue as the standard in calculating the upper limit of the amount of surcharge. Such judgment of the legislators is reasonable. Furthermore, such legislative judgment was also based upon a policy consideration to secure sufficient effect of sanction and inhibition on larger business entities with plentiful funds. Such sanction is not excessively severe considering the extent of the criminal punishment that may simultaneously be imposed (imprisonment for up to two years or a fine up to ₩150,000,000).

In summary, it is not an excessive sanction in violation of the principle of proportionality to employ the gross revenue of the business entity subject to sanction to calculate the upper limit of the amount of surcharge as well as to provide for the surcharge that may be imposed simultaneously with the criminal punishment, for an effective regulation of unjust internal transactions.

(D) The legislators gave authority to determine, under the provision at issue in this case, matters with respect to the imposition of surcharge to the Fair Trade Commission based on the policy decision that it would be desirable for an institution equipped with expert knowledge and experience to take charge in gathering and assessing the facts and the data concerning the negative effect of various unfair conducts including unjust internal transactions upon the market. Furthermore, the Fair Trade Commission, which determines the imposition of surcharge and the amount thereof, is a deliberative administrative institution endowed with a certain degree of independence in its organization and composition. In imposing surcharge, the parties concerned may participate in the procedure therefor through, for example, an opportunity to state their opinions, and a judicial review process subsequent to the imposition of surcharge by way of administrative litigation is further guaranteed. Therefore, considering the above factors, the procedure for the imposition of surcharge pursuant to

the provision at issue in this case is not in violation of the principle of due process or the principle of separation of powers that gives the judicial power to the court.

(2) Summary of the Dissenting Opinion

The surcharge pursuant to the provision at issue in this case has the nature of pecuniary sanction imposed upon a business entity found to have conducted an act of unjust support for other business entities. Even if it is necessary to sanction and punish acts of unjust support by business entities, the constitutional principle of personal responsibility that requires a just interrelationship between an unlawful conduct and the punishment or sanction therefor should still be observed. Here, however, there can hardly be any relationship between the scale of revenue and the act of unjust support, as a matter of principle. Therefore, determining the amount of surcharge based on the amount of gross revenue for an act of unjust support allows determination of the scope of responsibility by an element of the amount of revenue that is irrelevant to the act by the subject of surcharge of unjust support. As such, it is against the principle of personal responsibility.

Furthermore, under the principle of due process, in the procedure for imposing surcharge, there should be separate institutions for investigation and adjudication, there should be a sufficient guarantee of the decisionmaker's expertise and independence and the examination of evidence and the oral argument, and there should be a strict guarantee for the status of the decisionmaker, to the extent corresponding to the judicial process. The current system is conspicuously lacking these aspects; therefore, it is in violation of the principle of due process.

On the other hand, one of the Justices who have joined this dissenting opinion agrees with the above dissenting opinion of the other three justices, and, further yet, is of the opinion that the provision at issue in this case is also against the principle of double jeopardy and the principle of presumption of innocence.

7. Mandatory Employment of Disabled Persons
(15-2(A) KCCR 58, 2001Hun-Ba96, July 24, 2003)

Held, the provision of the former Promotion, etc. of Employment of Disabled Persons Act which provided that an employer employing over a certain number of individuals must employ disabled individuals of or over the standard employment rate or must bear the disabled employees employment charge is not unconstitutional.

A. Background of the Case

Pursuant to the former Promotion, etc. of Employment of Disabled Persons Act, an employer employing over a certain number of individuals, as set forth in the presidential decree, must employ disabled individuals at or over the rate set forth by the presidential decree of or over one-hundredth and of or under five-hundredths of the entire number of employees (the standard employment rate), and, should the employer fail to meet the standard employment rate, such employer must bear the disabled employees employment charge in a predetermined amount by paying such amount each year to the Minster of Labor.

Pursuant to the Enforcement Decree of the former Promotion, etc. of Employment of Disabled Persons Act, an employer normally and constantly employing three-hundred employees or more must employ disabled individuals at or over the rate of two-hundredths of the entire number of employees and, should the employer employ a higher rate of disabled persons, such employer receives an employment subsidy, but, should the employer fail to meet the above employment rate, such employer must bear the cost therefor.

B. Summary of the Decision

The Constitutional Court, by four out of nine Justices[6] with respect to the mandatory employment of disabled persons provision of the Act, and by a unanimous decision with respect to the disabled employees employment charge provision, held that the respective provisions are not unconstitutional. The grounds therefor are stated in the following paragraphs.

(1) Decision With Respect To The Mandatory Employment Of Disabled Persons Provision

(A) Opinion of four Justices that the provision is constitutional

The Preamble of the Constitution declares that an equal opportunity is guaranteed for all citizens and seeks to realize a welfare state by presenting the direction of the guarantee of the social basic rights. Article 32 of the Constitution provides that all citizens are entitled to the right to work, and that the state shall make effort to promote employment and to guarantee appropriate wages by social and

6) Pursuant to Article 113(1) of the Constitution, a quorum of six Justices is required for a decision holding a statute unconstitutional or an affirmative decision upon the constitutional complaint by the Constitutional Court.

economic means. Article 34 of the Constitution declares that every citizen is entitled to a life worthy of human beings; at the same time, it obligates the state to promote social security and social welfare to specifically realize such humane living conditions, and emphasizes that especially those citizens lacking capability of living due to such factors as disability, ailment, or aging shall be protected by the state pursuant to the relevant statutes. Also, Article 119(2) of the Constitution provides that the state may regulate and coordinate in order for the democratization of economy through harmonization among various subjects and actors within the economy.

Disabled persons often face extreme hardship in reality in obtaining a vocation appropriate to their ability due to their physical or mental conditions, which requires a measure at the social and national level in order to guarantee the right to work of disabled persons. From this perspective, despite the guarantee of the freedom of economic activities of business entities and the declaration of the freedom of contract among private individuals under the Constitution, it is an inevitable measure to restrict such freedom to a certain degree in order to recognize human dignity and value and to guarantee humane living conditions for disabled persons who are in a socially and economically weaker position. As the creation of jobs relies on general private business entities as well as the state, it is inevitable to obligate private businesses with respect to the guarantee of employment for disabled persons to an appropriate extent. Therefore, the mandatory employment of disabled persons provision at issue in this case does not excessively restrict the freedom of contract and other economic liberties of the employers.

The state and the local governments are the public actors responsible for carrying out education, publicity campaigns, and employment promotion drives for disabled persons to increase understanding of the employers and the general public with respect to the employment of disabled persons, carrying out support and subsidy for the employers, the disabled employees, and other parties concerned and vocational rehabilitation measures reflecting the unique characteristics concerning disabled individuals, and harmonically and effectively carrying out measures necessary to promote employment and job security for disabled persons. Also, the Act relaxes the employment requirement when applied to private industry where the Act acknowledges a considerable portion thereof consists of the vocation for which it is difficult to employ disabled persons. Therefore, although the Act provides that the state and the local governments shall make efforts to recruit and retain two-hundredths of the public officials employed

therein among disabled persons unlike private business entities[7] with the exceptional exclusion of certain public offices as set forth in the presidential decree, it is a differential treatment based on a reasonable ground and is thus not against the principle of equality.

The mandatory employment of disabled persons provision is centered on an established basic principle that the scope of the business entities that are mandated to employ disabled persons is to be determined by the number of employees. The scope of such business entities to which the mandatory employment of disabled persons system applies should be determined flexibly from time to time by considering the ratio of the unemployment rate among the disabled persons against the unemployment rate in the entire nation and the economic situations. Therefore, the judgment of the legislators that it would not be appropriate to expressly fix such business entities in the Act is not necessarily wrong. In addition, the provision at issue in this case delegates the number of disabled persons to be mandatorily employed to a presidential decree by establishing a specific scope of "of or over one-hundredth and of or under five-hundredths of the entire number of employees." Therefore, the mandatory employment of disabled persons provision is not in violation of the principle against blanket delegation or the principle of statutory reservation.

(B) Opinion of five Justices that the provision is unconstitutional

The principle against blanket delegation under Article 75 of the Constitution permits statutory delegation but does not permit blanket delegation, in order to harmonize the demand for administrative legislation and the principles of guarantee of basic rights under the Constitution. Mandatory employment of disabled persons and the ensuing obligation to bear the employment cost are important matters or essential contents that relate to the realization of the constitutional basic rights such as the freedom of contract and the right to work and right to property of the citizens. However, the mandatory employment of disabled persons provision merely states, with respect to the business entities to whom the provision applies, the "employers employing a certain number of employees or more as set forth by presidential decree," and thus this provision, without further, does not allow even a speculative general expectation with respect to the content to be regulated by presidential decree. Even the relevant provisions of the Act, in its entirety, does not allow a judgment as

7) The former Act provided that the "state and the local governments shall make an effort to employ two-hundredths or more of the public officials employed therein among disabled persons." However, this provision was revised by Law No. 6166 on January 12, 2000, prior to the request for constitutional review in this case, to a mandatory provision in that it now provides that the "state and the local governments shall employ two-hundredths or more of the public officials employed therein among disabled persons."

to the scope of employers to whom the above mandate applies. There can be found no ground that renders it especially difficult to provide the scope of the employers to whom the mandate applies in the statutory provision itself instead of delegating the same to presidential decree. Even assuming that there would be some difficulty for the National Assembly to directly define the scope of the employers to whom the mandate would apply within the statutory provision, at a minimum, the lower limit of the employers to whom the mandatory employment of disabled persons applies should be indicated in the statutory provision itself before delegation to a presidential decree. Therefore, the mandatory employment of disabled persons provision is in violation of the prohibition of blanket delegation, and it is not loyal to the principle of statutory reservation derived from the principle of rule of law and the idea of the protection of basic rights.

