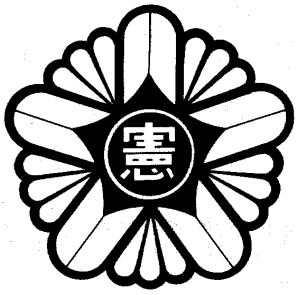
DECISIONS
OF
THE KOREAN CONSTITUTIONAL COURT
(2004)



THE CONSTITUTIONAL COURT OF KOREA

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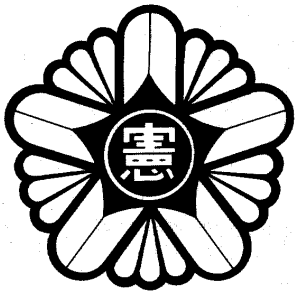

THE CONSTITUTIONAL COURT OF KOREA
2006

DECISIONS
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Preface

The publication of this volume is aimed at introducing to foreign readers important cases decided from January 1, 2004 to December 31, 2004 by the Korean Constitutional Court.

This volume contains 16 cases, 4 full opinions and 12 summaries.

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 Research Officer Park June-hee proofread the manuscript. The Research Officers of the Constitutional Court provided much support. I thank them all.

May 15, 2006

Seo Sang-hong
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.

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I. Full Opinions

1. *Case Concerning the Presidential Decision to Dispatch Korean National Armed Forces to Iraq*

(16-1 KCCR 601, 2003Hun-Ma814, April 29, 2004)

Dismissed, a constitutional complaint filed to challenge the decision of the President to dispatch the Korean National Armed Forces to Iraq.

Background of the Case

The President of the Republic of Korea decided on October 18, 2003, to dispatch the Korean National Armed Forces to Iraq, upon consulting the National Security Council that is in charge of the establishment of policies concerning national security. The complainant filed the constitutional complaint in the capacity of a Korean national, seeking to confirm the unconstitutionality of the above decision on the ground that, *inter alia*, the decision of the President to dispatch the Korean Armed Forces to Iraq was in violation of Article 5 of the Constitution of the Republic of Korea renouncing all aggressive wars.

Summary of the Decision

The Constitutional Court, in a unanimous opinion, dismissed the constitutional complaint in this case as lacking the legal prerequisites to a constitutional complaint. Four of the Justices issued a concurring opinion. The summary of the decision is as follows.

1. Majority Opinion of Five Justices

A decision to dispatch the National Armed Forces to a foreign jurisdiction is a complex and significant matter affecting the interest of the citizens and of the nation. As such, such a decision requires a determination of a highly political nature to be reached through the deliberation of various elements and circumstances including domestic and international political relations. Therefore, the judgment

upon the question of whether or not a decision to dispatch the Armed Forces, such as the one challenged in this case, is in violation of the Constitution, including the question of whether the war in Iraq is a war of the aggressive nature that is against the international norms, should be rendered by the President and the National Assembly, which are elected and composed directly by the constituents.

The dispatch of the Armed Forces at issue in this case was determined by the President upon considering various elements concerning national interest as well as the justifiability of the dispatch, and subsequently secured the procedural justification under the Constitution and the applicable statutes by obtaining the consent of the National Assembly following the deliberation and the decision of the State Council.

Then, as long as the decision to dispatch the Armed Forces at issue in this case which requires a determination of highly political nature was made in observance to the procedures required by the Constitution and the applicable statutes, deference should be given to the judgment of the President and the National Assembly. The judiciary, which may obtain no more than limited information by its own nature, should thus abstain from reviewing such a matter solely under the judicial standard. The constitutional complaint in this case is dismissed.

2. Concurring Opinion of Four Justices

The constitutional complaint system under the Constitution and the Constitutional Court Act is one of the remedies available to the individual citizens for the redress of their rights. Only those citizens whose constitutionally guaranteed fundamental right is presently and directly infringed by the exercise or non-exercise of the governmental power may file a constitutional complaint.

The complainant does not have a standing as he is not to be dispatched subject to the detachment decision at issue in this case, and, further, stands only in the capacity of a general citizen as he is neither presently nor scheduled to be in the military service. As such, although the complainant may have factual or indirect interest in the detachment decision at issue in this case, none of the constitutionally guaranteed fundamental rights of the complainant is presently or directly infringed by the decision.

Therefore, the complainant lacks self-relatedness to the detachment decision at issue in this case that is required as a legal prerequisite for the constitutional complaint. The constitutional

complaint in this case is dismissed.

Parties

Complainant

Lee O-Hoon

Counsel of Record, Appointed by the Court: Lee Young-Bok

Respondent

The President of the Republic of Korea

Holding

The constitutional complaint is dismissed.

Reasoning

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

A. Overview of the Case

The complainant, who is a Korean national, filed in such capacity a constitutional complaint on November 17, 2003, pursuant to Article 68, Section 1, of the Constitutional Court Act. The complainant claimed that the decision to dispatch the Korean National Armed Forces to Iraq was unconstitutional, on the ground that the decision of the government of the Republic of Korea on October 18, 2003 to dispatch the National Armed Forces to Iraq was in violation of Article 5 of the Constitution of the Republic of Korea renouncing all aggressive wars, and, further, that dispatching soldiers to Iraq in particular was in violation of the provisions of the Constitution pertaining to national security and the duty to defend the nation, as the rank and file in mandatory service, unlike career officers and deputies with regular payment of salaries, did not get paid for their service in any practical meaning.

B. Subject Matter of Review

(1) Subject Matter of Review

The constitutional complaint seeks to hold unconstitutional the 'decision of the National Security Council of October 18, 2003 to dispatch private soldiers to Iraq.' However, the National Security Council is no more than an advisory organization established under the Constitution and is not the entity that performs state action or exercises public authority such as detachment of the National Armed Forces at issue in this case. Even if the National Security Council did make such a decision or resolution, apart from the probability that such a decision would be presumed to be the one rendered by the President as the Commander-In-Chief, such a decision would be regarded as no more than internal decision-making within the state institution, such as the advice or suggestion of opinions to the President, and could not be deemed to be an act that would be legally binding or effective in itself.

The National Security Council is the advisory organization established by the Constitution for the President to consult in forming foreign policies and military policies concerning national security , and its resolution is not legally effective in itself as it is not binding. However, should the President have determined and publicly announced to dispatch the National Armed Forces with the advice and the resolution of the core international policy and military personnel, such a decision should be regarded as one rendered substantively by the President. Therefore, the subject matter of review in this case should be deemed to be the decision of the President to dispatch the National Armed Forces. This also conforms with the remedy the complainant seeks in this case.

Then, the subject matter of review in this case is the constitutionality of the 'decision of the President of October 18, 2003 to dispatch the National Armed Forces to Iraq(hereinafter referred to as the 'detachment decision at issue in this case').'

(2) Relevant Provisions of Law

The Constitution of the Republic of Korea(as revised on October 29, 1987)

Article 5, Section 1

Article 10

Article 60, Section 2

Article 74, Section 1

Article 91, Section 1

2. Summary of the Complainant's Argument and the Opinions of the Relevant Parties

A. Summary of the Argument of the Complainant

(1) Majority of the nations in the international community are in a position that the war in Iraq was waged by aggression. The decision at issue in this case to dispatch the Korean National Armed Forces to an aggressive war as such is in violation of Article 5, Section 1, of the Constitution of the Republic of Korea that "renounces all aggressive wars."

(2) It is necessary to dispatch soldiers rather than officers or deputies as the dispatch of the National Armed Forces has been determined. This will disturb the peace of all those who currently serve the military and are scheduled to serve, and the parents whose children are currently in service, as the Constitution obligates all citizens with a duty to defend the nation, thereby infringing their right to pursue happiness

B. Summary of the Opinions of the Relevant Institutions

(1) Answer of the President, as the Chair of the National Security Council

The subject matter of review as stated in the constitutional complaint in this case is the decision of the National Security Council of October 18, 2003 to dispatch additional Armed Forces to Iraq. However, the decision of the National Security Council is no more than the advice required for decision-making internal to the state institution, and is not in itself an act causing legal effect upon the rights and obligations of the citizens. Therefore, the constitutional complaint filed in this case is unjustified as it lacks the legal prerequisites, as it seeks review upon a matter other than the exercise of governmental power within the meaning of Article 68, Section 1, of the Constitutional Court Act. Should the detachment decision of the National Security Council be deemed as an exercise of governmental power, such a decision does not presently or directly infringe the fundamental right of the complainant himself, rendering the constitutional complaint in this case unjustified in this regard as well.

(2) Opinion of the Minister of the Ministry of Defense

(A) The decision of the President of October 18, 2003 to dispatch additional Armed Forces to Iraq, which is the subject matter of review in this case, constitutes no more than one step in the internal decision-making process of the state institution until the National Assembly consents to it, and does not in itself cause direct legal effect upon the citizens. Therefore, a constitutional complaint challenging such a decision is unjustified, lacking legal prerequisites.

(B) The detachment decision at issue in this case constitutes a so called executive prerogative action, for (i) the above detachment decision is an exercise of state power undertaken by the President in his capacity as the head of the state or the head of the executive branch endowed by the Constitution; (ii) the above detachment decision is a determination of highly political nature borne out of consideration of such various domestic and international political situations such as its influence upon national interest, relationship with the allies, an amicable settlement of the nuclear situation in North Korea, and the solidification of the South Korea-U.S. alliance; (iii) should the above detachment decision obtain the consent of the National Assembly, it would be inappropriate for the Constitutional Court, which is not on par with the legislative branch in terms of democratic legitimacy to determine the constitutionality of the above decision; and, (iv) should there be a decision holding the above decision unconstitutional, there is no legal method to enforce such a decision. As the judicial review over an executive prerogative action or political question should be restrained, the constitutional complaint in this case is unjustified.

(C) The complainant has only an indirect and factual interest upon the above detachment decision, and does not have a direct legal relation to the infringement of the fundamental right claimed by the complainant. As such, the constitutional complaint in this case is unjustified, as it lacks self-relatedness.

3. Determination of the Court

The Constitution endows the President with the authority to declare war and conclude peace along with the authority concerning the diplomatic relationship with foreign nations(Article 73), and also with the authority to command the Korean National Armed Forces pursuant to the Constitution and the applicable laws(Article 74, Section 1). At the same time, however, the Constitution prevents arbitrary warfare or dispatch of Armed Forces by mandating

prudence in exercising the prerogative of supreme command of military by the President, by requiring the consent of the National Assembly in case of the declaration of war or the dispatch of National Armed Forces(Article 60, Section 2).

A decision to dispatch Armed Forces to a foreign nation as at issue in this case is a complex and significant matter not only affecting the life and the bodily safety of the individual soldiers who are dispatched , but ultimately affecting the interest of the citizenry and the nation, including the status and the role of the nation in the international community, the nation's relationship with the allies, and the national security issues. As such, a decision to dispatch Armed Forces requires a resolution of highly political nature based upon the consideration of total circumstances concerning domestic and international political relations, and upon the presupposition of the future and the establishment of the goals concerning a desirable stance of the nation in the future and the direction in which the nation should move forward.

Therefore, it is desirable that such a decision is to be made by the institution representative of the constituents that can be held politically responsible toward the constituents therefor, by way of prudent decision-making through an expansive and extensive deliberation with the experts in the relevant fields. The Constitution in this vein endows such authority onto the President who is directly elected by the constituents and is responsible directly for the constituents, while authorizing the National Assembly to determine whether or not to consent to a decision to dispatch the Armed Forces, in order to ensure prudence in the President's exercise of such authority. Under the government structure of representative democracy adopted by the current Constitution, an utmost deference should be given to such a decision of highly political nature as this one rendered by the representative institutions of the President and the National Assembly.

Therefore, whether or not the dispatch decision at issue in this case is in violation of the Constitution, that is, whether such decision contributes to the world peace and human prosperity, whether such decision will ultimately benefit the interest of the citizenry and the nation by enhancing national security, and whether the war in Iraq is a war of aggression that is in violation of international norms, should be judged by the representative institutions of the President and the National Assembly, and may not be appropriately judged by this Court that is by nature in possession of no more than limited materials and information. Here, the judgment of this Court might not assertively be more right or correct than that of the President or the National Assembly; further

yet, the judgment of this Court may not securely receive public trust over its judgment upon this matter.

The record indicates that the dispatch at issue in this case was determined by the President after consultation with the National Security Council with respect to the nature and the size of the detachment and the duration of the station, based on the consideration not only of the justifiability of the dispatch but also of various elements concerning national interest such as the relationship with the allies for amicable settlement of the nuclear situation in North Korea, our national security, and the domestic and foreign political relationships; and subsequently that the dispatch decision at issue in this case was rendered with the consent of the National Assembly following the deliberation and the resolution of the State Council, thereby securing procedural justification pursuant to the Constitution and the relevant statutes.

The detachment decision at issue in this case is by its own nature a matter requiring a determination of highly political nature concerning national defense and diplomacy. As this decision has clearly been rendered following the procedures established by the Constitution and the relevant laws, the judgment of the President and the National Assembly upon this matter should be respected, while this Court should refrain from passing judgment upon this matter solely under judicial standards. Judicial self-restraint over the matters concerning diplomacy and national defense that require a resolution of highly political nature in other nations with a long tradition of democracy is also deemed to be in the very same vein. Although there may be concerns that such abstention of judicial review might leave arbitrary decisions intact, such decisions of the President and the National Assembly will ultimately be subject to the assessment and the judgment of the constituents through elections.

Then, as it is appropriate for this Court to refrain from judicially reviewing the detachment decision at issue in this case, with the exception that there is a concurring opinion of *Justices Yun Young-chul, Kim Hyo-jong, Kim Kyung-il and Song In-jun* as indicated below, this Court in a unanimous opinion of the rest of the Justices decides to dismiss the constitutional complaint in this case. It is so determined.

4. Concurring Opinion of Justices Yun Young-chul, Kim Hyo-jong, Kim Kyung-il and Song In-jun

We agree with the conclusion of the majority of the Court, however, respectfully disagree with the ground therefor, as stated in the following paragraphs.

The Constitution of the Republic of Korea expressly provides in Article 111, Section 1, Subdivision 5, for the adjudication upon constitutional complaint as one of the remedies for relief of the rights of the citizens, and, pursuant to this constitutional provision, the Constitutional Court Act in Article 68, Section 1, provides that any person whose constitutionally guaranteed fundamental right is infringed due to exercise or non-exercise of the governmental power may request the Constitutional Court an adjudication on constitutional complaint, thereby establishing the system therefor.

However, the person whose fundamental right is infringed within the meaning of this statutory provision is a person whose own fundamental right is presently and directly infringed due to the exercise or non-exercise of the governmental power, and does not include a third party solely with indirect or factual interest, pursuant to the decision of the legislators and the consistent position of this Court(*See*, for reference, 5-2 KCCR 127, 134, 89Hun-Ma123, July 29, 1993; 10-2 KCCR 563, 565, 97Hun-Ma404, September 30, 1998).

The complainant is, as the complainant himself admits, not a party concerned who will be dispatched due to the detachment decision at issue in this case, nor is the complainant presently or is he scheduled to be in military service. Then, while the complainant may have factual or indirect interest in the detachment decision at issue in this case in his capacity of a general citizen, his own constitutionally guaranteed fundamental rights, such as the right to pursue happiness as the complainant claims, is neither presently nor directly infringed due to the detachment decision at issue in this case.

We agree with the conclusion of the majority opinion that the constitutional complaint in this case should be dismissed. However, we base our conclusion on a different ground from the one of the majority in that the complainant lacks self-relatedness to the detachment decision at issue in this case which is a legal prerequisites for a constitutional complaint.

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

2. *Conscientious Objection of Military Service Case*

(16-2(A) KCCR 141, 2002Hun-Ka1, August 26, 2004)

Held, the provision of the Military Service Act that punishes a person who objects to mandatory military service on the ground that it is against his conscience, is not unconstitutional.

Background of the Case

The Military Service Act provides that a person who is drafted for military service yet fails to enroll or report, with no justifiable cause, shall be punished by imprisonment for up to six(6) months or fine of up to two million(2,000,000) Korean Won. The requesting petitioner is accused of violating the Military Service Act for failure to enroll for military service, while served with the notice of enlistment for active military service from the Commissioner of the Military Manpower Administration obligating him to enroll for active military service. The requesting party petitioned the court to request constitutional review, claiming that the Military Service Act applicable to the accused facts of the underlying case infringed the freedom of conscience of those who objected to military service on the ground of their religious conscience. The court thereupon accepted the petition and filed a request for constitutional review with the Constitutional Court.

Summary of the Decision

The Constitutional Court, in a 7:2 opinion, held the Military Service Act not unconstitutional. The summary of the reasoning is as follows:

1. Majority Opinion

The public interest to be achieved by the legal provisions at issue in this case is the very important one of 'national security,' which is the prerequisite for the existence of a nation and for all liberty and freedoms. When such an important public interest is at issue, an immoderate legislative experiment that might harm national security may not be demanded in order for a maximum guarantee of individual liberty and freedom. Considering the security

situation of Korea, the social demand concerning the equity of conscription, and the various restrictive elements that might accompany the adoption of the alternative military service system, the current situation does not assure that the adoption of the alternative military service system will not harm the important constitutional legal interest of national security. In order to adopt the alternative military service system, peaceful coexistence should be stabilized between South Korea and North Korea, and the incentives to evade military service should be eliminated through the improvement of the conditions of military service. Furthermore, a consensus among the members of the community that allowing alternative service still serves toward realizing the equality of the burdens in performing military duty and does not impair social unity should be formed, through the wide spread understanding and tolerance of the conscientious objectors within our society. The judgment of the legislators that the adoption of the alternative military service is presently a difficult task, where such prerequisites are yet to be satisfied, may not be deemed as conspicuously unreasonable or clearly wrong.

However, the legislators should seriously assess the possibility of eliminating the conflicting relationship between the legal interests of the freedom of conscience and the national security, and also the possibility of the coexistence of these two legal interests. Even if the legislators determine not to adopt the alternative military service system, the legislators should carefully deliberate whether to supplement the legislation so that the institution that implements the law may take measures to protect conscience through the application of law in a way favorable to conscience.

2. Dissenting Opinion of Two Justices

It is undeniable that the conscientious objection to military service is based upon the earnest hope and resolution with respect to the peaceful coexistence of the human race. The ideal toward peace is something that the human race has pursued and respected over a long period of time. In this sense, the objection to military service by the conscientious objectors should not be viewed as the avoidance of hardship of military service or the demand of protection as free-riders while failing to perform the basic obligation to the state. They have been sincerely pleading for alternative ways to service as they can in no way perform military duty to bear arms. The disadvantages they have to endure due to the criminal punishment for evasion of military service is immense. Also, in light of the gross number of our armed forces, the impact

upon the national defense power of the military service by the conscientious objectors on active duty to bear arms is not of the degree that merits a discussion of the decrease in combat capabilities thereby. The duty of national defense is not limited to the obligation to directly form a military force to bear arms by, for example, serving the military pursuant to the Military Service Act. Therefore, by imposing upon the conscientious objectors an obligation that is similar or higher thereto upon considering the time period and the burden of the military service on active duty, the equity in performing the duty of national defense may be restored.

3. Separate Concurring Opinion of One Justice

The faith of the petitioner is a religious one, thus the freedom of religion as well as the freedom of conscience is at issue. The Constitutional Court may not judge the legitimacy of the religious tenets, but it may only determine whether their effect upon society is acceptable in reality. Here, the objection to bear arms, which guarantees national security and the protection of national territory, is impermissible under our constitutional order. On the other hand, the external expression of the freedom of conscience that is not based upon religion is subject to restrictions, and the permissibility of the restriction depends upon whether the conscience has universal validity. Here, the objection to bear arms, which is to defend against unanticipated aggressions may hardly be deemed as conscience with universal validity. In addition, the recommendation of the majority opinion to assess alternative civilian service is inappropriate under the principle of separation of powers.

4. Separate Concurring Opinion of One Justice

It may hardly be deemed that the conscientious objectors have also given up the protection of themselves by free-riding on others' obligation to serve the military. Then, whether the conscience of those who object to the military service on the ground of conscience may fall within the meaning of conscience that is the object of constitutional protection is itself questionable, as such conscience is no more than a hope that is an antinomy, which lacks consistency and universality. Therefore, punishing those who object to military service on the ground of conscience is not beyond the external limit of justice. The recommendation for the legislators upon legislative matters with respect to the alternative military service system, which is irrelevant to the subject matter of review of this case, is not appropriate as it is beyond the limit of judicial review.

Aftermath of The Case

This decision, along with the Supreme Court decision of July 15, 2004 that affirmed the punishment of the conscientious objectors, brought an end to the legal debates over the conscientious objection. The conscientious objectors thereupon sought relief from the United Nations Human Rights Commission. On the other hand, a bill for the revision of the Military Service Act in order to legislate the alternative military service system was submitted to the National Assembly.

Parties

Requesting Court

Seoul Southern District Court

Petitioner

Lee ○ Soo

Counsel of Record: Saehanyang Law Firm
(Attorney In Charge: Oh Jong Kwon and 7 others)

Underlying Case

Seoul Southern District Court, 2001Kodan5819, Violation Of Military Service Act

Holding

Subdivision 1 of Section 1 of Article 88 of the Military Service Act(as revised on February 5, 1999 by Statute No. 5757) is not unconstitutional.

Reasoning

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

A. Overview of the Case

The requesting petitioner, who is the defendant in the underlying case, failed to enroll for military service until five(5) days after the enrollment date notwithstanding the notice of enlistment served by the Commissioner of the Military Manpower Administration for the conscription for military service on active duty. The charge against the requesting petitioner for violation of Subdivision 1 of Section 1 of Article 88 of the Military Service Act is currently pending at Seoul Southern District Court.

The requesting petitioner thereupon petitioned the underlying court to request constitutional review claiming that Subdivision 1 of Section 1 of Article 88 of the Military Service Act applicable to the accused facts of the underlying case infringed the freedom of conscience of those objecting to enlistment based on religious conscience(2002Choki54). The underlying court accepted this petition and filed a request for constitutional review with the Constitutional Court on January 29, 2002, with respect to the above provision.

B. Subject Matter of Review

The subject matter of review of this case is Subdivision 1 of Section 1 of Article 88 of the Military Service Act(as revised on February 5, 1999 by Statute No. 5757)(hereinafter referred to as the "statutory provision at issue in this case"). Its content is as follows:

> Article 88 of the *Military Service Act*(Evasion of Enlistment)
> Section 1. Persons who have received a notice of enlistment in the active service or a notice of call(including a notice of enlistment through recruitment), and fail to enlist in the army or to comply with the call, even after the expiration of the following report period from the date of enlistment or call, without any justifiable reason, shall be punished by imprisonment for not more than three years: Provided, That persons who have received a notice of check-up to provide the wartime labor call under Article 53(2), are absent from the check-up at the designated date and time, without justifiable reason, they shall be punished by imprisonment for not more than six months, or by a fine not exceeding two million won, or with penal detention.
> Subdivision 1. Five days in cases of enlistment in active service

2. Ground for Request of Constitutional Review of the Requesting Court and the Opinions of the Relevant Parties

A. Ground for Request of Constitutional Review of the Requesting Court

(1) In the case of so-called conscientious or religious objection to military service, that is, objection to performing the duty of military service on the ground of ideas or conscience or of religious tenets (hereinafter referred to as the 'conscientious objection to military service'), there is a clash between the basic duty of citizens under the Constitution of military service and the core fundamental right under the basic order of free democracy of the freedom of ideas, conscience and religion. Therefore, there is a need for harmony and coexistence of these two within the scope that does not impair the essential aspects of either of the two.

However, the current Military Service Act criminally punishes, without exception, the so-called conscientious objection to military service, that is, the objection to enlist on the ground of the decision of one's conscience. Thus, there is much room for possible infringement upon the freedom of ideas and conscience and the freedom of religion, and, further, the human dignity and values, the right to pursue happiness, and the right to equality, of those who conscientiously object to military service (hereinafter referred to as the 'conscientious objectors').

(2) Most of the advanced nations, including Germany and the United States, and the eastern European nations recognize the right of conscientious objection to military service as a right either under the constitution or statute, and the international organizations and institutions such as the United Nations Human Rights Commission] also recommend or obligate the member states to recognize such right. Our nation, however, does not recognize the right to object to military service on the ground of conscience (hereinafter referred to as the 'right to conscientious objection to military service') and imposes criminal punishment thereupon, which necessitates an assessment at the constitutional level.

B. Ground for Petitioning for Request of Constitutional Review of the Petitioner

(1) Article 10 of the Constitution guarantees human dignity and values, and Article 37, Section 1, of the Constitution provides that

the freedom and the rights of the citizens shall not be neglected even if not enumerated in the Constitution. Religion and conscience are indispensable elements in realizing dignity and values as humans, in the course of living limited lives while pursuing truth, goodness and beauty. Thus, restricting the objection to military service for the reasons of religious conscience by way of criminal punishment the is a violation of these provisions.

(2) Enforcing forceful conscription or imposing criminal punishment upon those who object to military service pursuant to their sincere religious conscience notwithstanding the prohibition of Article 11 of the Constitution against discriminatory treatment on the ground of religion, is in violation of the principle of equality. As female citizens and individuals with particular disease or physical or mental disability are excluded from the mandatory military service, excluding the conscientious objectors from the mandatory military service, as long as alternative service is mandated, falls within the scope of reasonable discrimination. Considering the disadvantages suffered by the conscientious objectors in the past, this must be considered from the perspective of affirmative action as well.

(3) The freedom of conscience and the freedom of religion are mandatory prerequisites for liberation from spiritual coercion, and the indispensable vitalizing elements of the basic order of free democracy that is rooted in the plurality of ideologies. Whereas coercing military service by imposing criminal sanctions fundamentally burdens conscience and religion, the state interest achieved through compulsory enforcement of conscription may be satisfied even without coercive conscription of the conscientious objectors. In such a case, therefore, it is desirable for the nation's legal order to concede. Forcefully enforcing the conscription of conscientious objectors by way of criminal sanctions in disregard thereof infringes the freedom of conscience.

(4) Even if the freedom to exercise religion, which is one aspect of the freedom of religion, may be restricted within the limits of Article 37, Section 2, of the Constitution, the standard of judgment upon the necessity of the restriction is the legal principle of clear and present danger or the prohibition of excessive restriction. As the number of conscientious objectors is extremely small, their conscientious objection does not pose a clear and present danger to national defense. Immediately imposing criminal punishment without providing the conscientious objectors with any opportunity of alternative military service is in violation of the prohibition of excessive restriction.

(5) The implementation of the alternative military service system may possibly cause a problem of the violation of the right

to equality or of mass production of those evading military service. This can be prevented by the implementation of the alternative military service system equivalent to the military service on active duty in terms of the duration of the service, the degree of hardships during the service, the life of the joint billet, and so forth. In light of the fact that the conscientious objectors constitute approximately 0.2% of the individuals who are conscripted, and of the transformation of the war today to scientific warfare, the implementation of the alternative military service system will be one mode of adequate utilization of human resources, rather than a threat to the national defense.

C. Opinion of the Chief Public Prosecutor of Seoul District Public Prosecutors' Office, South Branch

(1) The performance of the duty of military service is necessary and indispensable in order to guarantee of the right to peaceful living and the right to pursue happiness of the citizens. Should the right of conscientious objection to military service be recognized, the number of those voluntarily performing military service will decline, which will cause a serious threat to the existence of the nation. Therefore, non-recognition of such right of conscientious objection may not be deemed to infringe the right to pursue happiness.

(2) We should not treat identically those individuals with physical disabilities that objectively indicate the impossibility of military service on active duties and the conscientious objectors whom may not be objectively verified. Rather, allowing an exception to the duty to serve the military for the conscientious objectors would possibly violate the right to equality on the part of the overwhelming majority of the citizens. Thus, as far as it is not the case that the believers of a particular religion are singled out for the imposition of the duty of military service, non-exemption of the conscientious objectors is not in violation of the principle of equality.

(3) Although the freedom to exercise conscience may be deemed to include the conscientious objection to military service, as this is a right that may be restricted pursuant to Article 37, Section 2, of the Constitution, its external expression or realization is limited by the basic duty owed by the individuals to the state. Therefore, an individual may not refuse to perform the obligation to serve the military even if it is against one's own conscience, and there is no infringement upon the freedom of conscience.

(4) The conscience objectors whose objection is based on the religious beliefs refuse the act of war. Under the special security circumstance as in our nation, even if the duty of military service including military education is compulsorily enforced, as military education itself is not a coercion of the act of war, this may not be deemed as an infringement upon the freedom of religion of the individuals.

D. Opinion of the Minister of National Defense

(1) The conscientious objection to military service is not a constitutional right that is drawn as a matter of course from the freedom of conscience or the freedom of religion. Rather, it is no more than a statutory right that is recognized only by and upon the legislation of the legislators. Even assuming that the freedom to exercise conscience includes the right of conscientious objection to military service, this is a right that may be limited by and under Article 37, Section 2, of the Constitution. As suppressing the waging of war by the armed entity hostile to our nation, and ordering those conscripted to bear arms for national self-defense does not violate the right to life of others, the state's demanding those who have the belief in objecting war to bear the duty of military service during the time of peace is not a fundamental infringement of the freedom of conscience that threatens such belief.

(2) The alternative military service system asserted by the conscientious objectors is to exempt them from the basic military training, the eight(8)-week training during supplemental service and the wartime call-up mobilization duty in the entirety. This is a de facto exemption of military service that is different even from the supplemental service system under the current Military Service Act. Allowing alternative service as an option in a nation that adopts the mandatory conscription system is against the fundamental aspects of the mandatory conscription of uniformity and equality, which will result in discrimination against those who have already performed the duty of military service or the potential conscientious objectors within the military, as well as those who believe in other religions.

(3) In light of the reality of egregious service conditions in our Armed Forces, the adoption of the alternative military service system would cause exponential increase of those evading military service. Furthermore, as it would be difficult to assure the strictness of the evaluation procedure in selecting out conscientious objectors, the mandatory conscription system might collapse due to the damage to the uniformity and unity of the conscription system. Further yet, finding a task outside the military, equivalent to

military service on active duty in terms of hardships of service would not be easy. Therefore, the alternative military service system may not be deemed as a system harmonious with the guarantee of national security. Considering the fact that the duration of military service on active duty is currently two(2) years or up to two(2) years and four(4) months, neither limiting the prison term to the maximum of three(3) years for the crime of noncompliance with enlistment to guarantee the effectiveness of the duty of military service nor exempting from further military service upon sentencing of the actual prison term of one(1) year and a half or longer by enrollment in the second citizen service, is in violation of the principle of the prohibition against excessive restriction.

E. Opinion of the Commissioner of the Military Manpower Administration

The opinion of the Commissioner of the Military Manpower Administration is largely the same as the opinion of the Minister of National Defense.

3. Determination of the Court

A. Constitutional Meaning and Scope of the Protection of the Freedom of Conscience

(1) Article 19 of the Constitution provides that "All citizens shall enjoy freedom of conscience.", thereby guaranteeing the freedom of conscience as a basic right of the citizens. When the legal order of the nation and conscience as the internal and moral decision of the individuals collide, the Constitution thereby mandates that the state shall protect the conscience of the individuals. Collision between the legal order of the nation and the conscience of the individuals would always occur, should a minority of the citizens refuse, by asserting the freedom of conscience, to obey the legal order determined by the majority.

Conscience that is protected by the Constitution is an acute and concrete conscience that is the powerful and earnest voice of one's heart, the failure to realize which in action upon judging right and wrong of a matter would destroy one's existential value as a person (9-1 KCCR 245, 263, 96Hun-Ga11, March 27, 1997; 13-2 KCCR 174, 203, 99Hun-Ba92 and others, August 30, 2001; 14-1 KCCR 351, 363, 98Hun-Ma425 and others, April 25, 2002). That is, the 'decisions from the conscience' mean all earnest decisions concerning ethics

pursuant to one's own standards of right and wrong, acting against which is not possible without a serious conflict under the conscience, as the individual takes such decisions as something that binds her or him that should be obeyed unconditionally.