(2) Decision With Respect To The Disabled Employees Employment Charge Provision

The disabled employees employment charge is a means to secure the effectiveness of the mandatory employment of disabled persons system and, as such, is a contribution collectively paid by the employers in order to equally adjust the economic burden resulting from the employment of a disabled individual between the employer who actually employs a disabled individual and the employer who does not in light of the idea of social vicarious liability and also to reduce the burden on the part of the employer who newly employs a disabled person who is currently unemployed for the improvement of operations facilities. Such disabled employees employment charge system is to equalize the economic burdens incurred by the employment of a disabled person among different employers by charging the employers who do not meet the employment rate and subsidizing the employers who employ the disabled persons in excess of the employment rate as the employment subsidy. Therefore, the legislative purpose of the disabled employees employment charge provision at issue in this case is legitimate. The means adopted to achieve such legislative purpose is appropriate as well, in that the above charge is used to adjust economic burdens of employment of disabled persons and to subsidize such employers who employ disabled persons and does not revert to the general fiscal revenue of the state. Furthermore, the base line of the employment cost is set at 60 over 100 of the minimum wage or more, which neither excessively infringes upon the property right of the employer nor lacks a balance between the legal interests concerned in light of the public interest of the promotion of the employment of the disabled persons mandated by the Constitution.

In addition, the disabled employees employment charge system, pursuant to the provision at issue in this case, functions in itself to adjust the imbalance of economic burdens between the employers who sincerely assume their employment obligation and those who do not, and therefore it is not unreasonable discrimination.

Therefore, the disabled employees employment charge system does not infringe upon the freedom of contract and occupation, the property right, and the right to equality, of the employers.

C. Aftermath of the Case

The mandatory employment of disabled persons provision of the former Promotion, etc. of Employment of Disabled Persons Act was revised subsequent to the decision in this case, by Law No. 7154 on January 29, 2004, and it currently provides that the employers normally and constantly employing fifty employees or more shall employ disabled persons at or over the rate set forth by presidential decree within the scope of five-hundredths of the entire number of employees.

8. *Time Limit for Resignation by the Head of Local Government Running for the Election of the Members of the National Assembly*
(15-2(A) KCCR 516, 2003Hun-Ma106, September 25, 2003)

Held, the provision of the Act on the Election of Public Officials and the Prevention of Election Malpractices providing that a head of a local government who runs for election to be a member of the National Assembly in the local district should resign from the local government office no later than one-hundred and eighty(180) days prior to the election is unconstitutional.

A. Background of the Case

The Act on the Election of Public Officials and the Prevention of Election Malpractices (hereinafter referred to as the 'Public Election Act') provides that, when a head of a local government intends to run for election to be a member of the National Assembly in the local district, she or he shall resign from the local government office no later than one-hundred and eighty(180) days prior to the election, if the local district is the same as or corresponding to the jurisdiction of the local government.

The complainants, who are the heads of local governments, filed the constitutional complaint in this case on the ground that the provision at issue in this case violates their right to equality and right to hold public office, in that the provision at issue in this case singles out the office of the head of local government and places a stricter burden thereupon, whereas a member of the National Assembly may hold such office before resignation until the application to register as a candidate when running for the election of a head of a local government, a member of the National Assembly is not required to resign when running to be elected president or a member of the National Assembly, and other public officials suspected of possible abuse of position and the authority of a public office at election are required to resign from such public office no sooner than sixty(60) days prior to the election.

B. Summary of the Decision

The Constitutional Court, by a unanimous decision, held that the provision at issue in this case is unconstitutional. The ground therefor is stated in the following paragraphs.

(1) Legislative Purpose Of The Provision At Issue In This Case

When the head of local government runs for election to be a member of the National Assembly in the local district that is the same as or corresponding to the jurisdiction of the local government, there is a possibility of abuse or misuse of the position and authority as such in his or her election campaign, which would directly harm the fairness of elections. Also, allowing the head of local government to run for public election while maintaining the office as the head of local government would conflict with the obligation of public officials of undivided devotion to the public office under the State Public Officials Act and the Local Public Officials Act. In these respects, the legislative purpose of the provision at issue in this case is to secure the fairness of elections and the undivided devotion to the public office. Specifically, however, in light of the fact that the provision at issue in this case compels the head of local government to resign by far sooner (resignation no later than one-hundred and eighty(180) days prior to the election) than other public officials, the provision at issue in this case focuses more upon the 'fairness of the election' than the 'undivided devotion to the public office' between the above two legislative purposes.

(2) Violation Of The Right To Equality

With respect to the means adopted by the provision at issue in this case to achieve the legislative purpose of securing a fair election that requires resignation from the office of the head of local government by one-hundred and eighty(180) days prior to the election sooner by far than the resignation by sixty(60) days prior to the election for other public officials at the election, we consider whether there is any reasonable ground for such distinction.

First, even without the provision at issue in this case, the general provision of the relevant part of the Public Election Act also applies to the head of local government, thereby blocking any possibility of election campaign activities prior to the permitted election campaign period by use of the official position of the head of local government from sixty(60) days prior to the election. Furthermore, the Public Election Act secures fairness at elections and the undivided devotion to the public office, as it (i) prohibits any and all election campaign activities prior to the permitted election campaign period by providing that the "election campaign activities are permitted from completion of the registration as a candidate through one(1) day prior to the election," and (ii) generally prohibits certain conduct of public officials affecting the election as well as especially prohibits the head of local government suspected of a greater probability of abuse of such public office for prior election campaign from conducting prior election campaigns by publishing advertisement praising contributions and achievements.

To the contrary, the provision at issue in this case is invariably to cause a prolonged vacuum in local administration, thereby resulting in added chaos and ineffectiveness of administration.

To conclude, even without the provision at issue in this case, as various provisions of the Public Election Act place a wide range of prohibition against possible prior election campaigns by the head of local government, there can hardly be found any reasonable ground for requiring resignation therefrom by far sooner than what is normally required in addition to such general prohibitory provisions. Then, compulsory early resignation for the head of local government by the provision at issue in this case is discrimination against the head of local government with no reasonable ground in relation with other public officials.

(3) Violation Of The Right To Hold Public Office
- With Respect To The Principle Of Proportionality

Restrictions upon the right to be elected to public office that

constitutes the right to hold public office may be permitted only when there is a ground justifying such restrictions, and, even when permitted, such restrictions should not exceed the extent that is a necessary minimum.

The provision at issue in this case advances the time limit for resignation from the public office to one-hundred and eighty(180) days prior to the election when the head of local government runs for election to be a member of the National Assembly in the local district that is the same as or corresponding to the jurisdiction of the local government, thereby restricting the complainants' right to be elected to public office on one hand and also restricting, on the other hand, the complainants' right to hold public office by maintaining their public office as the head of local government. The provision at issue in this case likewise severely restricts the basic rights of the complainants from two directions, whereas the degree of realization of the public interests the provision at issue in this case intends to achieve is barely noticeable. As the Public Election Act contains various other provisions to secure the fairness in the election and the undivided devotion to the public office other than the provision at issue in this case as previously reviewed, the legal effect to be practically achieved by the means of mandatory resignation by one-hundred and eighty(180) days prior to the election under the provision at issue in this case is not substantial.

To conclude, the provision at issue in this case violates the principle of least restriction as it unnecessarily and excessively restricts the complainants' right to hold public office, and the degree of contribution of the provision at issue in this case to the achievement of its legislative purpose is minimal. To the contrary, the basic right of the complainants restricted by the provision at issue in this case is the right to hold public office consisting of the right to be elected to public office and the right to perform public office as the head of local government that should be respected to the maximum degree in a democratic society, and the degree of restriction thereupon by the provision at issue in this case is very significant. The provision at issue in this case lacks appropriate proportionate relations when balancing the public interest achieved by the provision at issue in this case and the degree of restrictions upon the basic right on the part of the complainants, therefore, the provision at issue in this case violates the principle of balance between the legal interests concerned.

(4) Conclusion

Then, the provision at issue in this case violates the principle of

equality as it lacks any reasonable ground to justify discrimination against the complainants, and, further, it fails to satisfy the principle of proportionality or the principle against excessive restrictions that should be observed in restricting the complainants' basic right to hold public office. Therefore, the provision at issue in this case is unconstitutional.

C. Aftermath of the Case

Following this decision, the National Assembly revised the law to shorten the time limit for resignation from the office of the head of local government by sixty(60) days, and the law now provides that a head of local office should resign from the office as such when running for election to be a member of the National Assembly in the local district that is the same as or corresponding to the jurisdiction of the local government no later than one-hundred and twenty(120) days prior to the election.