Under the system of basic rights of our Constitution that values the maintenance of human dignity and the unfettered expression of personality of the individuals the most, the function of the freedom of conscience lies in maintaining the homogeneity and identity of individual personality.

(2) The 'conscience' that the 'freedom of conscience' intends to protect is not synonymous to the thoughts and the values of the democratic majority; rather, it is something that is extremely subjective in an individualistic aspect. The conscience may not be judged by its object, content or motivation. Particularly, the standpoint of whether the decisions from the conscience are reasonable and rational, or appropriate, or consonant to the legal order, social norm or ethical rules may not serve as the standard that judges the existence of the conscience.

In general, as the democratic majority forms the legal order and the social order pursuant to its political will and ethical standard, it is an exception for such majority to have conflicts of conscience with the legal order of the nation or the ethical rules of the society. What becomes an issue in reality under the freedom of conscience is not the conscience of the majority of society, but the conscience of the minority intending to deviate from the legal order of the nation or the ethical rules of the society. Therefore, regardless of which religious viewpoint or view of the world or other value system forms the basis of the conscientious decisions, the conscientious decisions of all substance are protected by the freedom of conscience.

(3) The freedom of conscience under Article 19 of the Constitution is largely divided into the internal realm of the formation of the conscience and the external realm of the exercise of the conscience that has been formed. As such, in its specific objects of protection as well, it is divided into the 'freedom to form the conscience,' which is the freedom internal and inherent to one's heart, and the 'freedom to exercise the conscience,' which is to express and realize the conscientious decisions. The freedom to form the conscience is the freedom to form one's conscience and to make a decision under the conscience within the realm internal to one's heart, without unjust interference or coercion from outside. The freedom to exercise the conscience is the freedom to express the conscience thus formed towards the outside world and to establish life pursuant to the conscience, including, more specifically, the

freedom to express the conscience or not to be forced to express the conscience (the freedom to express the conscience), the freedom not to be forced to act against the conscience (the freedom to exercise the conscience by inaction), and the freedom to act pursuant to the conscience (the freedom to exercise the conscience by action).

Among the freedom of conscience, the freedom to form the conscience is an absolutely protected basic right as long as it stays within one's heart, while the freedom to exercise the conscience that is the right to externally express and realize the conscientious decisions is a relative freedom that may be restricted by the statute as it may violate the legal order or infringe upon the right of others (10-2 KCCR 159, 166, 96Hun-Ba35, July 16, 1998).

B. Basic Right Limited by the Statutory Provision at Issue in this Case

Article 39 of the Constitution provides for the duty of national defense as the obligation of the citizens, and Article 3 of the Military Service Act that specifies the constitutional duty of national defense imposes the duty of military service upon all male citizens of the Republic of Korea. The statutory provision at issue in this case provides for punishing those who notwithstanding the constriction fail to enroll until five(5) days past the date of enrollment without justifiable cause thereby imposing the sanction of criminal punishment upon those who evade military service, in order to compel the performance of the obligation to military service. The statutory provision at issue in this case imposes criminal punishment only upon those who fail to enroll 'without justifiable cause,' however, as the refusal to perform the duty of military service on the ground of conscientious resolution does not fall within the meaning of 'justifiable cause' here(refer to the Supreme Court Decision 2004Do2965, July 15, 2004), the conscientious objectors are criminally punished under the statutory provision at issue in this case as in the general case of those evading military service.

Should one's earnest conscience opposing war and the resulting human killing and injuring be formed pursuant to one's religious belief, values and view toward the world, the decision that one 'may not perform the duty of military service' is a powerful and earnest decision of ethics, acting against which is not possible without conflict with conscience. The circumstance that compels the performance of the duty of military service causes a significantly crucial state with respect to the ethical identity of the individual. Endowing the individual with a possibility of following the voice of

one's conscience in the case of the clash of two contradicting orders, the 'order of the conscience' and the 'order of the legal order', is the exemplary domain that the freedom of conscience intends to protect.

The statutory provision at issue in this case compels the conscientious objectors to act against their conscience by way of criminal punishment. Therefore, it is a provision that restricts the 'freedom not to be forced by the state to act against one's conscience' or the 'freedom not to perform legal obligation that is against one's conscience,' that is, the right to exercise the conscience by inaction.

On the other hand, as Article 20, Section 1, of the Constitution separately protects the freedom of religion, should the conscientious objection to military service be based upon religious doctrines or religious beliefs, the statutory provision at issue in this case restricts the freedom of religion of the conscientious objectors as well. However, as the freedom of conscience is a comprehensive fundamental right that includes non-religious conscience as well as conscience based upon religious beliefs, the focus will be centered upon the freedom of conscience in the following paragraphs.

C. Legislative Purpose of the Statutory Provision at Issue in this Case

The Constitution provides in Section 2 of Article 5 that the 'guarantee of national security' and the defense of the national territory are the sacred duties of the national armed forces. The Constitution further provides in Section 1 of Article 39 for the duty of national defense as an important means to realize the guarantee of national security. In addition, the Constitution indicates in Section 2 of Article 37 that all freedoms of the citizens may be restricted for the guarantee of national security, and regulates the 'guarantee of the national security' as an important constitutional legal interest by, for example, endowing the President with the national emergency power for the guarantee of national security in Section 1 of Article 76, and mandating the establishment of the National Security Council in Article 91 as an advisory institution for the President.

The 'guarantee of national security' is an important legal interest recognized by the Constitution regardless of the existence of express provisions therefor in the Constitution, as an indispensable prerequisite for the existence of the nation, preservation of the national territory, protection of the life and

safety of the citizens, and also as a basic prerequisite for the exercise of the freedom by all citizens. The duty of national defense is an important means adopted by the Constitution in order to realize the guarantee of national security. The statutory provision at issue in this case fulfills and compels the performance of the 'duty to national defense,' which is an obligation of the citizens, thereby ensuring to secure the military resources and balance the burden of military service under the military service system based upon mandatory conscription, and, ultimately, realizing the constitutional legal interest of the guarantee of national security.

D. Issue of Protection of Freedom to Exercise Conscience

(1) Freedom to Exercise Conscience as Part of the Constitutional Order

(A) As the freedom of conscience protects the freedom to realize the conscience in the external world as well as the freedom to form the conscience that occurs in the internal world of individuals, the freedom of conscience may collide with the legal order or the legal interest of others, which inevitably subjects it to restrictions. Even if not a statute that intentionally restricts the freedom of conscience, any statute applied generally to the entire citizenry always has intrinsically the possibility to collide with the conscience of some of the citizens.

The freedom of conscience is a freedom that is protected as the constitutional basic right, and constitutes part of the order of positive law. The freedom that is a basic right is a legal liberty, and the legal liberty may be guaranteed neither absolutely nor limitlessly. The existence of the nation and the legal order are the basic prerequisites for the exercise of the freedom by all constituents. It is the limit for all basic rights as a principle that the exercise of the basic right should be undertaken within the scope that enables the common life with others in the national community and does not endanger the legal order of the nation. To the freedom of conscience as well, as it has been established within the constitutional order, such a limit binding all constitutional legal interests readily applies.

Therefore, the guarantee of the freedom of conscience does not mean that individuals are endowed with the right to refuse to obey the legal order on the ground of their conscience. Considering that there is a possibility that all individuals might refuse to obey a statute that is constitutional claiming the freedom of conscience, and that all conscience is protected by the freedom of conscience

regardless of its substance as the conscience of the individuals is an extremely subjective phenomenon which includes the conscience that is unreasonable, unethical or antisocial, the position that the 'legal order of the nation is valid only as long as it is not against the conscience of the individuals' means the disintegration of the legal order and, further, the disintegration of the national community. However, no freedom that is a fundamental right may serve as the ground for disintegrating the state and the legal order, therefore, such interpretation does not stand.

(B) Therefore, in this case, the freedom of conscience of Article 19 of the Constitution does not endow the individuals with the right to refuse the performance of the duty of military service. The freedom of conscience is no more than the right to request the state to take into account and protect the individual conscience if possible, and is not the right to refuse to perform legal obligations on the ground of conscience or the right to request the provision of alternative obligations. Therefore, the right to request alternative military service may not be drawn from the freedom of conscience. Our Constitution does not have any normative expression therein that recognizes the unilateral superiority of the freedom of conscience, with respect to the duty of military service. The right to refuse the performance of the duty of military service on the ground of conscience may be recognized only when the Constitution itself expressly provides therefor.

(2) Unique Characteristics of Balancing of Legal Interests in the Case of Duty to National Defense and the Freedom to Exercise Conscience

The issue of guaranteeing the freedom to exercise the conscience is the question of harmonizing the 'freedom of conscience' and the 'constitutional legal interest' or 'legal order of the state' that the restriction of the freedom of conscience intends to achieve, and, the question of balancing between these two legal interests.

However, the freedom to exercise the conscience takes a special form in the balancing process between the legal interests. The general process of scrutiny of the proportionality principle that determines to which extent a fundamental right should concede on the ground of public interests through examination of the appropriateness of the means and the least restrictive means does not apply as unchanged to the freedom of conscience. In the case of the freedom of conscience, balancing the freedom of conscience against the public interest under the principle of proportionality and

rendering the conscience relative in order for the realization of the public interest is not compatible with the essence of the freedom of conscience. Should a conscientious resolution be diminished to a the state that is compatible with the public interest or be distorted and refracted in its substance in the process of balancing of the legal interests, this is not 'conscience' any more. In this case, exempting those objecting to the duty of military service on the ground of religious conscience from one half of the duty of military service or exempting those from the obligation of military service on the condition that the obligation to military service shall be imposed only at the time of emergency, may not be a solution that respects the conscience of the conscientious objectors.

Therefore, in the case of the freedom of conscience, it is not to realize both of the legal interests at the same time by reaching the state of harmony and balance through balancing between the freedom of conscience and the public interest; instead, there is only the choice between the 'freedom of conscience' and the 'public interest,' that is, the question of whether an action or inaction against conscience is 'compelled or not compelled' by the legal order.

E. Whether the Statutory Provision at Issue in this Case Infringes the Freedom to Exercise Conscience

(1) When the individuals claim that their freedom to exercise conscience is infringed by a statute, it is the case where the statute does not give a special consideration to their unique situation of ethical conflict while imposing a legal obligation that is applicable to all citizens, that is, where the individuals challenge the absence of the exceptions applicable to them within the statute such as the provision that exempts the obligation or the provision that provides for alternative obligations, which takes the situation of conscientious conflicts of such individuals into account.

The question of whether the state guarantees the freedom to exercise conscience is the question of whether the legal community possesses the possibility of relieving the conscientious conflicts through a means respectful of the conscience of the individuals. Eventually, the question of the guarantee of the freedom to exercise conscience is the question of 'how the state gives consideration to the minority of its citizens who think differently and intend to act differently from the decisions of the majority of the democratic community,' the question of national and societal tolerance towards the minority, and the question of 'whether the state is capable of presenting an alternative that is protective of the conscience of the

individuals while maintaining its existence and legal order.'

The freedom of conscience is a basic right that imposes an obligation to establish the legal order so that the freedom of conscience may be guaranteed as much as possible, primarily upon the legislators. When the legal obligation and the conscience of the individuals collide, if the conscientious conflict may be removed by presenting an alternative such as an exemption of the legal obligation or other possible substitutes for the legal obligation without endangering legal order or the realization of the public interest intended to be achieved through the imposition of the legal obligation, then the legislators are obligated to minimize the possibility of collision between the conscience of the individuals and the legal order of the nation by way of such means.

(2) Therefore, the question of whether the statutory provision at issue in this case infringes the freedom of conscience is a question of judging whether the 'public interest intended to be achieved by the imposition of the duty of military service may still be achieved notwithstanding the exception provided by the legislators in consideration of the freedom of conscience.' If the legislators do not present an alternative while an alternative may be presented without obstructing the public interest or the legal order, this may be unconstitutional as a unilateral compulsion of sacrifice upon the freedom of conscience.

However, exempting without imposing any of the alternative obligations those who claim the freedom of conscience from the obligation that is applicable to all citizens is equivalent to the endowment of a privilege that is not permissible under the Constitution. Therefore, if the freedom of conscience requests an exception from the obligation of the citizens, the state should offset such an unequal element through the imposition of the alternative obligations if possible, in order that the national tolerance and the permission of exceptions does not become a privilege of the few.

With respect to the duty of military service, as a means to take the conscience of the individuals into account while removing as much as possible the unequal element in imposing the obligation, that is, as a solution to harmonize the conflicting legal interests of the conscience and the obligation to military service, we may consider an alternative civil service system (hereinafter referred to as the 'alternative service system').

The alternative service system refers to a system under which the conscientious objectors provide service for the public interest in, for example, the state institutions, the public organizations and the social welfare facilities, as an alternative to the military service.

Currently, many of the nations have actually adopted this system on the constitutional or statutory basis, thereby resolving the situation of the conflict between the conscience and the obligation to military service.

(3) Then, the constitutionality of the statutory provision at issue in this case is ultimately the question of judging 'whether the legislators may still effectively achieve the public interest of national security while permitting an exception to the duty of military service through the adoption of an alternative service system.'

In judging whether or not to adopt an alternative service system, the legislators should comprehensively take into account the overall state of security of the nation, the combat capability of the nation, the demand of military resources, the quantity and the quality of the human resources subject to the conscription, the expected change in the combat capability in time of adoption of an alternative service system, the meaning and the significance of the duty of military service under the national security situation of Korea, the national and the social demand for the equal allocation of the performance of the duty of military service, the actual condition of the military service, and so forth. With respect to whether the adoption of an alternative service system will impede upon the achievement of the important public interest of national security under our current security situation, the following different assessments and judgments are possible.

(A) On one hand, an optimistic prediction can be made as follows.

First of all, the proportion of the conscientious objectors to the overall number of individuals under conscription is insignificant. In addition, the importance of human military resources has diminished in comparison, as the current-day national defense power does not depend solely upon the combat capability, and modern warfare takes on the aspect of the information warfare and the scientific warfare.

Although a question of equality in the duty of military service will be at stake if an exception to the duty of military service is to be permitted, the adoption of an alternative service system is feasible in reality as an alternative solution to simultaneously resolve the problems of the protection of the conscience and the equality, as has already been implemented in many nations for a long time.

If an alternative service system is operated in a way the burden of the alternative service is equivalent to that of the military service on active duty in totality of the duration of the service, the

degree of the hardships and so forth, then an equal implementation of the duty of military service can be secured and the problem of the evasion of military service by abusing this system will also be resolved. In addition, as the experience in many of other nations that have adopted the alternative service systems confirms, because it is possible to select true conscientious objectors through strict preliminary screening process and post management concerning whether or not the objection to military service is based upon the conscientious decision, the national defense power will be maintained unharmed even if an alternative solution of the alternative service system is to be adopted.

(B) On the other hand, however, a pessimistic prediction can be made as follows.

Our nation is the only divided nation in the world that is under the state of truce, and the South and the North are still in a hostile opposition state based upon extremely strong military powers accumulated through the arms races in the past. Under this unique security situation, the duty of military service and the principle of equality in allocating the burden of military service have an important meaning that is incomparable to other nations. Although it is true that there has been a change in the concept of national defense and the aspect of the modern warfare, the proportion of the human military resources in the national defense power may still not be neglected, and the natural decrease in the military resources due to the decrease of birth-rate of these days should also be taken into consideration.

Considering the tough conditions of military service on active duty in our nation, it is not easy to secure the equivalence of the burdens through the alternative service, and, there is a danger that the attempt to realize the equivalence of the burdens might render the alternative service into a measure punishing the realization of one's conscience.

In addition, although the proportion of the conscientious objectors to the overall number of individuals subject to conscription is not great at the current stage, we may not rule out the possibility that the preventive effect of deterring the evasion of military service by way of the criminal sanctions might abruptly be dissipated by the adoption of the alternative service system. In light of the past experience of our society that corruption and the trend to evade military service continued incessantly, it is too much of an optimism to expect to completely prevent solely by institutional preventive measures, the intentional evasion of military service by

abusing the alternative service system. In our society where the social demand for the equality in the burden of military service is strong and absolute, should the equality in performing the obligation become a social issue due to the permission of an exception to the duty of military service, the adoption of the alternative service system might cause a serious harm to the capacity of the nation as a whole by crucially injuring the social unification and might further destabilize the backbone of the entire military service system based upon the mandatory conscription of all citizens.

(4) Should the constitutionality of a statute restrictive of the basic right depend upon the legal effect that will be materialized in the future as in this case, the question lies in to which extent the Constitutional Court may review the predictive legislative judgment with respect to this and to which degree the Constitutional Court may substitute its own judgment on estimation for the uncertain predictive judgment of the legislators.

(A) The right of the legislators to make predictive judgment varies depending upon the significance of the public interest intended to be achieved through the statute, the meaning of the legal interest that is infringed, the characteristic of the area of regulation, and the degree of the realistic possibility to make a predictive judgment. The more significant the public interest intended to be achieved is, and the greater the influence on others and the national community the individuals exert through the exercise of the basic right is, that is, the greater the social relevance of the exercise of the basic right is, the broader formative power is given to the legislators. Therefore, in this case, the only thing that is subject to review is whether the predictive judgment of the legislators' or assessment may clearly be refuted or is plainly wrong. To this extent, the judgment with respect to which means will be employed to realize the public interest should be left to the legislators under the legislative authority for formation(14-2 KCCR 410, 432-433, 99Hun-Ba76 and others, October 31, 2002).

(B) Returning to this case, although the freedom of conscience is an extremely important basic right in the expression of the individual personality and the realization of the human dignity, considering that the essence of the freedom of conscience is not a right to refuse to obey the legal order but, instead, a right to request the state to protect within the scope that the national community may tolerate the conscience by taking the situation of conscientious conflict of the individuals into account, and, at the same time, the corresponding obligation of the state, the legislators have a wide scope of authority for formation with respect to whether the obligation to protect the conscience derived from the

freedom of conscience should be performed and its method therefor.

On the other hand, the public interest that the statutory provision at issue in this case intends to achieve is a very important public interest of 'national security,' which is the prerequisite for the existence of the nation and for all liberties. When such an important public interest is at issue, we may not request an immoderate legislative experiment that might harm national security in order for the maximum guarantee of the liberty of the individuals. Furthermore, as the realization of one's conscience by way of refusing to perform the duty of military service is requesting an exception from the duty of military service that is applicable to all, judging from the perspective of equal allocation of the burden of the duty of military service, the pervasive effect over others and the entire social community will be great, thus a strong social relevance of the exercise of the basic right is recognized.

Therefore, from this perspective, the judgment of 'whether the failure to adopt an alternative service system by the state is in violation of the freedom of conscience as the public interest of national security may still be effectively achieved notwithstanding the adoption of the alternative service system' should be limited to the test of 'whether the legislative judgment is conspicuously wrong.'

(5) As a matter of principle, determining upon the important policies concerning national security is the task for the legislators. The judgment of the legislators upon the security situation of the nation should be respected, and the legislators have a wide scope of freedom of formation in specifying the constitutionally imposed duty of national defense in the form of the statute based upon such judgment of the reality.

Considering the security situation of Korea, the social demand for equality in conscription, and the various restrictive elements that may accompany the adoption of the alternative service system, the current situation does not assure that the adoption of the alternative service system will not harm the important constitutional legal interest of national security. In order for the adoption of the alternative service system, the peaceful coexistence between South Korea and North Koreas should be established, the incentives for evading military service should be eliminated through the improvement of the condition of the military service, and, further, a consensus should be formed among the members of the social community that permitting the alternative service will harm neither the realization of equality in the burden of performing the duty of military service nor the social unity, through the wide spread

understanding and tolerance of the conscientious objectors. At the current stage where such prerequisites are yet to be satisfied, the legislative judgment that the time is not ripe for the adoption of an alternative service system, may not be deemed to be clearly unreasonable or plainly wrong.

When there is a collision between the obligation to military service and the freedom of conscience, although the legislators are obligated to take the freedom of conscience into account as much as possible within the scope that is tolerable by the state in the process of balancing the legal interests, should the legislators fail to provide the possibility of the alternative service that will be substituted for the military service based on the judgment as the result of the balancing of the legal interests, that the freedom of conscience cannot be possibly realized without endangering the public interest of national security, such decision of the legislators may be justified in light of the importance of the public interest of national security and, as such, is not in violation of the legislators' 'obligation to protect the freedom of conscience.' Then, the statutory provision at issue in this case does not infringe the freedom of conscience or the freedom of religion of the conscientious objectors.

F. Whether the Statutory Provision at Issue in this Case is in Violation of the Principle of Equality

The statutory provision at issue in this case punishes the conscientious objectors rejecting military service on the ground that is fundamentally different from that of the rest of those evading the military service, by treating the conscientious objectors identically to the rest of those objecting to military service. Thus, its violation of the principle of equality is possibly at issue. This issue, however, is eventually dependent on the judgment upon 'whether the non-recognition of an exception to the military service for the conscientious objectors is in violation of the Constitution.' Therefore, as examined above, the absence of the exception for the conscientious objectors in applying the statutory provision at issue in this case is not in violation of the principle of equality.

The petitioner claims that punishing those who object to the military service on the ground of religious conscience is discriminatory treatment on the religious ground in violation of Article 11 of the Constitution. However, the statutory provision at issue in this case uniformly regulates regardless of whether the objection to the military service is based on conscience or not, or whether the conscience is a religious one or non-religious one, and

does not discriminate on the ground of religion.

The petitioner further claims the violation of the principle of equality asserting that the impossibility of performing military service for the conscientious objectors is not different from the case of those with physical, mental or psychological disabilities or diseases, and comparing this case with the service as supplemental force or as personnel for public interest services by those with special talents in the areas of arts and athletics. However, there exists a fundamental difference between the conscientious objectors and those compared with by the petitioner from the perspective of military service. Therefore, a different treatment based on this corresponding difference is not in violation of the principle of equality.

G. Recommendation to the Legislators

(1) The issue of conscientious objectors has now become a major issue of the national community in our nation as well. The phenomenon of rejecting military service on the ground of religious conscience has existed since a long time ago primarily among the Jehovah's Witnesses, and, recently, this phenomenon has spread among the buddhists and the pacifists. Those who evade the military service are not only criminally punished under the statutory provision at issue in this case, but also subjected to the significant social disadvantages such as restrictions on becoming public officials or serving as directors or officers and the prohibition on obtaining permissions, approvals and licenses for various government-licensed businesses (Article 76 of the Military Service Act), and the deprivation of the qualification to serve as public officials for a considerable period of time even after the criminal punishment (Article 33 of the State Public Officials Act).

The number of the conscientious objectors still remains to be small. However, as the legislators have had so far a sufficient opportunity and time to recognize and affirm that the enforcement of the statutory provision at issue in this case collectively causes the situation of conscientious conflict, we are in the opinion that now is the time to seek a national solution of our own through a serious social discussion with respect to how to take the conscientious objectors into account, instead of neglecting and leaving as untouched the situation of suffering and conflict of the conscientious objectors.

In the international dimension as well, since 1967, the resolution for the recognition of the conscientious objection to military service has been repeatedly adopted at the European Union and the United

Nations. Further, many of the nations have already resolved this problem through legislation, as the survey conducted by the United Nations in 1997 indicates that, among those ninety-three(93) nations implementing the mandatory conscription system, only less than a half of the nations do not recognize at all the conscientious objection to military service.

(2) The legislators are obligated under the freedom of conscience of Article 19 of the Constitution to mitigate the conscientious conflict by presenting the alternatives within the scope of not impeding the public interest or the legal order, such as a different possibility as a substitute for the legal obligation, or an individual exemption of the legal obligation. If such possibility may not be provided, the legislators then should at least look for the room for the protection of the freedom of conscience by permitting the diminution or exemption of the punishment or sanction imposed for the violation of the obligation.

Therefore, the legislators should earnestly assess whether there is a solution for eliminating the conflict relationship between the legal interests of the freedom of conscience and the national security and for enabling the coexistence of these two legal interests, whether there is an alternative to protect the conscience of the conscientious objectors while securing the realization of the public interest of national security, and whether our society is now mature enough to understand and tolerate the conscientious objectors. Even if the legislators decide not to adopt an alternative service system, the legislators should seriously consider whether to supplement the legislation in the direction that the institutions implementing the law may take measures protecting the conscience through the conscience-favoring application of the law.

4. Conclusion

Therefore, it is hereby held that the statutory provision at issue in this case is not in violation of the Constitution.

This decision is by a unanimous decision of the participating Justices, with the exception that there are a dissenting opinion of *Justices Kim kyung-il* and *Jeon Hyo-sook* as in Paragraph 5 below, a separate concurring opinion of *Justice Kwon Seong* as in Paragraph 6 below, and a separate concurring opinion of *Justice Lee Sang-kyung* as in Paragraph 7 below.

5. Dissenting Opinion of Justices Kim Kyung-il and Jeon Hyo-sook

We agree with the majority opinion with respect to the constitutional meaning and importance of national defense and the political and social reality of our nation. However, we respectfully disagree with the conclusion of the majority opinion in that we conclude that the statutory provision at issue in this case is unconstitutional as stated in the following paragraphs. We are of the opinion that the legislators have failed to make the minimum of the effort that is necessary and possible notwithstanding the fact that we have reached the stage where we should search for an alterative for settling the conflict between the constitutional values of the freedom of conscience of the conscientious objectors and the duty of national defense.

A. Meaning of Freedom of Conscience

(1) Nowadays, the freedom of conscience is regarded as the root of the spiritual fundamental rights in major democratic nations. This is because, first, the freedom of conscience is inseparable from human dignity as it means that an individual may establish one's self-identity and live pursuant to one's own earnest and powerful voice from the heart by finding the existence within the surrounding world and the direction of one's actions; second, the freedom of conscience is the prerequisite for the realization of democracy as it enables the free formation and interchange of various opinions within the community based on value-relativism and the neutrality of the world views; and, third, without the freedom of conscience, neither the freedom of science and art nor the freedom of political activities may hardly be substantively guaranteed.

Our Constitution also has a separate provision of Article 19 that guarantees the freedom of conscience. The basis that forms conscience may be those that can properly be referred to as the view of the world, view of life, isms and beliefs or religion, and also the values and the ethical judgments internal to the heart pertaining to the formation of the personality of the individuals. When the religious conscience is at issue as in this case, the protection under the freedom of religion is also concerned. Whichever basis has formed conscience, however, the extent of sincerity required therefor is that the inability to act pursuant thereto would disintegrate the existential value of one's personality, and whether it is a powerful and earnest conscience as such should be judged separately in each of the individual cases.

(2) On the other hand, whether it is one's conscience may not be dependent upon the assessment on its substance by others external to that particular individual, nor may the degree of the value thereof be determined by such others. As long as it is a powerful and earnest voice from the heart, it should be regarded as one's conscience, and whether or not it is beneficial to the society, the nation or the human race is not considered in determining if it is conscience that is protected, with the exception that the assessment of its content may be conducted from the aspect of what impact a free permission of the realization of the conscience would have upon the guarantee of national security, the social order, or public welfare. From this aspect, whereas the conscience that remains internal to the heart is recognized as an absolute liberty and the restriction thereupon is not permissible, the external expression thereof or the exercise of the conscience through action or inaction may be restricted under Section 2 of Article 37 of the Constitution, as in the case of most of other rights to freedom.

An act should not be treated as insignificant, as a matter of course, on the ground that such an act is pursuant to the conscience that can be restricted. This is because humans do not live solely by the internal world but rather by relating themselves to the surrounding world, and also because, as the mind and the conduct are connected with each other, the mind may be preserved only when the conduct is in conformity with the internal side. The only thing is that, as the conduct pursuant to the internal mind has a greater social relevance due to the 'possibility of harming other persons' basic right or the social order' compared with something that remains as a thought internal to the heart, such conduct may be relatively restricted.

(3) The issue of conscience that may not be consistent with the order of a generally applicable statute that does not intend to restrict the freedom of conscience, appears in the form of the question of whether or not to recognize an exception to the legal order. It is easy to regard the 'exception or exemption' as a kind of privilege thus to deem that the realization of the freedom of conscience pursuant thereto is not guaranteed as a right.

However, the value chosen by the minority should not be presumed to be abnormal or inferior just because it is different from the thought commonly possessed by the majority, and conscience should be protected no matter what as a basic right. Therefore, in the above case, it is not appropriate to relax the review standard from the perspective of 'whether to provide a beneficial treatment' based on the premise that the majority principle should absolutely prevail. The constitutionality review of the statute in this case

should be conducted pursuant to the general principle of restriction of basic rights under Section 2 of Article 37 of the Constitution, as in the judgment upon the infringement of other basic rights.

B. Conflict of Constitutional Values and Obligation of Legislators

(1) In general, when there is a conflict between constitutional values the superiority among which may not easily be determined, the legislators should seek a way for the coexistence of each of the constitutional values and for the harmonization among them through the optimal realization thereof. Also, when there is a collision or conflict between a basic right and other constitutional values, the legislators should not seek to unilaterally realize such other constitutional values, yet, instead, should seek an alternative to avoid the collision or conflictp, and, even when an alternative may not be provided and the restriction of the basic right is inevitable, such restriction should stay within the scope that is in proportion to the purpose thereof. This is the content included in the principle of the restriction of basic right under Section 2 of Article 37 of the Constitution.

Therefore, when an alternative is necessary and possible, should the legislators fail to make the minimum effort therefor, the legislators may not be deemed to have abode by the principle of the restriction of basic right indicated above.

(2) On the other hand, while Article 39 of the Constitution imposes the duty of national defense upon all citizens, it at the same time endows upon the legislators as a matter of principle the authority and the responsibility to specify the duty of national defense in light of the totality of the national security conditions in reality and the amount of national defense power necessary for the existence of the nation. Among the systems relevant to national defense, especially the scope of the individuals subject to the conscription is a matter to be determined in light of the purpose in order to maintain the 'optimal combat capacity' while responding flexibly to the abruptly changing domestic and international political situations, and, as such, a wide scope of authority for legislative formation concerning this matter is essentially endowed to the legislators (14-2 KCCR 704, 710, 2002Hun-Ba45, November 28, 2002). However, such authority for legislative formation is not always recognized for any matters indirectly or abstractly relevant to 'national defense.'

As will be examined below, in light of the fact that the

conscientious objectors have objected to military service for a long period of time despite the continuing punishment and disadvantages that were suffered, the statutory provision at issue in this case has primarily functioned to resolve the inequality problem that would be caused by the recognition of the conscientious objection and its negative pervasive effect, rather than to secure the performance of the obligation to form military power by bearing arms on the part of the conscientious objectors. We do not claim in this situation that the conflict should be resolved by choosing the side of the protection of conscience notwithstanding the debilitation of military power or injury to the equality in the burden of military service. Our claim is that an alternative solution should be sought that may resolve the inequality issue and the negative pervasive effect issue to be caused by the recognition of an exception and may at the same time realize the protection of the conscience of the conscientious objectors. The search for this alternative solution does not belong to the typical national defense domain where essentially a very wide scope of authority for legislative formation is recognized, the examples of which include the range of the individuals subject to the conscription and the reasonableness of its construction. Therefore, the discretion of the legislators over the search for such an alternative solution may not be deemed to be as wide as above, just because the search for an alternative solution concerning the statutory provision at issue in this case is relevant to national security.

(3) The conscientious objection has continuously been at issue for half-a-century as centrally raised by the Jehovah's Witnesses, and they have endeavored to follow their conscience despite much of the disadvantages suffered including criminal punishment through incarceration. Thus, as it may hardly be debated under the current situation that their conscience is an earnest and powerful order from the heart that may never be relinquished, it is undeniable that its conflict with the constitutional duty of military service is in a serious state.

Therefore, the constitutionality of the statutory provision at issue in this case is to be determined depending upon, first, whether the recognition of an exception to the statutory provision at issue in this case generally applicable to those subject to conscription based on the premise of the duty of national defense would hinder national defense, second, whether the alternative service system under discussion as an alternative thereto is a proper alternative that may prevent a negative pervasive effect and eliminate the inequality problem, and, third, whether the legislators have failed to make even the minimum of the effort therefor notwithstanding the fact that all

of these questions are answered in the positive.