9. *Compelled Resignation from Membership in the National Assembly Standing Committee* (15-2(B) KCCR 17, 2002Hun-Ra1, October 30, 2003)

Denied, a request for competence dispute proceeding against the Speaker of the National Assembly by the petitioner, a member of the National Assembly of the Grand National Party , who was a member of the National Assembly's Health And Welfare Committee and then compelled to resign from the position as a member of the above committee at the request of the Grand National Party.

A. Background of the Case

Pursuant to the National Assembly Act, a political party with twenty Assemblypersons or more constitutes one negotiation group, and the Speaker of the National Assembly appoints and reappoints members of various standing committees within the National Assembly for a two-year term at the request of the representing Assemblyperson of each negotiation group, according to the rate of the number of Assemblypersons belonging to each negotiation group.

Standing committees established within the National Assembly are deliberative institutions of the National Assembly that review matters presented to the National Assembly prior to the review at the plenary session or prepare a bill for legislation in their respective areas. Under

the current customs of the National Assembly, review and assessment upon legislative bills centers on the pertinent standing committees rather than the plenary session. Therefore, the plenary session passes as almost unchanged what is reviewed and resolved at the pertinent standing committee.

The petitioner in this case is an Assemblyperson of the Grand National Party and conducted activities as a member of the Health and Welfare Committee of the National Assembly. The Grand National Party determined, as the party's official position, that the public finance for vocational participants and for regional participants of the national health insurance under the National Health Insurance Act should be separated, and intended to pass such measure at the National Assembly plenary session in December of 2001. The petitioner opposed the position.

When the passage of the above measure became difficult due to the petitioner's opposition, the leading circle of the Grand National Party decided to carry through the official party position by compelling the petitioner to resign from membership in the Health and Welfare Committee. The floor leader of the Grand National Party, who was the representative Assemblyperson of the negotiation group for the Grand National Party, requested the Speaker of the National Assembly to remove the petitioner from the Health and Welfare Committee and appoint another Grand National Party Assemblyperson to the petitioner's seat on the committee. The Speaker of the National Assembly accepted such request.

The petitioner thereupon filed a petition for competence dispute proceeding in this case seeking to void the acts of appointment and removal by the Speaker of the National Assembly and to confirm that the right to review and vote upon legislative bills of the petitioner as an Assemblyperson was infringed by the compelled resignation of the petitioner from the Health and Welfare Committee of the National Assembly by the Speaker of the National Assembly.

B. Summary of the Decision

The Constitutional Court rejected, by a majority of eight out of nine Justices, the petitioner's request for competence dispute proceeding. The grounds therefor are stated in the following paragraphs.

(1) Summary of the Majority Opinion

(A) A political party is an intermediary between the citizenry and the state and by functioning as such political conduit, forms the political

opinions that may directly affect the decision of the national policies by independently and actively leading and unifying the pluralistic political opinions of the public.

In order for a political party to perform such function of free and open formation of political opinions, a maximum guarantee of the freedom of the political party must precede.

On the other hand, the political party is a political organization that holds a public position and, as such, certain legal regulations to secure its democratic internal order are inevitable. However, such regulations should not operate as an undue interference with the freedom of political activities of the citizens or the organizational autonomy of the political party.

(B) The National Assembly is an important constitutional institution and possesses a wide scope of autonomy to independently manage its own matters. The removal and appointment of members to its standing committee at issue in this case is also within the organizational autonomy of the National Assembly. Therefore, in assessing this matter, a hasty conclusion of unconstitutionality should be abstained unless clearly against the Constitution or relevant statutes.

Open delegation under which each Assemblyperson may take his or her own position, in principle, in activities on the floor of the National Assembly serves a beneficial function of realization of democracy within the political party and prevention of dictatorship or oligarchy of the political party, by bringing in unrestrained discussions and formation of opinions.

On the other hand, the negotiation group, which is one of the means fortifying the political party affiliation of the Assemblypersons in today's political party state, also functions to reflect the political party's major policies to a maximum degree at the review of the legislative bills by an attempt to unify the acts of the Assemblypersons of the same political party on the floor. Thus, it necessitates advice and control over the floor activities of the Assemblypersons of the same political party.

Even from the position that puts greater importance on the nature as the citizens' representatives than on the nature as the political party members of the members of the National Assembly, a 'practical coercion from inside the political party' or a 'deprivation of political party membership' is possible, although deprivation of the status as a member of the National Assembly on the ground of political activities against the political affiliation or the decision of the negotiation group (so-called the 'official position of the political party') is not permitted.

Then, a measure of transferring a party member to a different standing committee of the National Assembly (by way of resignation

and appointment to a vacancy) of an Assemblyperson belonging to a political party who holds a different position from the official position of that political party according to the need of the negotiation group for the same political party falls within the scope of 'practical coercion from inside the political party' permissible, without special circumstances, under the Constitution.

(C) In light of the functions of the negotiation group discussed above, it is necessary for the effective operation of the National Assembly that the Speaker of the National Assembly consults the representative Assemblyperson of each negotiation group and respects his or her request in appointing and removing the members of the standing committees for a smooth and effective operation of various matters of the National Assembly.

Unless a request of the representative Assemblyperson of a negotiation group to appoint or remove members of the standing committee is against the Constitution or pertinent statutes, accommodation to such request by the Speaker of the National Assembly also conforms to the legislative intent thereof, considering the meaning and the function of the negotiation group in a political party state.

In summary, the acts of removal and appointment by the Speaker of the National Assembly at issue in this case represent the request of the representative Assemblyperson of the negotiation group for the political party to which the petitioner belongs based on the practical coercion from inside the political party and the acceptance by the Speaker of the National Assembly of such request as part of the authority to arrange various matters of the National Assembly. As such, there is no infringement upon the right and authority of the petitioner clearly in violation of the Constitution or pertinent statutes conspicuously outside the limits of discretion in the procedures concerned.

(2) Summary of the Dissenting Opinion

As long as the assessment and the voting for legislation that is the original mission of the National Assembly is concerned, the right and authority of members of the National Assembly to vote independently and to be bound solely by their respective conscience, either in a plenary session or in a standing committee, should be guaranteed as an inviolable and inalienable right and authority under the principle of open delegation in a representative democracy, which must be given priority in observance notwithstanding today's trend toward a political party state.

Members of the National Assembly are not merely representatives

of their respective political parties, and therefore, Assemblypersons are bound by the policies and decisions of the political parties of their membership only to the extent they do not sacrifice the interest of the general public by doing so. Therefore, in this case, the open delegation relationship should be deemed to take precedence over the 'party affiliation' or the 'negotiation group affiliation.' However, the Speaker of the National Assembly removed the petitioner from the Health and Welfare Committee of the National Assembly at the request of the representative Assemblyperson of the negotiation group of the Grand National Party, which was clearly in violation of the right to deliberate and vote of the petitioner.

Furthermore, even if the National Assembly Act provides that the Speaker of the National Assembly may remove and appoint for vacancies in the standing committees at the request of the representative Assemblypersons of negotiation groups and is otherwise silent about any special additional requirements, the general and internal limits apply under statutory interpretation as a matter of course. Therefore, as long as a particular individual Assemblyperson wishes to continue to perform activities as a member of a standing committee, unless there are special circumstances of unlawful or unjust activities concerning the relevant standing committee, compulsory removal from that particular committee during the two-year term against the will of the individual Assemblyperson should not be allowed.

Then, the acts of removal of the petitioner and appointment to a vacancy therefor by the Speaker of the National Assembly infringed upon the petitioner's right to deliberate and vote on legislative bills at the Health and Welfare Committee of the National Assembly and violated the right and authority of the petitioner to conduct activities during the two-year term as a member of the same standing committee but for special circumstances.

10. *Mandatory Seatbelt Requirement*
(15-2(B) KCCR 185, 2002Hun-Ma518, October 30, 2003)

Held, the provisions of the Road Traffic Act that require drivers of vehicles to wear seatbelts while driving and the state to notify drivers of administrative fine for violations thereof are not unconstitutional.

A. Background of the Case

The Road Traffic Act obligates drivers of vehicles to wear seat-

belts while driving and provides for a notification procedure for the payment of administrative fine for violations of the above requirement.

The complainant was cited by a police officer and notified to pay administrative fine in the amount of ₩30,000 while driving without wearing a seatbelt. The complainant thereupon filed a constitutional complaint in this case on the ground that the above provisions of the Road Traffic Act infringe upon the general freedom to act, the freedom of privacy, and the freedom of conscience of the complainant.

B. Summary of the Decision

The Constitutional Court, in a unanimous opinion, held that the provisions at issue in this case are not unconstitutional.

(1) General freedom to act includes the freedom to conduct all actions and inactions and does not merely protect conduct that has value. Therefore, in the scope of its protection, a right to live in a rather dangerous way is also included, and the right not to wear seatbelts falls within the scope of protection of the general freedom to act that stems from the right to pursue happiness guaranteed in Article 10 of the Constitution.

Mandating a seatbelt requirement is to protect the mutual interests of the social community by preventing and removing the danger and the hindrance to the life and the bodily safety of citizens that may be caused by traffic accidents, by reducing the social cost incurred by the traffic accident and by maintaining traffic orders. As such, its legislative purpose is legitimate.

In addition, the provision at issue in this case is an appropriate means to achieve the above legislative purpose as there is a clear causal relation according to statistics between wearing seatbelts and the reduction of human casualty in case of traffic accidents.