C. Proper Understanding of Conscientious Objection to Military Service

(1) It is not a subject matter of review here whether the ideology of the conscientious objectors objectively conforms to justice or is complete as an ideology or personality. However, it is undeniable that the conscientious objection to military service is based upon the sincere hope and resolution for the peaceful coexistence of the human race. Both at the individual level and the state level, the belief in refusing any and all killing or wounding irrespective of the cause has continuously appeared throughout history, and the ideal of peace represented in the forms of, for example, non-violence, prohibition of killing, and pacifism has been sought for and respected by the human race for a long period of time irrespective of the possibility of its realization. Our Constitution also expresses an aspect of such ideology in its Preamble by declaring the 'contribution to perpetual world peace and common prosperity of the human race.' The facts that many of the nations in the world have recognized the conscientious objection to military service and the international organizations have also continuously confirmed the need for its protection through the resolutions and the decisions of various kinds indicate that this issue is correlated to the common ideal of the human race as discussed above.

In this sense, the objection to military service by the conscientious objectors may not be deemed as an attempt to avoid the hardships of the military service or a demand for protection as free-riders while failing to perform the basic duty owed to the national community. They do not deny the sincere performance of their various other duties including that of taxation as members of the community, and sincerely petition to be provided with an alternative means of service that is no easier than the military service, in lieu of bearing arms for military service that they cannot perform.

With respect to entitling this as the 'conscientious' objection, a question is raised whether this then means "those who serve the military lack conscience and those who object to military service are conscientious." However, the meaning of conscience here does not include the judgment that it is ethically justified; rather, the conscience here simply means that an individual is lead to objects to military service by the order from one's heart that may not be disobeyed. Therefore, this should not be understood as devaluing

either the sanctity of the duty of national defense or the spirit and the hardships of most of the citizens who willingly perform the duty of military service in order to protect the nation and their families.

(2) Although the conscientious objection to military service is not, as examined above, to evade the obligation owed to the national community, the disadvantage that the conscientious objectors have to suffer due to the criminal punishment for the evasion of military service is immense.

First, the conscientious objectors are mostly sentenced to prison terms of a minimum of one year and a half, and may not be qualified to serve as public officials for a certain period of time even subsequent to the completion of the prison term(Subdivision 3 of Section 1 of Article 33 of the State Public Officials Act; Subdivision 3 of Article 31 of the Local Public Officials Act). In addition, in the case they are in public offices or work as directors and officers or employees of a civilian company, they shall be disemployed and lose their jobs by the irrebuttable presumption that they are military service evaders (Section 1 of Article 76 and Section 1 of Article 93 of the Military Service Act), thus will have to look for a new job following the release from the prison terms, while they are deprived of all of the previously obtained patents, permissions, approvals and licenses for any businesses subject to government permission(Section 2 of Article 76 of the Military Service Act). On top of these disadvantages under the law, they also have to suffer in their subsequent social life such disadvantages as the various tangible and intangible inhospitalities and hardships in employment as criminal convicts with a criminal record of prison terms.

Especially when the religion and the belief upon which the conscientious objection is based is shared by family members, the father and the son from one generation to another or the brothers in succession are criminally punished, which causes even further infelicity to other family members. Actual cases include the case of incarceration of two sons subsequent to four years of incarceration of the father in the past and in anticipation of the incarceration of yet a third son, all for the reason of conscientious objection, and the case of the punishment of all of four brothers one after another by prison terms of either two years or one year and six months all as the conscientious objectors.

What do these examples, which are even frightening, mean? To which degree is the weight of their conscience that they endeavor to preserve despite the criminal punishment and the immense harm in social life they suffer? Aren't we perhaps considering too lightly their sincere conscience or are we prejudiced against them?

D. Necessity for and Possibility of Alternative Military Service System

In light of the facts that the freedom of conscience is an important right basic among the rights to spiritual freedom and that the freedom to exercise the conscience should not be disregarded, the seriousness of the conflict between the current law and the conscience surrounding the conscientious objection, the discussions and the experiences accumulated domestically and internationally concerning this matter, and the degree of discretion endowed to the legislators with respect to this matter, we are of the opinion that the legislators are now obligated to search for a solution to achieve harmony by settling the conflict relationship between the freedom of conscience and the equal performance of the duty of military service by way of, for example, providing an alternative solution, and, further, that it is sufficiently possible in reality to satisfy such obligation.

(1) First, the effect upon the overall national defense power of the service and the failure thereof in the military to bear arms of the conscientious objectors in itself is examined.

The records presented by the Military Manpower Administration indicate that the number of the conscientious objectors who suffered criminal punishment was approximately 400 per year from 1992 to 2000, and approximately 600 per year from 2001 to 2003. They are mostly Jehovah's Witnesses. Also, from 2001 to 2003, the number of the individuals who objected to enlistment thus either were or currently are subjected to trial therefor as buddhists or pacifists was less than 10 in the respective years. On the other hand, the number of the individuals who are conscripted for military service on active duty is approximately 300,000 to 350,000 per year, and the number of those enlisted in the first militia service as of January 1, 2003 is approximately 350,000. Also, the number of the individuals who are enlisted as the result of the physical examination in the supplemental force for the supplement of short-term deficiency in military power is approximately 40,000 per year, and the number of the individuals enlisted as personnel for public interest service is approximately 30,000 per year. Therefore, in terms of the numbers, the proportion of the conscientious objectors does not reach the extent that will cause a decrease in military power or combat capacity.

In addition, the fact that they have continuously objected to enlistment or bearing arms despite criminal punishment and the immense tangible and intangible disadvantages subsequent thereto for half-a-century since the enactment of the Military Service Act

or the Military Criminal Act corroborates that criminal punishment may not be expected to have either a special deterrence effect or a general deterrence effect with respect to the conscientious objection to military service. Then, it can hardly be deemed that the criminal punishment of the conscientious objectors is a means necessary for securing the performance of the obligation by them or by the potential conscientious objectors in the future.

(2) Therefore, if there is something that the legislators should be concerned about with respect to the recognition of the exception for the conscientious objectors, it would be the issue of equality in the duty of military service. There is a concern that the recognition of an exception for them might hinder securing the equal performance of the duty of military service, and that its pervasive effect might harm the effectiveness of military service system based on mandatory conscription applicable to all citizens as a whole due to the loss of trust in the entire military service system and the increase of those evading military service under the pretext of the conscientious objection. The claim that the statutory provision at issue in this case against the conscientious objectors is necessary as general deterrence in the sense that it prevents the general trend of evading military service is also based upon the concern stated above.

Considering the wide spread and incessant trend to evade military service and also a wide spread and strong demand for the equal performance of military service due to our security situation, the seriousness of the burden demanded from the individuals by the performance of military service, the corruption concerning military service, and the issue of welfare within the military concerning the military facilities and the military culture, it is true that there exists a justifiable ground for the concern that the above problems might appear in the future in serious forms.

However, this is premised primarily on the expectation that it is extremely difficult for the legislators to find a solution, theoretical or practical, facing the issues of the equal performance of the duty of military service and the increase in evasion of military service, while such expectation is not the result of a serious and sufficient assessment of possible alternatives. An alternative solution that may resolve the protection of conscience and the issue of inequality at the same time is possible in theory, and, further, the fact that many of the nations in the world have maintained the conscription system by effectively resolving these issues while recognizing the conscientious objection to military service for a considerable period of time strongly indicates that it is feasible in practice as well.

(A) First, the issue of securing equal performance of the duty of military service is hereby examined.

Sharing the equal burden among all citizens to participate in national defense as members of the nation is the core of our national defense system and an important element that has maintained the national community and held the citizens together. From this aspect, the inequality in performing the duty of national defense that will inevitably resulted from an exception to the duty of military service for the conscientious objectors has a serious significance, and will cause yet another issue of violation of the Constitution.

However, the duty of national defense is not limited to the obligation to directly form military force by bearing arms by, for example, serving the military pursuant to the Military Service Act (7-2 KCCR 851, 860-861, 91Hun-Ma80, December 28, 1995), therefore, the compulsion of the performance of the obligation and the criminal punishment under the statutory provision at issue in this case are not the only means to achieve equality in performing the duty of national defense. Therefore, if an obligation that is equivalent to or severer than military service on active duty in light of its duration and burden is to be imposed upon them, the equality in performing the duty of national defense may be restored and the debate over providin the conscientious objectors with an unjust privilege will also cease.

Various means may be devised with respect to the content of such an obligation. For example, many of the nations in the world including Germany, Denmark, France, Austria, Italy, Spain, Brazil and Taiwan have resolved the issue of equality in performing the duty of military service and maintained the conscription system without any notable problems by having the conscientious objectors serve as non-combat force within the military or in the alternative civilian duties. These nations generally utilize as the alternative civilian duties tasks such as rescuing activities, patient transportation, fire-fighting, service for the disabled persons, environmental improvement, agriculture, refugee protection, service at the youth protection centers, preservation and protection of cultural heritages, service at the prisons or rehabilitation institutions.

There are many of those that can be sufficient alternatives under the current law with slight changes in the system. For example, the legislators may prepare an institutional device so that those conscientious objectors who do not object to the enlistment itself but object to bearing arms may serve in the tasks not directly related to arms-bearing or combats, and may also revise the current

supplemental force system in part so that it will apply to the conscientious objectors.

It should be specifically noted that having the conscientious objectors perform support tasks necessary for the public interest of the state, public organizations or social welfare facilities and those with expert knowledge and abilities server the public interest by utilizing it will bring a greater substantively beneficial effect on national security in the broad sense than compelling military service on active duty by bearing arms thus subjecting them to criminal punishment. Such systems in the current Military Service Act as the personnel for public interest service system under which those who are qualified to serve on active duty as the result of physical examination may serve in support tasks for the public interest, in the art and athletics areas for prosperity of culture and enhancement of nation's prestige, or in the tasks supporting the developing nations(Section 1 of Article 26) and the system under which such individuals may be enlisted in the supplemental force and serve as public health doctors, doctors for international cooperation, or law officers for the public interests are also the result of consideration upon this very aspect.

However, in the case of the current supplemental forces, they are subject to military training in the range of the maximum of 60 days (normally for 30 days) (Section 1 of Article 55 of the Military Service Act, Article 108 of the Enforcement Decree). Even subsequent to the completion of the service, they remain to be subject to be called for military force mobilization for composition of troops or military strategy demand upon occurrence of war or calamity or the declaration of the mobilization order, and are subject to military force mobilization training for up to 30 days each year (Articles 44 and 49 of the Military Service Act). Therefore, exempting the conscientious objectors from these obligations would cause an issue from the aspect of the equivalence of the obligations. However, this problem may also be settled by obligating them to physical training for a specific time period in lieu of military training, as seen in the alternative service systems in other nations, and by making the duration of service longer than that for military service on active duty reflecting the time period of military force mobilization training.

(B) Next, the issue of the negative pervasive effect on the military system as a whole that is based on the mandatory conscription of all citizens due to the increase of those evading military service, is hereby examined.

The current situation of failing to eradicate corruption concerning military service and the trend evading military service

despite the continuous effort to secure the fairness of military affairs administration, provides a strong corroboration for the prediction that recognizing the conscientious objection to military service would offer yet another incentive for corruption concerning military service or evasion from the military service. It is also true that a considerable number of citizens share this view.

However, as shown in the experiences of many of other nations that operate the alternative service system, as indicated above, it is possible to select out the true conscientious objectors from those who are not through strict preliminary review processes and post management.

Most of all, should the incentive for the evasion of the military service on active duty be eliminated by securing the equivalence of military service on active duty and the substituting alternative service, this problem may be effectively settled. If anyone would attempt to evade bearing arms for military service on active duty under the pretext of the conscientious objection, this would be because of the judgment that serving in the alternative tasks would be beneficial to that individual. Thus, the greater the burden and the hardship of the alternative service would be, the corollary would be the decrease of such evaders of the military service. Eventually, securing the equivalence of the burdens, along with the guarantee of the equality in the duty of national defense, can be the ultimate means to resolve the problem of the evasion of military service. In addition thereto, it is a matter of course that the improvement of the treatment and the welfare within the military concerning, for example, the military facilities should be undertaken simultaneously with the above measures. Those nations implementing the alternative service system have in fact witnessed the effect that the welfare of the military has also improved.

It is a possibility, as a matter of course, that an excessively long duration or excessive degree of the alternative service might render it difficult for the conscientious objectors to choose the alternative service system thereby making the alternative service system no more than nominal or causing the problem of yet another violation of the Constitution. However, this may only be concluded as the problem of unreasonableness of the content of the alternative service itself, and may not lead to the conclusion either that the provision of the possibility to choose the service in an alternative form in lieu of bearing arms for the military service on active duty is in itself unreasonable, or that the uniform compulsion of military service on active duty by bearing arms under the statutory provision at issue in this case is reasonable.

Should there be solutions to face such problems that might be

caused by the exemption of the conscientious objectors from enlistment for active duty, such as the inequality of duty of military service and the abrupt increase of the evasion of military service, it may not be deemed that there necessarily is a need to criminally punish those evading military service pursuant to their conscience by prison terms in order to compel military service on active duty by bearing arms, even if there are practical difficulties to be overcome in the process of implementing those solutions.

(3) There is a high demand for the recognition of the conscientious objection to military service from the aspect of the international laws as well.

The International Convention on Civil and Political Rights adopted by the United Nations in 1966 guarantees in Article 18 the freedom of ideas, conscience and religion. In 1993, the United Nations Human Rights Committee declared, in its General Comment No. 22 concerning the freedom of ideas, conscience and religion, that "The Covenant does not explicitly refer to a right to conscientious objection, but the Committee believes that such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief."

The United Nations Commission on Human Rights also expressed the same position through repeated resolutions. For example, the above Commission expressly stated in 1987, in its Resolution No. 46, that "we urge a universal recognition of the right of conscientious objection," and declared in 1993, in its Resolution No. 84, that "alternative service should be of a non-combatant or civilian character, in the public interest and not of a punitive nature," as well as declaring for the prohibition of criminal punishment of the conscientious objectors. In addition, in 1998, the Commission in its Resolution No. 77 reaffirmed the right of conscientious objection, and also requested each of the nations to adopt the alternative service system, as well as to establish an independent and fair institution to judge the claims of the conscientious objectors, to stop the imprisonment and the repeated imposition of criminal sanctions, to stop discrimination in economic, social, cultural, civil or political rights, and to protect as refugees those individuals who left their home countries to avoid persecution due to the conscientious objection.

Our nation signed the above Covenant in 1990 without any reservation with respect to Article 18, became a member of the United Nations in 1991, and directly participated in the recent resolutions of the United Nations Human Rights Commission for the recognition of the right of conscientious objection including the

resolution in the year 2004. It is necessary to actively seek an alternative solution while we may no longer postpone or turn our face away from this issue, not only in light of the facts that many of the nations already recognize the right of conscientious objection to military service and that the nations punishing as many individuals as our nations for conscientious objection are rare, but also in light of the fact that our statutes and relevant practices may in no way be harmonized with the above international laws.

(4) Nevertheless, examining our military service system and the statutory provision at issue in this case, there may be found no trace of even the minimum consideration for the conscientious objectors in consideration of such situations.

In the case of the supplemental force under the current Military Service Act, there exists no supplemental force on the ground of conscience, as the supplemental force enlistment is categorized under the criteria of the determination of the degree of physical capability and the expert knowledge and abilities. Also, even those among the conscientious objectors who are categorized for the supplemental force service according to the criteria such as the degree of physical capability, are still subject to 'military training' for up to 60 days pursuant to the Military Service Act and to the military force mobilization training subsequent to the completion of service, thus this is hardly acceptable on the part of the conscientious objectors who refuse to bear arms.

In the case of someone under military service on active duty, there is a possibility of being exempted from weapons training and serving instead as medical personnel depending on the discretion of the Ministry of National Defense or the commanding officer in charge. However, it is questionable whether the Ministry of National Defense or the commanding officer in charge does actually have such discretion, and also whether it is desirable to recognize such individual exercise of discretion in the military organization that needs consistent and uniform structures and rules. Further, even if it is possible under the current law that the adjudicating courts may flexibly apply the statutory provision at issue in this case in consideration of the situation of the conscientious objectors, this does not exist as a measure for the protection of conscience, nor, on the other hand, may it hardly be expected that the institutions enforcing the law or the adjudicating courts take measures in consideration of them, in light of the practice of compulsion of military service on active duty by bearing arms and criminal punishment imposed upon them so far (*Refer to* Supreme Court Decision 2004Do2965, July 15, 2004).