Any disadvantage on the part of the driver from the mandatory seatbelt requirement while driving is a marginal burden on slight discomfort and the administrative fine imposed for failure to wear a seatbelt is in a small amount. To the contrary, the public interest the mandatory seatbelt requirement intends to achieve is promotion of the interest of the social community by protecting the life and the bodily safety of citizens and by reducing the social cost incurred by traffic accidents. Therefore, the public interest to be achieved is greater than the private interest of the complainant that is infringed thereby.

The legislators determined to mandate a seatbelt requirement based on the judgment that mere publicization of the benefits of

wearing seatbelts toward the public could not achieve the legislative purpose of the protection of life and bodily safety of citizens.

The administrative fine under the Road Traffic Act is a procedure which provides an opportunity to pay an administrative fine in a certain sum pursuant to an administrative measure for a relatively minor act of violation prior to criminal proceedings therefor and allows a prompt and simple closure to a case without criminal charge for those who pay such administrative fines. The administrative fine notification provision at issue in this case allows a closure to legal sanctions by payment of an administrative fine prior to the imposition of administrative punishment that would be a means most restrictive of the basic rights among those limiting the rights and liberties of citizens for violation of the obligation to wear seatbelts. Also, the amount of administrative fine in this case was no more than ₩30,000. Therefore, the administrative fine notification provision in this case does not excessively restrict the basic rights of the complainant, nor is it in excess of the limit upon the legislative discretion.

Then, the provisions at issue in this case do not excessively infringe upon the complainant's general freedom to act in violation of the principle of proportionality.

(2) The road utilized for general traffic falls into the realm where the national and local governments are responsible for management thereof, and such realm is interrelated to the legal interests of numerous other drivers and pedestrians or the community interests. Thus, the act of driving a vehicle thereon is no longer a conduct that occurs in a personal and intimate arena. Furthermore, whether or not one should wear a seatbelt while driving a vehicle on the road is hardly relevant to the basic conditions for privacy concerning overall personality and survival of such individual or to the core area for self-determination or the essence of personality. Therefore, as the question of wearing a seatbelt behind the wheel while driving is no longer a question belonging to the zone of privacy, the provisions at issue in this case do not infringe upon and the freedom of privacy of the complainant.

(3) Conscience that is protected by the Constitution is a strong and sincere voice of one's mind without acting according to which one's existential value of personality would collapse and is not a vague and abstract concept. The complainant may possibly debate whether or not to wear a seatbelt while driving, but, even if the complainant could not but wear a seatbelt following the debate in order to avoid a sanction, this would not distort or bend the complainant's conscience as a human being established internally nor would it cause the complainant's existential value of personality to collapse. Therefore, wearing a seatbelt behind the wheel while driving does not belong

to the area protected by the freedom of conscience.

11. *Aggravated Punishment for Crimes Concerning Narcotics*
(15-2(B) KCCR 242, 2002Hun-Ba24, November 27, 2003)

Held, the provision of the Act on the Aggravated Punishment, etc. of Specified Crimes that uniformly aggravates the crime of simple purchase or possession for the purpose of sale of narcotics to be subject to the same punishment as in the case of an offense for profit and a repeat offender is unconstitutional.

A. Background of the Case

(1) The Controlled Substance Act, which is a consolidation of the former acts, the Narcotics Act, the Psychotropic Drugs Control Act, and the Cannabis Control Act, regulates in Article 58 the export and import and the sale of narcotics, the manufacturing, the export and import and the sale of Psychotropic Drugs, and the export and import of cannabis, and imposes relatively lighter punishment upon simple narcotics-related crimes as distinguished from crimes for profit or repeated offenses concerning narcotics. The Act on the Aggravated Punishment, etc. of Specified Crimes (hereinafter referred to as the 'Aggravated Punishment Act'), which included an aggravated punishment provision for narcotics-related crimes even prior to the consolidation of relevant statutes to the Controlled Substance Act, provides for an aggravated punishment for those who commit narcotics-related crimes under Article 58 of the newly enacted Controlled Substance Act. In doing so, the Aggravated Punishment Act uniformly imposes for the purchase of narcotics or the possession of narcotics for the purpose of sale, the punishment of a death sentence, life sentence, or imprisonment of ten years or longer, which is identical to the punishment for the crime for profit or repeated offenses, without questioning whether the conduct of purchase or possession is for profit or a repeated offense.

(2) The complainant was found guilty and sentenced to imprisonment for five years in both courts of first instance and second instance for purchasing and for possessing for the purpose of sale opium, which is a controlled narcotic. The complainant subsequently appealed to the Supreme Court and, during the pendency of such appeal, petitioned the Supreme Court to request a constitutional review upon the above provision of the Aggravated Punishment Act on the ground that the

uniform aggravation of punishment for the purchase or the possession for the purpose of sale of narcotics without questioning such act is a crime for profit or a repeated offense under the above provision was unconstitutional, which was, however, denied. The complainant thereupon filed a constitutional complaint in this case.

B. Summary of the Decision

The Constitutional Court, in a unanimous opinion, held that the provision of the Aggravated Punishment Act uniformly aggravating the punishment for narcotics-related crimes (hereinafter referred to as the "provision at issue in this case") is unconstitutional. The ground therefor is stated in the following paragraphs.

(1) In determining the scope of the statutory sentence for crimes, the demand of Article 10 of the Constitution that human dignity and value must be respected and protected against the threats of punishment should be met, and the principle of individualized punishment should apply pursuant to the spirit of the prohibition against excessive legislation under Article 37(2) of the Constitution. There should be an appropriate balance so that the punishment imposed corresponds to the quality of the crime and the actor's responsibility.

(2) The conduct of purchasing narcotics for profit connotes further unlawfulness and deserves further blame compared with a simple purchase of narcotics not intended for profit or other crimes for profit, in that such conduct of purchasing narcotics for profit contributes to large-scale dissemination of narcotics by generating new narcotics suppliers, enlarging those preexisting manufacturing and sales organizations, and stimulating dissemination of narcotics, and that such conduct pursues profit by devastating others' spirit and body. On the contrary, a simple purchase of narcotics without intention for profit is distinguishable from a purchase thereof for profit in terms of the criminal quality including such aspects as the degree of contribution to the dissemination of narcotics, the structure of the conduct, the degree of danger involved, and the blameworthiness, as a simple not-for-profit purchase of narcotics basically falls on the demand-side and is at the final stage in the narcotics circulation and distribution structure.

Considering such differences in criminal quality, the Controlled Substance Act provides that simple narcotics-related crimes are punishable by a life sentence or imprisonment of five years or longer, whereas crimes for profit and repeated offenses are punishable by such a grave statutory sentence as capital punishment, a life sentence, or imprisonment of ten years or longer. As such, the distinction between

simple narcotics-related crimes and narcotics crimes for profit is both greatly meaningful and necessary. The provision at issue in this case, however, uniformly aggravates the punishment for the above two types of conduct with the identical statutory sentence ignoring the different degrees of unlawfulness, the difference in criminal quality, and the difference in quality in terms of the blameworthiness for the respective conduct. Therefore, the provision at issue in this case fails to satisfy the proportionate relationship between the actor's responsibility and the ensuing punishment, deviating from the scope of legislative formation concerning the determination of statutory sentences.

(3) The crime of possessing narcotics with the intent to sell is to independently and separately punish such conduct inchoate to the actual sale of narcotics. The essential nature of the conduct of sale of narcotics is generally pursuit of profits. In light of this, probability of actual sale and contribution to the dissemination of narcotics concerning simple not-for-profit possession with the intent to sell is extremely marginal. The above provision of the Aggravated Punishment Act nonetheless aggravates the punishment uniformly for such conduct without distinguishing such conduct from narcotics crimes for profit. This is an excessive abuse of the state authority to criminally punish.

(4) The above provision of the Aggravated Punishment Act provides that even simple purchase of narcotics or simple possession with the intent to sell shall be punished by capital punishment, life sentence, or imprisonment of ten years or longer. As such, the above provision of the Aggravated Punishment Act is highly inappropriate and unjust as it extremely restricts the right and authority of a judge in determining sentences for it leaves no possibility of probation but for additional legal sentence-mitigating factors even for, for example, purchase or possession of narcotics in an extremely small amount, even with mitigating factors applicable in practice, and, also, as it limits the right of a judge to determine the sentence at its source by disallowing the judge to sentence corresponding to the actor's responsibility.

(5) In light of the danger of narcotics or the weight narcotics occupies in our society, narcotics do not pose more of a danger than Psychotropic Drugs to the extent that narcotics-related crimes should specifically be punished to an aggravated degree as opposed to those crimes involving Psychotropic Drugs such as methamphetamine. There can be found no reasonable ground to aggravate punishment specifically for narcotics-related crimes considering the reality concerning various crimes, the rate of prosecution, the result of criminal proceedings, and the legislative history of the statutes regulating controlled substances. The above provision of the Aggravated Punishment Act singles out

and aggravates punishment for such narcotics-related crimes as the purchase and the possession with the intent to sell of narcotics with no reasonable ground therefor, and thus, it violates the principle of equality as it conspicuously lacks the requisite balance in the punishment and sentencing structure.