More than anything else, leaving the solution in the discretion

and judgment of the individual enforcement institutions or adjudicating courts without any legislative solutions may not be expected to be a fair, objective or consistent measure. This method may not be a fundamental solution, as it will produce yet another debate over corruption concerning the military service or inequality and cannot but be incomplete from the aspect of the protection of conscience. It is worth noting in this respect that those nations adopting the alternative service system have detailed legislation therefor, and that the resolutions of the United Nations Human Rights Commission expressly required an independent and fair decision making institution be established to determine the appropriateness of the conscientious objection in particular cases (Resolution No. 84 of 1993, and Resolution No. 77 of 1998).

Therefore, there is no room to deem under the current law that there are certain elements that enable conscience protection measures by the institutions implementing the law or that there exist the minimum of measures for adjustment from the perspective of the national legal system in its entirety.

E. Conclusion

Listening to the voice of the 'minorities' who think differently from the majority and reflecting it under the democratic decision making structure based upon the majority rule is a core element in the basic ideas of our Constitution of the guarantee of the inviolable basic human rights of the individuals and the establishment of the democratic basic order. Furthermore, we believe that respecting and to a possible extent accepting the belief of the conscientious objectors who are the minority citizens distinguished from the majority of the society will guide our society in the direction toward further maturity and development.

We conclude, as examined above, that the legislators have failed to make even the minimum effort to harmonize by resolving a serious and long conflict relationship between the duty of military service and the freedom of conscience of the conscientious objectors who are the social minorities in compelling the enforcement of the duty of military service specified by the statutory provision at issue in this case. Therefore, we are respectfully of the opinion that the statutory provision at issue in this case is unavoidably unconstitutional to the extent that it uniformly compels enlistment and imposes criminal punishment upon the conscientious objectors.

6. Separate Concurring Opinion of Justice Kwon Seong

I agree with the conclusion of the majority opinion that Subdivision 1 of Section 1 of Article 88 of the Military Service Act indicated in the holding of the opinion of the Court is not in violation of the Constitution. However, I respectfully disagree in part with the majority opinion to its structuring of the reasons therefor, and hereby express my opinion as follows.

A. There are two ways of approaching the constitutionality of the statutory provision at issue in this case. The first of these is the method of proving the unconstitutionality of the legislative omission of the failure to legislate the possibility of the so-called alternative civilian service and then drawing from this the conclusion that the statutory provision at issue in this case that punishes the evasion of military service while blocking the possibility of substituting the alternative civilian service is also unavoidably unconstitutional. The second of these is the method of proving that, based upon the premise of the accumulated interpretation of the courts that evading military service in order to obey the order of conscience mandating refusal to bear arms does not constitute a 'justifiable cause' for evading military service, the statutory provision at issue in this case that represents the above interpretation is unconstitutional as it infringes upon the freedom of conscience.

(1) First, the appropriateness of the first approach is hereby examined.

The statutory provision at issue in this case is no more than a provision that criminally punishes those evading military service, and the obligation of enlistment for military service on active duty itself is not imposed by the statutory provision at issue in this case. The obligation of enlistment for military service on active duty is imposed by Articles 3(Obligation To Military Service), 5(Types Of Military Service) and 16(Enlistment For Military Service On Active Duty) of the Military Service Act and by Article 21 of the enforcement decree(Service Of Notice Of Enlistment For Military Service On Active Duty). Thus, a valid service of the notice of enlistment in active service originates the obligation of enlistment in active service, while the statutory provision at issue in this case applies to the failure to perform such enlistment obligation, in order to punish such failure to perform the obligation. Therefore, assuming the existence of a provision permitting alternative civilian service, such a provision must apply prior to the occurrence of the obligation of enlistment in active service, that is, prior to the sending out for service of the notice of enlistment, by way of the

application therefor by the individuals concerned, the review, and the determination. This is because the alternative civilian service may not be available to those who have already been enlisted to serve on active duty, as the military soldiers on active duty and the civilians have a different status and the service as a military soldier on active duty and the service in alternative civilian tasks will fundamentally differ in their respective contents. If arguing for a provision permitting the transfer to alternative civilian service subsequent to the occurrence of the obligation of enlistment for military service on active duty, this would be an after-the-fact termination of the already originated obligation of enlistment. This would therefore be identical in practice to recognizing the ground for permitting alternative civilian service as a 'justifiable cause for refusing enlistment,' which then matches the second approach stated above. If this were claiming for a provision permitting the transfer to alternative civilian service subsequent to the enlistment in active service duty, then such a provision would bear no relevance to the statutory provision at issue in this case punishing those refusing the enlistment itself, therefore this would be an issue beyond the subject matter of this case.

From this perspective, should it be determined to adopt a provision permitting alternative civilian service, such a provision in its own nature should be the one regulated as a measure of exception to the imposition of the duty of military service, at the stage of imposition of the duty of military service prior to the origination of the obligation of enlistment in active service. Therefore, even assuming that the omission of legislating to permit alternative civilian service were held to be unconstitutional, such unconstitutionality might only possibly lead to the unconstitutionality of the provision uniformly imposing the duty of military service (that is, Article 3, 5 or 16 of the Military Service Act), yet could not lead to the unconstitutionality of the provision punishing the failure to perform the previously originated obligation of enlistment for military service on active duty (that is, the statutory provision at issue in this case).

Then, attempting to prove the unconstitutionality of the statutory provision at issue in this case by way of the first approach, that is, attempting to conclude the unconstitutionality of the statutory provision at issue in this case depending upon the unconstitutionality of the omission of legislation of the permissibility of the alternative civilian service, is not appropriate, as an argument structured upon a matter that bears no logical causation to the statutory provision at issue in this case. I support the separate concurring opinion of Justice Lee Sang-kyung that points this out

first, and respectfully disagree with the majority opinion disregarding this.

(2) Next, the second approach predicated above is hereby examined.

Pursuant to the accumulated opinions of the courts, the "evasion of the enlistment in order to obey the so-called order of conscience mandating the refusal to bear arms" may not constitute a 'justifiable cause' for the evasion of enlistment regulated in the provisions of law. Therefore, the statutory provision at issue in this case should be treated as conclusively having this meaning therein. With respect to whether the statutory provision at issue in this case that has such meaning does actually violate the freedom of religion or conscience of the petitioner, that is, with respect to the second approach predicated above, my opinion is in the negative as stated in the following. This is examined in a separate paragraph below.

B. Infringement upon Freedom of Religion

(1) Distinction between Conscience and Religion

Conscience refers to the mind of humans that orders humans to think and judge morally and ethically and to act accordingly. Thus, conscience is the subject that exists within humans and makes humans as moral and ethical beings, and this constitutes the main axis that supports human dignity. On the other hand, religion that means an internal conviction towards God and the world after human mortality is the voice of God as the teachings of god delivered by the human consciousness. Therefore, while conscience is the voice of the human mind itself, religion is the voice of God delivered by the human consciousness. Whether these two are ultimately identical is a separate issue of a higher dimension, and, as an issue in the phenomenal world, a starting point for the reasonable discussion lies *prima facie* in the understanding of these two as distinguishable as above, respectively belonging to different categories. This distinction conforms to the tenor of our Constitution that separately and distinctively provides for the freedom of conscience, the freedom of religion, and the freedom of science and art.

In many cases, the belief as the result of conscience and the belief as the result of religion coincide in their conclusions. However, this does not render these two identical, as these two clearly have different origins.

The analysis of the petitioner's claim in this case in light of the facts of the case reveals that this falls under the religious belief that originated from the religion of Jehovah's Witnesses in which the petitioner believes (According to the summary of the case under

Item 1. on page 1 of the petition for the request of constitutional review filed by the petitioner, the petitioner alleges that he refused to the enlistment pursuant to his firm religious conscience formed through the religious life as a Jehovah's Witness). The petitioner's claim is clearly based upon, internally, the voice of god and the teachings of god as the starting point.

The majority opinion understands the issue of this case as a matter of conscience as well as a matter of religion at the same time, and then states that it is to be examined mainly under the freedom of conscience for a more comprehensive discussion. However, as explained above, even when the result of the conscience and the result of the religion take an identical external form, as long as they have different origins internally, these two should not be regarded as the same.

(2) From this perspective, whether the statutory provision at issue in this case violates the freedom of religion is examined first.

(A) First, whether or not the petitioner's refusal to bear arms is right as a religious belief or teaching is not a subject matter of review. This is because it is not appropriate for humans that are limited and incomplete beings to judge the right and wrong of the teachings of God in their substance that are premised upon the God as the omnipotent being in terms of capability and knowledge. The principle against state interference with this matter reflects human wisdom that accepted the lessons from the history. In this sense, the freedom of religion under the Constitution is an absolute liberty.

(B) Therefore, the task for us in constitutional adjudication is not to judge whether or not the content of the religious belief or teachings is justifiable; instead, it is limited solely to the judgment over the realistic acceptability of the effect of its social waves upon the constitutional order. To recapitulate this, the act that expresses the religious teachings or belief (defined to include the act for the realization of such teachings or belief) is an act that results in pervasive effects upon society, therefore, such an act is the object of regulation by the statute, and, as such regulation concerns the restriction of a basic right, Section 2 of Article 37 of the Constitution applies thereto.

The relationship between the need for the guarantee of national security regulated in Section 2 of Article 37 of the Constitution and the duty of national defense under Article 39 of the Constitution is examined below where the freedom of conscience is discussed.

(C) The assessment under this logical context over whether the statutory provision at issue in this case violates the petitioner's freedom of religion leads to the conclusion that the social effect of

refusing to bear arms which is for the guarantee of national security and the defense of national territory under our Constitution that denies the war of aggression (Section 1 of Article 5) is not acceptable under our constitutional order.

That is because it is not certain whether permitting the refusal to bear arms would not harm the important constitutional legal interest of national security, considering the security situation of our nation, the social demand for the equality in conscription, and the various restrictive elements that might accompany the permission of the conscientious objection and the adoption of an alternative solution.

In order to recognize and permit the refusal to bear arms, a peaceful coexistence at least between South Korea and North Koreas should be settled, and, in the long run, an international order for the guarantee of security should be in formation, which will render the wealth and the military power of a nation unnecessary therefor. It is difficult to hold a positive view at the current stage that such conditions have been satisfied. Therefore, the legislative judgment (and the accumulated interpretation of the courts) that the refusal to bear arms on the ground of religion does not constitute a justifiable cause for the evasion of enlistment is neither clearly unreasonable nor plainly wrong.

Then, non-recognition of the so-called refusal to bear arms on the ground of religious belief in the statutory provision at issue in this case does not violate the petitioner's freedom of religion as it is necessary for the guarantee of national security, and, therefore, it is not in violation of the Constitution.

C. Issue of Freedom of Conscience

The issue to be determined when it is assumed that the petitioner's refusal to bear arms is not mandated from the voice of God but instead from the voice of his own conscience is now examined.

(1) While religious belief or teaching is the voice of God, the voice of conscience is the human voice, which is the expression of the ethical determination in conformity with human dignity.

It is already stated in the preceding paragraphs that humans may not judge the right and wrong of the voice of God in its substance, and merely the acceptability in reality of its social impact can be the subject matter of constitutional adjudication as a matter of the restriction of basic rights.

On the contrary, the voice of conscience is the human voice, therefore, the right and wrong of its substance, that is, its

justifiability, can be judged, as a matter of course. At the stage when the voice of conscience remains internal in one's mind, it is exempt from criticism as it is guaranteed as an absolute liberty in the sense that its external expression may not be coerced, although, however, once expressed and disclosed, it may not be excluded from the criticism. Conscience that has been expressed is no more one's own but has become an objective thing to which both self and others are socially related, thus it is now subject to criticism. It is different from that the voice of religion may not be criticized in the voice of the humans other than its being criticized in other names of the god.

(2) There is no limitation of the means to express the voice of conscience. Expression by way of conduct is possible, as well as verbal expression. Furthermore, such expression may be the representation of the gradual pursuit of the truth or the sudden enlightenment as well.

Eventually, the act of realizing the conscience is one form of expressing conscience, and becomes as such an objective thing to which both self and others are socially related. Therefore, the freedom to realize conscience may be the subject matter of criticism.

(3) What is the criterion for criticism? It is the universal validity.

As the voice of conscience is the result of ethical determination that conforms to human dignity, it should be in conformity with human dignity and should thus have universal validity that is acceptable by human reason. At a minimum, even if universal validity is currently not recognized, the possibility of obtaining it should be left open.

What is the threshold for obtaining universal validity?

Unlike science or ideology, conscience is the essence of the ethical determination. Therefore, the substance of its universal validity is epitomized as benevolence(仁) and righteousness(義), which are the core theses of ethics.

Some variations in the approach thereto and the expression thereof depending upon the time and the individuals notwithstanding, it is undeniable that, eventually, benevolence(仁) and righteousness (義) are the two specific marks that the essential nature of any and all humans pursue.

Benevolence(仁) and righteousness(義) are the reasons enabling humans to become dignified and to become ethical beings. Therefore, a conduct of benevolence(仁) and righteousness(義) obtains the universal validity, whereas a conduct that lacks benevolence(仁) and righteousness(義) has no possibility of obtaining

the universal validity. [Refer to Paragraph(6) below for the meaning of benevolence(仁) and righteousness(義) in this case.]

Should the voice of conscience have universal validity, such voice of conscience should be absolutely protected. Section 2 of Article 37 of the Constitution does not apply as it is absolutely protected. Therefore, should the voice of conscience have universal validity, even if its social impact is hardly acceptable readily under the current order of positive law, this may not be regulated by applying Section 2 of Article 37 of the Constitution. In this sense, universal validity is the internal limit of the freedom of conscience.

However, it is a different matter when the voice of the conscience lacks universal validity. In this case, first, should there be little concern over its social impact, this may not be regulated by the application of Section 2 of Article 37 of the Constitution, even if its substance is unjustifiable. What falls within this range is the object of tolerance.

Then, the voice of conscience is categorized into different phases and constitutionally protected in accordance thereto, as follows. First, when it is an internal thing, it is absolutely protected. That is, there is no room for Section 2 of Article 37 of the Constitution to be applied. Second, when the voice of conscience that has been expressed has universal validity, it is also absolutely protected. Therefore, it may not be restricted even for the guarantee of national security, the maintenance of order, or public welfare. That is, Section 2 of Article 37 of the Constitution does not apply thereto. Third, when the voice of conscience that has been expressed lacks universal validity, Section 2 of Article 37 of the Constitution does apply. As a result, it may be restricted if necessary for the guarantee of national security, the maintenance of order, or public welfare, while it may not be restricted if such need is not recognized.

Understanding the constitutional protection of the freedom of conscience by categorization as above for respective phases is a means to provide a greater protection therefor, correspondingly to the importance of the freedom of conscience. It is because, under the previously held opinion, only the conscience remaining at the stage internal to the heart was absolutely protected in general, whereas, pursuant to the opinion of categorical protection indicated above, not only the conscience that remains as an internal being but also the conscience with universal validity that has been expressed is also absolutely protected.

Furthermore, if the freedom of conscience is, as the majority opinion states, no more than something that petitions for tolerance

for the conscience of minorities and imposes the obligation of favorable consideration for tolerance upon the state, the protection of the freedom of conscience turns into something that does not have any substantial content or meaning in reality. This is out of balance with the position that holds the freedom of conscience out as the most important basic right.

Therefore, it is appropriate to determine the depth of the protection for the freedom of conscience under the criterion of the existence of universal validity.

The judgment upon universal validity is conducted in two venues. One is the court and the Constitutional Court, and the other is the market of scholarship. The judgments by these two should be mutually respectful, however, they inevitably are mutually intrusive in reality.

(4) The freedom of conscience, the freedom of ideas and the freedom of science share a common aspect in that they all have their roots in the spiritual process of the internal mind of humans. Therefore, the above discussion concerning the freedom of conscience may generally be appropriate as is for the freedom of science or the freedom of ideas.