(6) To conclude, the provision at issue in this case sets forth excessively grave criminal punishment for the conduct at issue compared with the unlawfulness of such conduct. Thus, the provision at issue in this case is against the idea of the state substantively ruled by law devoted to protect human dignity and value as it fails to satisfy the proportionate relationship between the responsibility and the criminal punishment, violates the principle of prohibition against excessive legislation as it conspicuously deviates from the degree necessary for achieving original function and purpose of the criminal punishment, and violates the principle of equality in relation with other crimes as it lacks the requisite balance in the criminal punishment and sentencing structure.

12. *Permission for Extension of Detention Period and Restriction of Frequency of Visits to the Detainees*

(15-2(B) KCCR 311, 2002Hun-Ma193, November 27, 2003)

Held, the relevant provision of the Military Court Act permitting extension of detention period by the military police and the relevant provision of the Enforcement Decree of the Military Criminal Administration Act limiting visits to the detainees to two times per week are unconstitutional.

A. Background of the Case

The Criminal Procedure Act makes it a principle to investigate the suspect without detention and provides that the suspect shall not be detained except under arrest warrant issued by a judge upon satisfaction of certain requirements. Also, even when an arrest warrant has been issued, the Criminal Procedure Act sets forth a limit on the detention period so that the public prosecutors and the police may detain the suspect for a period of up to ten(10) days respectively. The public prosecutors may extend the above extension period once for another ten(10) days by obtaining permission therefor of the judge, yet the police may not extend the above detention period. The provision of the Military Court Act at issue in this case, however,

unlike the above provisions of the Criminal Procedure Act, permits extension of the detention period by the military police (hereinafter referred to as the 'provision at issue in this case'). In addition, whereas the Enforcement Decree of the Criminal Administration Act allows one visit per day to the detainee, the Enforcement Decree of the Military Criminal Administration Act, unlike the above provision of the Enforcement Decree of the Criminal Administration Act, limits the frequency of visits to the detainee to twice per week (hereinafter referred to as the 'provision of the Enforcement Decree at issue in this case').

One out of the two complainants in this case, who served as a Republic of Korea Air Force colonel, was arrested for allegedly divulging military secrets and receipt of bribery concerning official duties. During investigation by the military police, his detention was extended by another ten(10) days under the above provision of the Military Court Act. The other complainant in this case, who is the spouse of the above complainant, was placed under restriction upon the frequency of visits to the first complainant, pursuant to the provision of the Enforcement Decree at issue in this case. The complainants thereupon filed a constitutional complaint in this case on the ground that the provision at issue in this case and the provision of the Enforcement Decree at issue in this case infringe upon their basic rights.

B. Summary of the Decision

The Constitutional Court, in a unanimous opinion, held that the provision at issue in this case and the provision of the Enforcement Decree at issue in this case are both unconstitutional. The grounds therefor are stated in the following paragraphs.

(1) The provision at issue in this case permitting extension of detention period by the military police

(A) The Constitution provides for the presumption of innocence in Article 27(4) in order to strictly guarantee the freedom of bodily integrity. This principle applies as a matter of course to a suspect at the investigation stage. The presumption of innocence mandates investigation and trial without detention as a matter of principle. Therefore, detention may be used as an exception only as the final means when it is impossible to effectively fight against the crime in no other way than by detention in achieving the purposes of criminal litigation, and even when investigation or trial by detention is permitted, the period of detention should be no longer than the minimum necessary.

The provision of the Military Court Act at issue in this case permits detention by the military police for a period of ten(10) days, which is itself an exception to the principle of investigation without detention derived from the constitutional requirement of the presumption of innocence. The provision at issue in this case, however, unlike the corresponding provision of the Criminal Procedure Act that does not permit extension of detention period at the police investigation stage, permits an extension of detention period by the military police, thereby establishing yet another exception to the exception, thus aggravating the restriction upon the freedom of bodily integrity, which is one of the most basic of the basic rights.

(B) At the stage where the military police requests the issuance of an arrest warrant for a suspect, the military police must have supporting materials gathered to confirm the objective suspicion of the alleged crime. Therefore, by the time the military police arrests a suspect, it is deemed that the general investigation over the objective suspicion of the alleged crime is already completed. The military police may continue investigation to gather evidence and supplementarily submit the gathered evidence subsequent to the detention of the suspect by the prosecution, as in the case of non-military general police authorities. There can hardly be found any ground to allow a longer period of detention by the military police for any special investigatory needs.

On the other hand, in the case of investigation by the military police, the harm possibly to be caused by a longer detention period is rather grave compared with other non-military cases, in that the exercise of the right to defense is easily daunted in the military criminal proceedings due to the special nature of the military society and there is insufficient supervision or control over the military police by the military prosecutors.

(C) Even assuming there are certain cases where the Military Court Act applies for which an extension of detention period is necessary for investigation purposes, permitting extension of detention period for all crimes the Military Court Act applies is in violation of the principle of prohibition against excessive restriction due to its excessively vast applicability.

In addition, for such cases the degree of importance thereof may justify extension of detention period for investigation purposes such as those directly relevant to national security, it would be more appropriate to have the military prosecutors whose higher legal knowledge and expertise is institutionally guaranteed investigate such cases and, if necessary, to permit an extension of the detention period by military prosecutors. Therefore, attempting to achieve such legislative purpose

even by extending the detention period by the military police is tantamount to an excessive restriction upon the basic rights by way of inappropriate means, and, as such, infringes upon the freedom of bodily integrity and the right to speedy trial in violation of the principle against excessive restriction.

(2) The provision of the Enforcement Decree at issue in this case limiting the frequency of visits to the detainee

(A) The main provision of Article 12(4) of the Constitution provides that "everyone shall have the right to assistance of counsel immediately upon arrest or detention." However, there is no express provision within the Constitution with respect to the right of the suspect or the defendant in custody to meet with a 'third party' who is not an attorney as in this case. On the other hand, the Criminal Procedure Act provides that "the defendant in custody may, within the scope permitted by a statute, meet with third parties, receive documents or things, and receive medical treatment," which applies *mutatis mutandis* to the suspect in custody. The question here is whether this is a right merely guaranteed by the Criminal Procedure Act, or a constitutionally guaranteed basic right.

The right of the suspect and the defendant in custody to meet and interact with others who are not attorneys is one of the basic rights as a human being that must be guaranteed in order to prevent complete severance and destruction of basic life relations as a human being to interact with family and others due to detention and also to prepare for the defense of such suspects and defendants. Therefore, it should be deemed to be a constitutionally guaranteed basic right by its nature.

The right of the detainee to meet and interact with others is derived from the general freedom to act that the Constitutional Court has recognized as one of the basic rights included in the right to pursue happiness of Article 10 of the Constitution. Also, Article 27(4) of the Constitution providing for the principle of presumption of innocence is yet another provision from which such right is derived.

(B) Pursuant to Article 37(2) of the Constitution, basic rights may in principle be restricted solely by statute. Therefore, the right of the detainee to meet and interact with others, which is guaranteed as a constitutional basic right, may in principle also be restricted solely by statute. The provision of the Enforcement Decree at issue in this case nevertheless limits the frequency of visits to the detainee by a provision not in a statute but in a presidential decree.

The principle of statutory reservation with respect to the restriction

of basic rights under Article 37(2) of the Constitution mandates 'regulation based on statute' and not necessarily 'regulation by way of statute,' and thus it requires statutory basis for restrictions upon basic rights and does not necessarily mean that the form of the restriction should be in the form of a statute. On the other hand, Article 75 of the Constitution provides that the "President may issue presidential decrees concerning matters delegated to him or her by statutes with the scope specifically defined and also matters necessary to enforce statutes," thereby establishing a basis for statutory delegation and expressly indicating the scope and the limit of statutory delegation.

The relevant provisions of the Military Criminal Administration Act state that visits to the detainee should be permitted unless there are special grounds to determine that such visits are inappropriate for purposes relating to guidance and treatment. The Military Criminal Administration Act is thus premised upon unrestricted visits with no limits on frequency thereof, and is silent of delegation with respect to the frequency of visits to the detainee. Therefore, limiting the frequency of visits to the detainee to twice per week by the provision of the Enforcement Decree at issue in this case is in violation of Article 37(2) and Article 75 of the Constitution as a restriction upon the right to visit and interaction without statutory delegation.

(C) The provision of the Enforcement Decree at issue in this case cannot but be held unconstitutional as it fails to satisfy requirements as to form or method of restrictions upon basic rights. Further yet, substantively, its content also violates the right to visit and interact and the right to equality of the complainants in violation of the principle against excessive restriction, as discussed in the following paragraphs.

The presumption of innocence requests that detainees be treated equally with other citizens and be free from unnecessary hardships other than the state of detention unless against the purpose of detention. Therefore, even when detention is justified, rights and privileges of detainees should not be arbitrarily restricted except for those restrictions thereupon for the prevention of flight or destruction of evidence, which is the purpose of detention, or for the maintenance of order within the detention facilities.

The provision of the Enforcement Decree at issue in this case limits the frequency of visits to the detainee to twice per week, whereas the corresponding provisions of the Enforcement Decree of the Criminal Administration Act allow one visit per day to the detainee. There are other effective means available for the detention facilities to achieve the legislative purpose of 'prevention of flight or destruction of evidence and maintenance of order within detention facilities' while restricting less of the basic rights of the complainants, by way of,

for example, stricter supervision of visits by participation of a prison officer therein or temporary prohibition of visits when necessary. Therefore, the provision of the Enforcement Decree at issue in this case fails to meet the requirement of the least restrictive means necessary for the constitutional justification of restrictions upon basic rights. The provision of the Enforcement Decree at issue in this case is therefore unconstitutional as it excessively restricts the right to visit and interact of the complainants.

(D) The provision of the Enforcement Decree at issue in this case reduces the frequency of visits to the detainees subject to the Military Criminal Administration Act as opposed to other detainees while the underlying legislative purpose is identical for all detainees. There is hardly any increased need for prevention of flight or destruction of evidence or there is hardly any greater request for maintenance of order within the detention facility, in the case of the former. Therefore, there is no reasonable ground that would objectively convince such differential treatment between the above two groups.

Therefore, the provision of the Enforcement Decree at issue in this case violates the right to equality as it arbitrarily treats those detainees subject to the Enforcement Decree of the Military Criminal Administration Act differently from those detainees subject to the Enforcement Decree of the Criminal Administration Act.

13. *Day and Time of, and Method of Determining the Elect at the Reelection and the Vacancy Election for Members of the National Assembly*
[15-2(B) KCCR 339, 2003Hun-Ma259, etc.,(consolidated), November 27, 2003]

Held, the provisions of the Act on the Election of Public Officials and the Prevention of Election Malpractices providing for the reelection and the vacancy election for the members of the National Assembly to be held on a Thursday that is not an official holiday, for the vote to be closed at six o'clock in the afternoon, and for the election to be determined by a simple majority of valid votes regardless of the voting rate are constitutional.

A. Background of the Case

The Act on the Election of Public Officials and the Prevention of Election Malpractices provides for the reelection and vacancy election for members of the National Assembly, as in the general election

for members of the National Assembly, that the vote shall take place on a Thursday, from six o'clock in the morning to six o'clock in the afternoon, and that a candidate who obtains a simple majority of the valid votes shall be elected regardless of the voting rate.

On the other hand, the government designates the election date for the general election for members of the National Assembly, unlike for the reelection and the vacancy election therefor, as an official holiday, pursuant to a presidential decree of the Regulation on Public Office's Official Holidays.

The complainants in this case, who were the candidates and the voters at the reelection and the vacancy election for members of the National Assembly held on April 24, 2003, filed the constitutional complaint in this case on the grounds that the above provisions are against the principle of people's sovereignty and violate the right to equality and equal vote, as such elections are held on a Thursday that is not an official holiday and time for the vote at such elections is not extended thereby restricting the exercise of the voting right of those who have a vocation, and a candidate is elected by a simple majority regardless of the voting rate thereby intruding the representativeness that is the essence of the election.

B. Summary of the Decision

The Constitutional Court, in a unanimous opinion, held that the above provisions at issue in this case are not unconstitutional. The grounds therefor are stated in the following paragraphs.

(1) The Act on the Election of Public Officials and the Prevention of Election Malpractices provides identically for the general election for members of the National Assembly and the reelection and vacancy election for members of the National Assembly in terms of the day of the week of the election and the time period available for voting. Therefore, it does not discriminate between voters and candidates at the general election and voters and candidates at the reelection and vacancy election, in these regards.

The government designates the election date for the general election as an official holiday. However, as indicated above, this is pursuant to the Regulation on Public Office's Official Holidays. Therefore, implementing the reelection and the vacancy election without designating the date therefor as an official holiday is not a question for the Act on the Election of Public Officials and the Prevention of Election Malpractices itself in this regard.

Furthermore, Article 41 of the Constitution provides that the

National Assembly shall be constituted by the Assemblypersons elected by general, equal, direct, and secret vote of citizens (Section 1), and that matters concerning the election of members of the National Assembly including the election district and the proportional representation system shall be regulated in statutes (Section 2).

It would be desirable, in light of the principle of representative democracy, to secure representativeness of the elected by promoting convenience of voting on the part of the voters and increasing the voting rate. However, matters concerning whether or not to designate the date of the reelection and vacancy election for members of the National Assembly as an official holiday and whether or not to extend time for voting until after the normal business hours fall within the meaning of such other 'matters concerning the election' duly delegated by the Constitution to the purview of the legislators' law making power.

The current provision of the Act on the Election of Public Officials and the Prevention of Election Malpractices that designates a Thursday as the election date and designates the time for voting identically for both the general election and the reelection and vacancy election for members of the National Assembly does not fall outside the scope of such legislative discretion of the legislators.

(2) The Constitution requires that the method of election be that of general, equal, direct, secret, and free vote. The representativeness of the election is sufficiently secured and realized under the current method that provides all voters with an opportunity to participate in voting without discrimination thereagainst, assesses the votes of the voters participating in the election at equal value, and determines the candidate who has obtained a majority of valid votes to be elected.

There can be found no clear constitutional provision or constitutional principle that requests an additional requirement of the minimum voting rate system in order to further secure the representativeness of the election.

If the minimum voting rate system were to be introduced, as argued by the complainants, in case the actual voting rate would turn out to be lower than the required minimum voting rate, voting should be repeated until the voting rate would reach the minimum voting rate, which might cause complication and waste of time and cost. If such methods as civil penalties or fine were to be adopted in order to prevent such situation thereby compelling the voters to vote, this would unjustly abridge the freedom to form opinions of the voters and, as the result, might infringe upon the right to vote, thereby violating the principle of free election.

(3) To conclude, the provisions of the Act on the Election of

Public Officials and the Prevention of Election Malpractices concerning the date and the time of the reelection and the vacancy election for members of the National Assembly are within the scope of the legislators' law making power and, as such, do not abridge the right to equality or equal vote or the right to participate in politics of the complainants who are the voters. The provision of the Act on the Election of Public Officials and the Prevention of Election Malpractices determining the election by a simple majority of the valid votes is not in violation of the essence of representativeness of the election or the principle of people's sovereignty.

C. Aftermath of the Case

The decision of the Constitutional Court above holding the provisions concerning the date and the time of reelection and vacancy elections for members of the National Assembly constitutional does not, as a matter of course, prohibit legislative measures adjusting the date or the time of election in order to increase the voting rate.

The Act on the Election of Public Officials and the Prevention of Election Malpractices, through its revision of March 12, 2004, adjusted the date and the time of election to address the problem of low voting rates at reelection and vacancy elections for members of the National Assembly. Considering the fact that the election date for reelection and vacancy elections is not designated as an official holiday unlike the general election, the date of election is now changed from a Thursday to a Saturday to accommodate more convenient exercise of voting rights. The time for voting is now extended by two hours so that the voting is open from six o'clock in the morning to eight o'clock in the afternoon, thus now two hours longer than in the general election.

14. *Restriction upon Broadcasting Business Operator's Announcement of Sponsors*
(15-2(B) KCCR 502, 2002Hun-Ba49, December 18, 2003)

Held, the provision of the Broadcasting Act that delegates the scope of announcement of sponsors permitted for broadcasting business operators to the presidential decree is not unconstitutional.

A. Background of the Case

Announcement of sponsors is the act of broadcasting business

operators by way of broadcasting the name or the trade name of the sponsors who, although not involved in the production of broadcasting materials, have provided costs, goods, services, human resources, or location directly or indirectly necessary for the production of broadcasting programs. Pursuant to the Broadcasting Act, broadcasting business operators may make such announcement of sponsors within the scope set forth by presidential decree (hereinafter the "provision at issue in this case"), and are subject to a civil penalty of up to ₩20,000,000 for violation of the above provision. The Enforcement Decree of the Broadcasting Act provides that announcement of sponsorship is disallowed for those sponsors who manufacture and sell products whose broadcasting advertisement is prohibited under pertinent law or the Rules of the Korean Broadcasting Commission. Advertisement concerning cigarettes and smoking is prohibited by the Rules of the Korean Broadcasting Commission.

The complainant, who is a private business operator, was subjected to a civil penalty imposed by the Korean Broadcasting Commission for violation of the provision at issue in this case, when it announced sponsorship by the Korea Tobacco and Ginseng Corporation (KT&G), a manufacturer and seller of cigarette products, in its broadcasting program. The complainant thereupon filed the constitutional complaint in this case.

B. Summary of the Decision

The Constitutional Court, by a majority of six out of nine Justices, held that the provision at issue in this case is not unconstitutional. The grounds therefor are stated in the following paragraphs.

(1) Summary of the Majority Opinion

(A) Whether the provision at issue in this case violates the principle against blanket delegation

Article 75 of the Constitution provides that the "President may issue presidential decrees concerning matters delegated to him or her by statutes with the scope specifically defined and also matter necessary to enforce statutes," thereby establishing the basis for statutory delegation and indicating the scope and the limit of statutory delegation. The meaning of the 'matters delegated to him or her by statutes with the scope specifically defined' is that the statute must specifically and clearly indicate basic factors as to the content and the scope to be regulated by the presidential decree so that anyone may expect from the statute itself general content of what is to be regulated in the presidential decree.