When adapting the Inquisition of the Middle Ages on the heliocentric theory of Galileo's to today's constitutional adjudication as a means of explanation, the heliocentric theory is, first, not the voice of conscience as it does not fall within the category of ethics and morals, nor is it a matter of religion as it does not deliver the voice of God. This belongs in the dimension of natural science and the philosophical ideology based thereupon. Then, the expression of the heliocentric theory comes under the freedom of science and ideology, and, should its content have universal validity or the possibility thereof, it should be absolutely protected. The above Inquisition of the Middle Ages was incorrect in regarding the heliocentric and the geocentric theories as a matter of religion, in rejecting the universal validity of the heliocentric theory by abstract dogmatism without examining its universal validity by way of reason, and, even worse, in coercing the defendant to deny the heliocentric theory by threats. In light of the understanding of the general public toward science at that time and of the sophistication of the judges, it was indeed an extremely difficult task to examine and affirm the universal validity of the heliocentric theory. A lesson from history is drawn from this as follows: In examining universal validity concerning such matters as conscience, science and ideology, prudence is mandated when denying the universal validity, in light of the enlightenment of human reason, the development of science and the evolution of the society that may proceed in the

future; and, even upon denial thereof, as generous as possible a position should be taken over the ensuing sanction thereupon, in light of the possibility of its obtaining universal validity in the future. This is one of the elements that the courts today may take into account at trial.

(5) The voice of conscience that is absolutely protected under the Constitution is limited, as indicated above, to that with universal validity in its substance and that with the open possibility of obtaining the universal validity. Furthermore, although it is a matter of course, sincerity in its formation process should also be recognizable. Eventually, sincerity in the formation process and universal validity of the substance, these two are the required elements for the constitutional protection of the voice of conscience.

Those having a problem in the formation process, for example, those formed due to mental disease, should be excluded from the object of protection. In addition, sincerity in formation is one of the elements distinguishing the freedom of conscience from the general freedom of conduct. Only when it is based upon an intense determination that means the expression of one's identity, an intense determination that means one's consistency in knowledge and conduct, or a determination for which sacrifice is willingly suffered, it is the expression of the conscience; if not, it comes under the general freedom of conduct.

(6) Returning to this case, there is an extremely thin possibility that refusing to bear arms required to defend against an unjust and unrighteous war of aggression can be judged as an ethical determination that is in conformity to human dignity. There is sufficient recognition that the natural perception of ordinary people across nations and throughout history is that they would feel much ashamed if they could not bear arms due to the order of their conscience, when the bearing arms is to preserve national territory and the constitution, to fight against the killing and wounding of themselves, their families and their loved ones, and to prepare for such resistance. Furthermore, such perception can sufficiently be recognized as proper upon rational thinking of our reason.

Taking no measure upon witnessing the killing and the wounding of one's parents, siblings, spouse and children is suspicious of the lack of benevolence(仁) due to the destitution of the feeling of commiseration(惻隱之心); Feeling no fury upon witnessing such killing and wounding is under suspicion of the lack of righteousness(義) due to the destitution of the feeling of shame and dislike(羞惡之心); Remaining solely at the indulgence in the safety earned as the result of hardships and sacrifices of other people is under suspicion of the deviation from propriety(禮) as it

lacked the feeling modesty and complaisance(辭讓之心); Turning the face away from the danger of invasion that is sufficiently predicted yet not imminent is suspicious of the lack of wisdom(智慧).

A conduct that is suspicious of lacking benevolence(仁), righteousness(義), propriety(禮) and wisdom(智) as such may not be recognized to have universal validity.

Therefore, refusal to bear arms that is necessary to defend a war of aggression or to prepare such defense may not be recognized as the voice of conscience that has universal validity.

It was not because Yulgok Lee Yi lacked conscience or was belligerent that he petitioned to raise 100,000 soldiers in 1583, ten years prior to the outbreak of the Korean-Japanese war of 1592. Nor is it because those many young persons in military service are lacking in conscience or are belligerent that they bear arms and offer sacrifice in the military. It is not because of the lack of conscience or the sake of enjoyment of war that the United Nations commits the peace-keeping corps to subjugate the entity committing cruel ethnic cleansing.

Therefore, it may never be deemed as the voice of universally valid conscience to refuse to bear arms for defensive purposes. Even considering the future, this conclusion will remain unchanged for at least a considerable period of time.

Then, the act of refusing to bear arms lacks universal validity even if it is based upon the voice of conscience, as far as the bearing of arms is not demanded to conduct a war of aggression. Thus, the constitutional protection therefor may be restricted. It may be limited by the statute when necessary for the guarantee of national security, the maintenance of order, or public welfare.

(7) Relationship between Need in order for Guarantee of National Security under Section 2 of Article 37 of The Constitution and the Duty of National Defense under Article 39 of the Constitution

As stated above when discussing the categorical protection for the freedom of conscience, the voice of conscience that lacks universal validity may be limited under Section 2 of Article 37 of the Constitution by the statute if necessary for the guarantee of national security, the maintenance of order, or public welfare. In this case, what is at issue is the need for the guarantee of national security, while the issue here does not include prima facie that of the need for the maintenance of order or public welfare. Therefore, the discussion in this paragraph proceeds as limited to the issue of the guarantee of national security, with respect to Section 2 of Article 37 of the Constitution.

In order to restrict the voice of conscience pursuant to Section 2 of Article 37 of the Constitution, the need for the guarantee of national security should first be recognized, and then the content of the limit should be regulated in the form of a statute. In general cases of the restriction of basic rights, not only the content of the restriction upon the basic right should be regulated in a statute, but also the need for the sake of the guarantee of national security, whether express or implied, should be regulated together in the statute. Here, the duty of national defense or the duty of military service provided in Article 39 of the Constitution is in response to the need for the guarantee of national security in its essence, and, on the other hand, the performance of an obligation of any kind is in essence inevitably accompanied by the restriction of rights. Therefore, the imposition by the Constitution in its Article 39 of the duty of military service upon all citizens means that the Constitution itself recognizes that it is necessary to impose the obligation to military service for the guarantee of the security of the nation, and that it is inevitably necessary to restrict the basic rights for the performance of the duty of military service. To recapitulate, with respect to the imposition of the obligation to military service and the restriction of the fundamental right caused thereby, the Constitution itself is already recognizing the need therefor and regulating such (constitutional reservation), even without having to regulate such in a statute. To repeat, the need for the guarantee of national security is not to be freshly debated, as the Constitution is already recognizing it.

Then, in applying Section 2 of Article 37 of the Constitution to the voice of conscience that lacks universal validity, the remaining question is whether the content of the restriction, that is, in this case, non-recognition of the refusal to bear arms on the ground of conscience as a justifiable cause for evading military service, violates the essence of the freedom of conscience or not.

The essence of the freedom of conscience lies, *inter alia*, in non-interference of the state with the free formation of conscience and the free expression (either active or passive) thereof. Here, the statutory provision at issue in this case does not concern free formation or expression of the conscience. It is merely that the state has not proactively accepted the voice of conscience that is claimed by the petitioner. Although the punishment of the petitioner pursuant to this provision at issue may well have the effect of indirectly suppressing to a certain extent the expression of the petitioner's conscience, such indirect suppression does not affect the essence of the freedom of conscience. This is because the punishment here is not due to the content or the expression of the

conscience, but based on the ground that the conduct that is externally expressed is objectively in violation of the legal obligation in another dimension that is imposed upon all citizens. To state differently, it is because this provision at issue merely demands an external obedience of the petitioner, and neither compels the petitioner to abandon the voice of his conscience nor coerces an inner conviction in the justifiability of the obedience. Therefore, the statutory provision at issue in this case does not violate the essence of the freedom of conscience, and, thus, is not unconstitutional.

The general content of the duty of military service including the issue of what may constitute a justifiable cause for evading enlistment is a matter to be determined by the legislature under its discretion, in the dimension of achieving the purpose of national defense while at the same time endeavoring to reasonably guarantee the basic right. From this perspective, for the same reason examined in Paragraph B(2)(C) above, the statutory provision at issue in this case that does not recognize the refusal of bearing arms on the ground of conscience as one of the justifiable causes for evading enlistment is not a clear deviation from or abuse of the discretion of the legislature, thus may not be deemed to violate the essence of the freedom of conscience.

Another remaining question is whether it is an excessive restriction or not that the statute imposes a uniform sanction of incarceration for the refusal to bear arms. This is also a matter of legislative discretion, and, as there is no clear deviation from discretion in this regard, the statutory provision at issue in this case is not unconstitutional.

(8) In conclusion, even assuming that the petitioner's refusal to bera arms is mandated by the voice of his conscience, such voice of conscience lacks universal validity, while it is necessary to not accept this in order for the guarantee of the national security. Therefore, even if the petitioner's refusal to bear arms on the ground of conscience is not recognized under the meaning of the statutory provision at issue in this case as one of the justifiable causes for evading the enlistment, this is not in violation of the freedom of conscience.

D. On Recommendation to the National Assembly

The recommendation made by the majority opinion that a research on the part of the National Assembly is necessary over the demand for the legislative improvement concerning the alternative civilian service is improper under the principle of the separation of powers and may rather possibly cause misapprehension. As such, such recommendation is undesirable.

7. Separate Concurring Opinion of Justice Lee Sang-kyung

A. Although I agree with the conclusion of the majority opinion, I respectfully disagree to the reasoning of the majority in reaching the conclusion. My opinion in this regard is hereby stated in the following paragraphs.

B. Legal Nature Of Section 1 Of Article 39 Of The Constitution That Provides For Duty Of National Defense

Article 39 of the Constitution provides in its Section 1 that " all citizens shall have the duty of national defense under the conditions as prescribed by Act," and, in its Section 2, provides that "no citizen shall be treated unfavorably on account of the fulfillment of his obligation of military service." Therefore, the Constitution itself imposes the duty of national defense as a duty of all citizens, and the duty of military service is interpreted to be the core element thereof.

Although Section 1 of Article 39 of the Constitution indicated above does not specifically express the basic rights that are restricted thereby as it takes the form of imposing an obligation upon the citizens, because it is premised as a matter of course that individual liberties are restricted for the performance of the duty of national defense, the above provision is one that restricts relevant basic rights such as bodily freedom. Further, as the Constitution itself restricts the basic rights, the above provision sets the constitutional limit on the relevant basic rights.

C. Standard for Constitutional Review over the Statute that Regulates Collision between Constitutional Values

(1) Section 1 of Article 39 of the Constitution providing that the specific content of the duty of national defense shall be regulated by the statute, reserves that the Constitution itself may limit the basic rights of the citizens whom it shall protect within the scope that is necessary for the purpose of its own defense in order for the Constitution to protect itself by safeguarding the nation that is the basis of its own existence against the invasion from outside(theory of constitutional reservation of important matters), and provides that such content that is reserved(inherent content) shall be established and formed by the National Assembly, which is the representative organ that represents the citizenry(theory of reservation to the legislature). Therefore, the Military Service Act that is a statute pursuant to the same provision is the materialization of the content inherent in the Constitution for the realization of constitutional values. Thus, the statutory provision at issue in this case which is

of such nature establishes and forms the specific duty of the citizens of national defense, while, on the other hand, it specifies the content of the restriction of the basic rights such as the freedom of conscience that is particularly at issue in this case, as well as the bodily freedom that is relevant to such duty of national defense. Therefore, although the statutory provision at issue in this case does have the content restrictive of the basic rights of the citizens, this is not a new creation of the content of statutory restriction of the basic rights, but instead has the constitutional effect of specifying the content inherent to the Constitution concerning the restriction or the limitation of the basic rights, which is presupposed by the Constitution itself for the realization of the constitutional provisions.

Therefore, the restriction of the basic rights pursuant to the statutory provision at issue in this case is to establish the border line in terms of positive law where the two colliding constitutional values encounter each other, between the constitutional value of the maintenance of national defense power for the preservation of the nation that the duty of national defense intends to realize, and the constitutional value of individual basic rights. Thus, it should be distinguished from the case of the statutory restriction of the basic rights for the realization of the legislative purpose that is itself established by the statute, which is the case presupposed by Section 2 of Article 37 of the Constitution.

(2) Our Constitution does not expressly present a standard for resolving the problem of the clash between the constitutional values, including the one indicated above. With respect to this, the dissenting opinion employs the prerequisites for the restriction of basic rights set in Section 2 of Article 37 of the Constitution as the standard of review, thereby assessing whether the statutory provision at issue in this case is in violation of the principle of proportionality or the principle of prohibition against excessive restriction.

However, the principle of prohibition against excessive restriction is the review formula that prioritizes the constitutional value of basic right on top, when there is a clash between basic rights that is of constitutional value and the legislative purpose and the means therefor which are statutory values. That is, it is a restrained and passive review standard that is based on the premise that the statute or the public interest restrictive of the basic rights may be sacrificed in order for the maximum guarantee of basic rights, requiring that, in order for the restriction of basic rights by statute to be justified, the legitimacy of the legislative purpose thereof should first be proven, the appropriateness of the legislative

measure that is a means to obtain such legislative purpose should be recognized, the infringement upon the basic rights due thereto should be the minimum, and the public interest intended to be realized should be greater than the private interests restricted thereby. On the other hand, the principle of pragmatic harmonization, which is one example of the solution for the clash of the constitutional values, actively pursues the mutually supplemental optimum under which the clashing basic rights (that is, constitutional values) may both be respected and exert the maximum effects thereof. Thus, in this regard, these two standards of review fundamentally differ.

Therefore, applying Section 2 of Article 37 of the Constitution and the principle of prohibition against excessive restriction as the standards of review in resolving the problem of the clash between the constitutional values that are equivalent to each other in terms of values and thus incomparable to each other may not be accepted, for this contains the danger of injuring either one of the constitutional values against the will of the framers of the Constitution and the constitutionally sought values.

(3) In seeking the standard for the resolution of the clash between constitutional values, it should be clearly understood first that the settlement of the clash of such values is a task for the legislative formation for the preservation of the constitutional values, rather than a subject matter of judicial review. The Constitution's choice to not present a clear standard for the settlement of the clash of the values, while accepting within the constitutional order different values that may contradict each other, is interpreted to be its delegation to the National Assembly of the establishment the demarcation between the domains of the respective values in clash, by way of the statute, based upon the legislators' accurate assessment of the state of interests surrounding the conflicting values and gathering of the political wills reflecting toward the aspirational values of the members of the legal community. Such constitutional request is more evidently indicated when the Constitution reserves the formation of the specific matters to the statute.

The legislators are likewise endowed with the authority to establish the law for a reasonable demarcation in the areas of conflict between different constitutional values. Accordingly, in principle, the legislators are given certain room for the prognosis (Prognosespielraum) in understanding the perceptional facts that form the basis of the legislation(objective judgment), and with certain freedom of formation(Gestaltungsfreiheit) in determining the procedure, the substance and the form of the legislation(subjective

judgment). This means, in the exercise of the legislators' authority, legislative discretion in a broad sense is endowed thereto. Especially, when the Constitution itself has an express provision restricting the basic right for the purpose of obtaining a particular public interest, it is interpreted as the reflection of the will of the framers of the Constitution that the Constitution has thereby placed that constitutional value (i.e., public interest) forming the basis of the restriction of such basic right above that basic right, in which case, therefore, the legislators are possessed of a broader legislative discretion in the realization of the public interest requested by the Constitution.

However, endowment of legislative discretion to the legislators should not be deemed that the freedom and rights enjoyed by the citizens, especially the freedom of conscience, have thereby been degenerated to the nominality that is limited to the scope benignly permitted by the state under the interrelationship with the maintenance of the legal order. The legislative discretion of the legislators is also subject to a certain limit. Here, when the legislators have conducted a specific legislative act, the purview of judicial review is limited to the issue of whether the legislators' exercise of legislative discretion is deviative of its limits, and the standard in such judicial review should be whether the exercise of the legislative authority has gone beyond the external limit of justice thereby rendering a contradiction with justice intolerable, that is, whether it has crossed the limit of tolerance under justice, or, the principle of prohibition against arbitrariness that prohibits arbitrary exercise of the legislative power.