The announcement of sponsors, as in this case, is in essence a type of commercial advertisement, in that the sponsors provide financial resources for broadcasting programs in order to advertise the sponsors' name or trade name, image, or product, in the name of sponsorship. Therefore, such announcement of sponsors should be allowed within the scope permitted for broadcasting advertisement under the law. The legislative purpose of the provision at issue in this case is, on one hand, to guarantee the announcement of sponsors as a means to obtain financial resources indispensible for the operation of private broadcasting businesses. On the other hand, the legislative purpose of the provision at issue in this case is to promote the fairness and the public nature of broadcasting through establishment of a wholesome broadcasting culture and orders pertaining to advertisement and, further, to substantively guarantee the freedom of broadcasting, by forming a basis to regulate announcement of sponsors that falls outside the permissible scope, thereby preventing private interests of the sponsors from exacerbating the commercialization of the broadcasting programs or harming the freedom and independence of editing the broadcasting programs.

Therefore, in light of the essential nature and the legislative purpose of the announcement of sponsors, the internal permissible scope of the announcement of sponsors to be regulated by the presidential decree pursuant to the delegation of the provision at issue in this case is limited to the scope that may promote the fairness and the public nature of broadcasting through establishment of a wholesome broadcasting culture and orders pertaining to advertisement and may further contribute to a substantive guarantee of the freedom of broadcasting, within the permissible scope for broadcasting advertisement under the law. Therefore, it is sufficiently expectable that a broadcasting business operator, such as the complainant, may not receive sponsorship, or announce such sponsorship, from someone who manufactures and sells products or services whose broadcasting advertisement is prohibited, such as the former Korea Tobacco and Ginseng Corporation, who was the sponsor in this case.

Furthermore, the provision at issue in this case applies to broadcasting business operators, who are in a position to sufficiently expect generally the permissible scope of announcement of sponsors by way of full knowledge of the content of the relevant broadcasting laws forming and regulating the scope of the broadcasting business operations obtainable through the licensing or approval processes pertaining to their own broadcasting businesses under such broadcasting laws.

Whereas it is difficult to set forth in detail the permissible scope of announcement of sponsors in the statute in light of the technicality, expertise, diversity, and transformability of broadcasting, it is reason-

able to delegate such matters to the administrative legislation for an active and flexible reaction to the situations of the time. On the other hand, the provision at issue in this case permits the announcement of sponsors as part of the freedom to operate broadcasting businesses, yet, at the same time, has established its permissible scope. The subjective right of the broadcasting business operators is thus created by the establishment of the provision at issue in this case. In case of such formative and permissive provisions, the degree of requirement for specificity and clarity is relaxed compared with the provisions tending to directly abridge or restrict the basic rights of citizens. Here, the scope of the announcement of sponsors to be regulated by the presidential decree pursuant to the delegation of the provision at issue in this case is limited as indicated above. In this regard, the requirement of specific and clear delegation is satisfied.

Then, the provision at issue in this case is not in violation of the prohibition against blanket delegation, as it allows an expectation of the general scope permissible for the announcement of sponsors to be regulated by the presidential decree by the legislators' delegation.

(B) Whether the provision at issue in this case violates the basic rights of the complainant

The freedom of broadcasting, as with the freedom of the printed news media, has the nature of an institutional guarantee as an objective regulatory order that serves the function indispensible for unhindered formation of opinions or formation of public opinion, as well as the nature as a subjective right. The legislators may substantively regulate the organizational and procedural matters concerning establishment and operation of the broadcasting including the choice of broadcasting system and the status of the broadcasting business operators, with vast legislative formative discretion. Therefore, when the legislators permit privately owned and operated broadcasting businesses through formation of broadcasting law and legal system, private broadcasting business operators are guaranteed of the function of the broadcasting expected in such broadcasting law and legal system and are entitled to the private right and the constitutional protection within the scope given under the law thus formed.

The announcement of sponsors regulated by the provision at issue in this case is, by its nature, a type of broadcasting advertisement unique to the operation of the broadcasting business. As such, the regulation thereof is a matter that falls within the formation of the broadcasting business. That is, the provision at issue in this case does not concern restrictions upon the freedom of broadcasting; rather, it is a formative legislation that regulates the operation of the broadcasting business. As such, the provision at issue in this case guarantees the announcement of sponsors as a means to obtain financial

resources necessary for the operation of private broadcasting business on one hand, and, on the other hand, sets forth a regulation necessary to substantively guarantee the constitutional freedom of broadcasting by considering various interests of viewers and broadcasting service providers as well as broadcasting business operators through restrictions on its permissible scope. The provision at issue in this case does not restrict business activities to the extent that it denies profit of private broadcasting business, nor does it deprive private broadcasting business operators of decisions based on self-governance and autonomy. It, therefore, abides by constitutional principles. The provision at issue in this case further conforms to the Constitution as it has not deviated from the scope of legislative discretion.

Any of the subjective rights to operate broadcasting business, to broadcast, to advertise, and to expression of the broadcasting business operators concerning the announcement of sponsors are established solely by the formation by the provision at issue in this case and solely by the standard set forth thereby, therefore there is no implication or connotation of restriction or abridgement of basic rights, which, in turn, requires no additional constitutional justification.

(2) Summary of the Dissenting Opinion

The legislative purpose of the provision at issue in this case does not indicate any other perspectives that would allow an understanding of specific purpose or scope of the statutory delegation other than the one that 'intends to permit sponsorship necessary for the operation of the broadcasting business and the resulting announcement of sponsors within the scope regulated by presidential decree.' Therefore, from such legislative purpose, no guidance or standard to be observed by the executive branch in exercising the legislative authority as delegated may be derived. In addition, even if the announcement of sponsors is a type of commercial advertisement, announcement of sponsors is fundamentally different from advertisement in nature; therefore the announcement of sponsors should be regulated in a way different from the one applicable to broadcasting advertisement.

Furthermore, a civil penalty is imposed for the announcement of sponsors in violation of the provision at issue in this case. The provision at issue in this case, although it is not a criminal provision, thus incurs the effect of greatly restricting the basic rights. Therefore, a strict requirement for clarity of delegation next to the one applicable to criminal provisions should apply to the provision at issue in this case. In addition, the announcement of sponsors merely consists of announcing the name or the trade name of the sponsors upon reception of sponsorship and, likewise, does not often transform reflecting

changes in social phenomena or involve factual relationship in diverse forms. Therefore, there would be no great hardship in terms of legislative technique in determining the general standard for permission on the part of the legislators themselves.

Therefore, the provision at issue in this case is in violation of the principle of the prohibition against blanket delegation, and is therefore unconstitutional.

15. *Long-Term Constant Handcuffing*
(15-2(B) KCCR 562, 2001Hun-Ma163, December 18, 2003)

Held, the act of the warden of a prison handcuffing the complainant detained in the same prison at all times for the sum of three-hundred and ninety-two(392) days so that the complainant could not use either arm under metal and leather handcuffs is unconstitutional, as an infringement upon the freedom from bodily restraint and the human dignity of the complainant.

A. Background of the Case

The complainant, while detained in Gwangjoo Prison, was indicted for further offenses including robbery. During the trial therefor at Gwangjoo District Court, the complainant stabbed a prison officer on duty at the courtroom with a previously prepared weapon and fled. The complainant thereafter was arrested and confined in the same prison.

The warden of Gwangjoo Prison imposed a sanction of two months of disciplinary confinement upon the complainant pursuant to the Criminal Administration Act on the ground of above flight, during the period of which the complainant was confined in the sanction room and was banned from visits, reception of mail, telephone correspondence, writing, labor, exercise, newspaper, and reading. Further, the warden of Gwangjoo Prison ordered handcuffing of the complainant among such prohibitory devices used to prevent flight and self-harming of the detainees and to maintain safety and order within the prison. The complainant thereby had been forced to wear two metal handcuffs and one leather handcuff since the confinement to the disciplinary room, which continued until after the end of the disciplinary confinement period, and the complainant wore the above devices for three-hundred and ninety-two(392) consecutive days until transferred to another prison. The complainant thereupon filed the constitutional complaint in this case on the ground that the above use of prohibitory devices

violated such basic rights of the complainant as the human dignity and value and the freedom from bodily restraint.

B. Summary of the Decision

The Constitutional Court, in a unanimous opinion, held that the act of the Warden of Gwangjoo Prison using the prohibitory devices as indicated above is unconstitutional as infringing upon the basic rights of the complainant. The grounds therefor are stated in the following paragraphs.

(1) The detainee who is wearing the prohibitory device is greatly restrained in bodily movement of arms and legs and is subject to a high probability of harming physical and mental health. Therefore, prohibitory devices should be, more than anything else, used within the scope that could maintain the state of physical and mental health of the detainee and should be limitedly used to the minimum extent necessary to remove specific, clear, and imminent danger to the safety of the facility and the order of life under detention. Even in such circumstances, such devices should be used in a way that allows maintenance of basic dignity as a human being.

(2) Prohibitory devices are used based on the Criminal Administration Act in order to prevent flight, violence, uprising, or suicide of the detainee and to maintain safety and order of the prison, and include binding ropes, handcuffs, chains, and protective facial masks. Among these, the metal handcuffs the complainant was wearing had a closure mechanism in the shape of saw blades or biting clutch, fixing both arms when used on the wrists; the leather handcuff is a device fixing both arms to the waist using a waistband and wristbands, the usage of which can extremely limit the scope of movability of the wearer.

The complainant constantly wore a leather handcuff and two sets of metal handcuffs and lived in the state under which two arms were fixed to the body, for a period longer than one year, with the exception that such devices were temporarily removed for preparation of petition and other litigation documents, cleaning and laundry once or, if often, several times per week, for thirty minutes to two hours at each of such occasions. The complainant could not perform daily life in a normal fashion, as the complainant was forced to eat, excrete, and sleep under such state.

(3) The purpose of the act of using the subject prohibitory devices such as handcuffs by the respondent as the warden of the prison responsible for the maintenance of safety and order of the detention facility to prevent flight, suicide, and self-harming of the complainant

was legitimate, and the use of the subject prohibitory devices was an appropriate means to achieve such purpose. However, even if the use of prohibitory devices itself was an appropriate means to achieve legitimate purpose, the usage of subject prohibitory devices in this case can hardly be justified in light of the period of usage thereof and the degree of harm suffered by the complainant.

The use of prohibitory devices in this case lasted for over one year. Such prolonged use of prohibitory devices might probably have caused harm to the physical and mental health of the complainant. Also, the complainant was thereby forced, for a long period of time, to a life where even a minimum degree of dignity as a human being could hardly be maintained. Despite the complainant's previous history of flight and the danger of suicide and self-harming due to the complainant's mental instability and conflict, such history and propensity could not be a particular ground sufficient to justify the use of prohibitory devices to the extent that both arms were constantly and completely fixed to the body throughout the entire detention period for over one year. Prohibitory devices should be used when there is a specific need, to the minimum degree that is necessary. This equally applies to someone with a previous history of flight or a violent propensity. Furthermore, for use of prohibitory devices for a long-term prohibiting any meaningful or useful bodily movement upon someone not in transit but detained in a prison, there should be a more specific and clear grounds therefor such as the current possibility of flight or the impossibility of controlling violent conducts, than such vague grounds as previous history, propensity, or 'instability due to grave sentence.'

(4) Therefore, the use of prohibitory devices in this case excessively restricted the complainant's freedom of bodily movement beyond a necessary degree in excess of the limit on the restriction of basic right, abridged the complainant's freedom from bodily restraint by depriving the complainant of minimally humane life, and, further, violated the human dignity of the complainant.

C. Aftermath of the Case

Following this decision, the Ministry of Justice abolished the former rules concerning the use of prohibitory devices (the Ministry of Justice Directives), and newly enacted an ordinance of the Ministry of Justice, which provides the following: use of leather handcuffs on the detainee is prohibited, and, instead, belt-handcuffs are introduced; chains are prohibited; medical examination for the detainee under the restraint of prohibitory devices is reinforced; use of prohibitory devices may be temporarily suspended during meal or cleaning; protective facial

mask is redesigned in a modern fashion considering the convenience of the wearer; respective prisons should review daily the need for the use of prohibitory devices to reduce the harm caused by constant wearing of prohibitory devices; and, use of prohibitory devices for over seven consecutive days is subject to the control of an immediately higher authority.

16. *Excessive Audits*
(15-2(B) KCCR 609, 2001Hun-Ma754, December 18, 2003)

Held, audit following the previous one similarly conducted by an administrative authority including general environmental assessment over a particular business entity in fifty-five(55) occasions over a period of two years and ten months through which no particular act in violation of law was revealed, is not unconstitutionally excessive, although restrictive upon the complainant's freedom of business.

A. Background of the Case

Industry ○○, a partnership, which is the complainant in this case, is a corporation manufacturing and selling construction materials such as bricks and blocks by recycling industrial waste. The supervising authorities of the complainant including the head of the *Kun* of Buyeo (the respondent in this case) and its higher authorities (including the governor of South Choongcheong Province, the minister of the Ministry of Environment, and the chair of the Board of Audit and Inspection of Korea) conducted an audit over the complainant for a period of approximately two years and ten months, in fifty-five(55) occasions, including assessment of installation and operational situation of physical facilities, audit of various business records, and overall environmental assessment of the factory including sampling of materials , through which no particular act in violation of law was revealed. Yet, upon filing of a civil petition against the complainant, the respondent once again conducted an audit similar to the one that had previously been conducted. The complainant thereupon filed the constitutional complaint in this case on the ground that conducting the audit at issue in this case was unconstitutional as violative of the complainant's freedom of business.

B. Summary of the Decision

The Constitutional Court, by a majority of five out of nine Justices, rejected the constitutional complaint in this case on the ground that

the audit at issue in this case was not unconstitutional. The grounds therefor are stated in the following paragraphs.

(1) Summary of the Majority Opinion

(A) The Wastes Control Act provides that the minister of the Ministry of Environment, governors, mayors, and heads of *Ku/Shi/Kun* [1] may initiate and conduct audits. It, however, generally places no restrictions upon the specific content of the audit such as the frequency, time, and method of audit. As the result, there is a room for infringement upon the freedom of business of citizens through excessive audits in terms of frequency, time, and method thereof. However, the legislative purpose of the above provision of law is to achieve the public interest of preservation of the environment and creation of a pleasant living environment by guiding and supervising the appropriate treatment of waste products, and, as such, its legislative purpose is legitimate. In light of the significance of harm caused by environmental pollution and the importance of advance prevention, there is an acknowledgeable need for frequent supervision and diversified authorities for performance of audits, in order to secure effectiveness of the audits. Therefore, the Wastes Control Act itself, which served as the legal ground for the audits at issue in this case, maintains an appropriate balance between the legislative purpose and the means, and does not infringe upon the essential aspect of the constitutionally guaranteed freedom of business.

(B) Even an exercise of state authority based on constitutional and legitimate law, should such state authority be exercised arbitrarily and without reasonable ground beyond original legislative purpose, could be unlawful as deviation from and abuse of discretion and thus become an unconstitutional exercise of state authority.

1) In most of the occasions, audits in this case by various auditing authorities including the respondent were initiated primarily by civil petitions or appeals by residents. In light of the variety of the causes of environmental pollution, the significance of harm, and the difficulty of restoration thereof, prevention of environmental pollution cannot be sufficiently achieved by voluntary observance of relevant laws by individuals or private business entities seeking economic profits, nor can environmental pollution be effectively prevented by regular audits by supervising authorities. When civil petitions are filed concerning, for example, the harm caused by environmental pollution or there is otherwise concern for environmental pollution, spontaneous and frequent audits are necessary to prevent in advance environmental pollution

1) Types of autonomous local governments. (translator's note)

by waste products or avoid dissemination of harm caused thereby. Furthermore, supervision and control over environmentally injurious industries cannot be done by supervising authorities alone; rather, its purpose can be achieved only by relying upon multiple methods including the neighborhood vigil and supervision. Therefore, civil petitions of residents are an important part of the structure of supervision over the business entities involving waste products, and the state authorities including the respondent are legally obligated to act and notify upon filing of civil petitions by residents. The official record of this case indicates that the audits conducted by the respondent were conducted pursuant to the provisions of law to examine whether the complainant was in observance of relevant laws, and reveals no evidence or other materials showing that the respondent deviated from and abused its discretion as a means to conveniently resolve civil petitions beyond the original purposes.

2) The audits at issue in this case directly restricted business activities of the complainant, thereby causing hindrance in overall business activities of the complainant. However, such restraint did not reach the level unbearable by the complainant or mandating the closure of business activities. Rather, the complainant is legally obligated to respond to the audits conducted by the respondent for the sake of the important public interest of preservation of the environment, and the harm caused by performance of such obligation, up to a certain extent, is an inevitable burden that the complainant should bear.

The act of audit by the respondent at issue in this case, then, was an appropriate means to achieve the legitimate public interest of the preservation of the environment, and can otherwise not be deemed as an act that was a deviation from or an abuse of the discretion on the part of the respondent. Therefore, the audits at issue in this case were not in violation of the Constitution.

(2) Summary of the Dissenting Opinion

The Constitution mandates that any state authority, even if under the law, should be exercised in a fair manner in conformity with the legislative purpose and, also, should be exercised in a way least restrictive upon the holders of basic rights. The authority to audit pursuant to the Wastes Control Act should also be exercised, as a matter of course, in observance of such constitutional mandate. State authorities in this case including the respondent, however, initiated audits, guided by inertia, upon filing of a civil petition or appeal by residents regardless of the reliability of the civil petition or the interval from the immediately preceding audit, although previous audits had

not revealed any problems concerning the complainant. This is undeniably an unconstitutional exercise of state authority as an arbitrary exercise of authority to audit provided by law, under the name of law, solely as a solution to civil petitions, without considering the harm and the pain to be suffered by the complainant, by the state that is obligated to protect basic rights. In addition, should the state authority be swayed by civil petitions, fair execution of law may not be expected, and, ultimately, it may not be possible to realize public interests through important national policy or public interest industries.

Indiscreet and repeated audits of the same or similar kind only by different state authorities conducting audits compel nothing but the sacrifice of the complainant regardless of the obtainability of the purpose of the audit. Such audits demonstrate an exercise of state authority beyond constitutional limits and a typical example of exhibitory administration. The state should establish a solution thereto, by way of, for example, improvement of the comprehensive audit system, to prevent excessive or repeated audits, thereby promoting uniformity and effectiveness of the exercise of auditing authority yet minimizing the restriction upon basic rights.