Such a difference in review standards may bring about a substantive difference not only in the structure of reasoning for the review but also in the allocation of the burden of proof or the burden of persuasion for unconstitutionality. Pursuant to the principle of prohibition against excessive restriction, unless it is proven that the statute restrictive of the basic right is not an excessive intrusion (especially that the public interest intended to be achieved is greater), it is held to be unconstitutional. However, on the other hand, if legislative discretion is recognized, unless it is proven that the legislators have crossed the limit in exercising legislative discretion, that is, that the legislators have exercised the legislative power arbitrarily, the statute under review is held constitutional. For example, there exists a possibility that these two review standards will lead to different conclusions, when a fact in the past or future that may form the basis of the legislation cannot be proven.

(4) Such constitutional interpretation with respect to the review

standards is consistent with the position that has been taken by our Constitutional Court. That is, the Constitutional Court, in its decision in the case of 90Hun-Ba27(consolidated), April 28, 1992, with respect to the restriction by Sections 1 and 2 of Article 66 of the State Public Officials Act of the scope of the public officials guaranteed with the three basic labor rights, which is pursuant to the restriction of the subject of the fundamental right under Section 2 of Article 33 of the Constitution concerning the three fundamental labor rights of the workers guaranteed by Section 1 of Article 33 of the Constitution, held that the above statutory provision is not deviative of the discretion of formation endowed to the legislators by Section 2 of Article 33 of the Constitution which delegates to the legislators to determine the scope of the public officials who may become the subject of the three fundamental labor rights, and that, therefore, the above statutory provision is not violative of the Constitution. The above decision affirmed the legislators' discretion of formation in the case of the restriction of the basic right by the Constitution itself. Furthermore, the above decision merely reviewed, within the scope of rationality review, first, whether the above statutory provision is not in conformity with the purpose that is inherent in the statutory reservation of Section 2 of Article 33 of the Constitution, and, second, whether there is a proper harmony between the order of the value that is to be achieved by the constitutional guarantee of the three fundamental labor rights for the workers and the purpose of public welfare of the entire citizenry that is to be achieved through the maintenance and the development of a reasonable professional civil servant system; while the above decision did not employ a strict scrutiny under Section 2 of Article 37 of the Constitution and under the principle of prohibition against excessive restriction.

In addition, in the decision in the case of 95Hun-Ba3, December 28, 1995, the Constitutional Court held that the proviso of Section 1 of Article 2 of the State Compensation Act is not in violation of the Constitution in that such proviso is directly based upon Section 2 of Article 29 of the Constitution that restricts in the way inherent to the Constitution the claim for state compensation which is guaranteed by Section 1 of Article 29 of the Constitution, and that the content of this proviso substantively conforms to that of Section 2 of Article 29 of the Constitution. This has also clarified that judicial review upon the violation of basic rights in the case of the restriction of basic rights by the Constitution itself may not be the same as the judicial review in the case of the restriction of basic rights by way of ordinary statutes.

(5) Therefore, the dissenting opinion's employment of Section 2

of Article 37 of the Constitution and the principle of prohibition against excessive restriction as the review standards in reviewing the constitutionality of the statutory provision at issue in this case may not be acceptable, in that it is the choice of an incorrect review standard caused by neglecting the special characteristics, i.e., the constitutional reservation of the important matters and the principle of reservation to the National Assembly, of Article 39 of the Constitution which restricts basic rights by the Constitution itself, and, further, in that it is also inconsistent with the review standard and the method of review taken by our Constitutional Court in the past.

D. Constitutionality of the Statutory Provision at Issue in this Case

(1) As the majority opinion indicates, the statutory provision at issue in this case punishes those who are subject to enlistment for active duty but fail to enroll until five days past the designated date of enlistment with no justifiable reason. As such, the statutory provision at issue in this case restricts the freedom to exercise conscience of the conscientious objectors, thereby limiting the freedom of conscience provided in Article 19 of the Constitution.

From the aspect of coercing the duty of military service by way of criminal punishment upon the conscientious objectors as such, there is a clash between the constitutional value intended to be realized through the duty of national defense provided in Section 2 of Article 5 as well as Section 1 of Article 39 of the Constitution, that is, the constitutional value of the maintenance of the nation and preservation of national territory, or the preservation of the life and the safety of its citizens, or, more specifically, the maintenance of national defense power, on one hand, and, on the other hand, the constitutional value of the freedom of conscience which is the fundamental right of the citizens.

Here, as Section 1 of Article 39 of the Constitution is deemed to have placed the constitutional value of the maintenance of national defense power over basic rights by expressly providing for the restriction of basic rights, the legislators have extremely broad legislative discretion for the realization of the constitutional value of the maintenance of national defense power. Therefore, in order to hold the statutory provision at issue in this case unconstitutional, it should be proven that the statutory provision at issue in this case has gone beyond the limit of the legislative discretion by demonstrating either that this provision is beyond the limit of tolerance of justice or that the affirmation of the facts that formed the basis of the legislation and the choice of the policy measure were clearly arbitrary.

(2) First, whether the statutory provision at issue in this case is beyond the limit of tolerance of justice is hereby examined.

First, it is hereby examined whether the imposition of criminal punishment under the statutory provision at issue in this case upon the so-called conscientious objectors, is beyond the tolerable limit of justice thereby violating the freedom of conscience.

There is a fundamental difference between the freedom of conscience and the other basic rights. In the cases of the freedom of life, property, expression, assembly, vocation, etc., such basic rights are guaranteed regardless of the individual and subjective state internal to the subject of the respective basic rights, and, further, are not violable by governmental power. Therefore, should a specific legal provision violate any of the above basic rights of one individual, the application of this legal provision to another individual also constitutes a violation of the basic right of that individual. On the contrary, as the freedom of conscience is extremely subjective in its own nature, the violation of the freedom of conscience caused by the clash between a decision under the conscience and the national legal order is inevitably individualistic, and, even if a legal provision thereby violates the freedom of conscience of one individual, this does not result in the general effect of the violation of the freedom of conscience of other individuals. Therefore, we may not request the legislators to enact a general provision under which the freedom of conscience is considered in advance and preventively over any and all cases where there is room for conscientious conflict which is individualistic and cannot be generalized. We may not, as a rule, impose upon the legislators an obligation to provide an alternative that may be substituted for a legal obligation, in light of countless individual possibilities of the occurrence of conscientious conflicts, which are beyond perception. Even if the legislative omission of such a provision does result in the violation of the freedom of conscience, this does not render the statute unconstitutional *per se* (Refer to Herdegen, Gewissensfreiheit und Normativitat des positiven Rechts, S. pp.286-287).

In light of such characteristics of the freedom of conscience in its own fundamental nature, even if the legislators did not enact a general provision for the protection of conscience in legislating the statutory provision at issue in this case, it should not be concluded directly therefrom that the statutory provision at issue in this case is unconstitutional for the reason that it is intolerable from the perspective of justice as deviative of the external limit of justice.

Next, it is hereby examined whether the statutory provision at

issue in this case is in contradiction to justice, as it criminally punishes those individuals with conscience the content of which is the ideology of justice.

That is, there may be a question of whether the statutory provision at issue in this case is intolerable by any means for its contradiction to and conflict with justice, as it is a provision of positive law that suppresses and sanctions the conscientious objectors, when the conscientious objectors punished by the statutory provision at issue in this case are the so-called prisoners of conscience, who pursue the just values toward which this community in which we live should move forward and attempt to realize this in a passive way.

Here, conscience that the Constitution intends to protect is the 'powerful and earnest voice of the heart that determines the right and wrong of a matter, failing to conduct pursuant to which will disintegrate one's existential value as a person.' As such, the conscience protected by the Constitution is a specific conscience that is earnest and acute, and not the conscience as a vague or abstract concept. Furthermore, it should be conscience that satisfies the consistency or universality in judging the values.

The conscientious objectors that the statutory provision at issue in this case concerns claim that they refuse enlistment due to the order of conscience pursuant to the teachings of the religion of their belief. The conscience of such conscientious objectors should be deemed to prohibit any and all violence including war, as far as it is not merely for the evasion of the military service. Whether this conscience is the one that satisfies the consistency or universality in the judgment of the values is dependent upon whether or not these individuals who have such conscience respectful of non-violence will actually give up the protection by governmental power in its entirety, which inevitably accompanies the exercise of the physical power, upon infliction of harm by others on their own life, body or property. It should be noted that the refusal of the duty of military service is inevitably linked to the abandonment of such protection of oneself, especially because our Constitution denies the war of aggression (Section 1 of Article 5 of the Constitution) thereby undeniably characterizing the maintenance of national defense power of the Republic of Korea as one of self-defense.

If the conscientious objectors do completely give up protection by governmental power offered through the exercise of the physical power provided for their protection, the consistency and universality of their conscience and ideology can be affirmed, as sufficiently possessing the value that deserves to be respected. However, the very fact that they maintain their life and property within the

territory of this nation is in itself clear evidence that they receive the protection provided through the use of physical power by governmental power, or the institutionalized violence. In addition, any record indicating that the so-called conscientious objectors have refused such protection of governmental power by way of physical power is nowhere to be seen. As such, conscience that the so-called conscientious objectors claim to have is undeniably an antinomy, if they object to the performance of the duty of obligation to military service that contributes to the formation and the maintenance of the physical power which constitutes an important part of the governmental power of the nation on one hand, while, however, they intend to and do enjoy the protection provided by such governmental power for their life, body and property, on the other hand. Further, this unavoidably presents a serious doubt with respect to what the conscience of the conscientious objectors purporting to pursue nonviolence is in substance, and whether such conscience may be accepted as an earnest value system that has consistency and universality. Such doubt is of a fundamental nature that it may not be eliminated solely by the fact that the conscientious objectors claim their conscience notwithstanding the incarceration and the ensuing great disadvantages of hardships in vocational career and inhospitalities from society, or that the conscientious objection is broadly recognized in other nations and its recognition is also internationally demanded. Rather, the conscience that comes from the bottom of our hearts mandates a more serious deliberation over this issue for the future of our community, despite the sympathetic atmosphere of society towards the so-called conscientious objectors. The conscience that they claim to have may hardly be accepted as one that has a sincere value system with consistency and universality, from the fact that the claims of the petitioner and others objecting to military service purportedly on the ground of conscience, at least at the current point, indicate no clear perception or explanation on this issue and even no serious thought given to this issue.

Then, the conscience of those who object to military service on the ground of conscience is itself something no more than a hope of antinomy that lacks consistency and universality. Thus, it is questionable whether such conscience may be deemed conscience that is the object of constitutional protection, and, at the very least, this is unacceptable as one criterion of justice that rules our community. Therefore, the imposition of criminal punishment upon those who object to military service on the ground of conscience may not be deemed as an intolerable contradiction of the exercise of the legislative authority against justice beyond the external limit of justice, as in the case of the persecution of the earnest

conscientious criminal convicts.

(3) Next, whether the statutory provision at issue in this case is a clearly arbitrary legislative measure is hereby examined.

The first question to be posed here is whether the imposition of the criminal sanction upon non-performance of the duty of military service is a proper means to achieve the constitutionally established legislative purpose, that is, the maintenance of national defense power, the maintenance of the nation and the preservation of national territory, and the protection of the life and safety of its citizens. The appropriateness of criminal sanction for such purpose is easily agreeable, in that it at least deters, due to the effect of general deterrence of such criminal sanction, the spread of the evasion of military service by others who use as a pretext conscience that lacks sincerity, even if the statutory provision at issue in this case does not have an effect of making those objecting to perform military service and choosing instead a criminal punishment for the reason they may not refuse the order of their conscience, to enroll and serve by bearing arms. Considering especially that the criminal punishment regulated in the Military Service Act punishes the *mala prohibita* and not *mala in se*, such general deterrence effect is rather a core function of the criminal punishment under the statutory provision at issue in this case.

Then, the crucial issue is whether criminal sanction as such is an excessive one for a prisoner of conscience convict who has not committed physical harm to others, that it should be replaced with other alternative means.

The petitioner argues for the settlement of the clash between the conscience and the duty of military service by way of an alternative civilian service system (hereinafter referred to as the 'alternative service system'). However, the statutory provision at issue in this case, which is the subject matter of the request for constitutional review in this case, does not itself provide for the duty of military service. Instead, the statutory provision at issue in this case merely regulates the sanction for the violation of the obligation, on the premise of the duty of military service provided for in Sections 3 and 5 of the Military Service Act. Thus, the alternative service system that is to cause a transformation of the duty of military service itself is not relevant to the constitutionality of the statutory provision at issue in this case to be judged in the process of the constitutional review in this case, which does not include the above provisions mandating military service duty as the subject matter of review. Therefore, judgment upon this issue may not fall within the scope of judgment for this case (This confusion seems to have been caused by the decision of the requesting court

that filed the request for constitutional review solely of the statutory provision at issue in this case, while putting the right of conscientious objection at issue). Even if the alternative service system has been claimed in the context that it should be recognized as one form of lenient sanction, the alternative service system may not, as examined above, be deemed as a sanction for the violation of the duty although it may change the content of the duty itself. Once the state has imposed the obligation of military service without altering it, it must clearly present toward the citizens the standard of judgment over the right and wrong in the normative sense, by imposing negative value assessment and criticism against the conduct that is in violation of such obligation. Should instead merely a value-neutral social service or alternative service be imposed as the legal effect thereof, this would be an act of contradiction abandoning the status as the protector of justice and norms, on the part of the state itself. Therefore, I do not agree with the view of deeming the alternative service as one form of lenient sanction.

Then, it is now examined whether the means of sanction is excessive. The criminal punishment is the most powerful and cruel among all sanctions for failure to perform obligations in public law. Especially, the statutory provision at issue in this case imposes incarceration of fixed prison terms of a maximum of three years, thus the degree of restriction of the fundamental right is considerable. As there are possibilities of administrative order punishments such as non-penal fines as well as the above administrative penal punishments, which are available as sanctions for the failure to perform obligations in public law, it may be questioned whether criminal sanction had to be chosen as the sanction for the violation of the duty of military service, and, whether it was not possible to provide for a more lenient kind of criminal punishment when choosing to impose criminal punishment. However, there is a prima facie balance between the sentence of fixed term incarceration under the statutory provision at issue in this case and the violation of the duty, in light of the facts that the military service on active duty to which the statutory provision at issue in this case applies is imposed for the period of two years through two years and four months (Article 18 of the Military Service Act), that such duration of service may be extended for up to one year in certain cases necessary for national defense (Article 19 of the Military Service Act), and that individual liberty is considerably limited thereby as such military service on active duty is imposed by way of mandatory conscription.

Creation of a new lenient means of sanction may be considered,

as a matter of course, should we lie in the situation of a conspicuous decrease in the need for the maintenance of national defense power rendering the powerful sanction of criminal punishment unnecessary. Such lenient means of sanction should of course be premised upon a diagnosis for the future situation that the implementation of such new system will not compromise the maintenance of national defense power.

With respect to this, the petitioner claims that the implementation of the alternative service system will be a proper method of utilizing human resources rather than a threat to national defense, in light of the facts that the concern of mass producing military service evaders upon the availability of the alternative service system can be eliminated by the implementation of the alternative service system that is equivalent to the military service on active duty in terms of the duration of service, the degree of hardships and life of joint camp training, that the proportion of the conscientious objectors is approximately 0.2% of the entire number of individuals subject to conscription, and that modern warfare is turning into a scientific warfare.

On the contrary, the Minister of National Defense and the Commissioner of the Military Manpower Administration claim that the alternative service system is not a system that may be in harmony with the guarantee of national security, on the grounds that there is a concern of abrupt increase of the number of conscientious objectors under the current situation of poor conditions in military service, that injury to uniformity and unity of the conscription system, under the situation where it is difficult to secure a strict review process for the selection of the conscientious objectors, might disintegrate the conscription system, and that, further, it is difficult to find a task outside the military that is equivalent to the military service on active duty in terms of the degree of hardships.

As such, there are different expectations toward the result of the relaxation of the duty of military service and the relevant sanctions, depending upon their respective positions. Further, it may not be concluded that it will not affect the maintenance of national defense power in the future on the sole ground that currently the proportion of the conscientious objectors is small, especially considering in total that the number of individuals subject to conscription is in the process of diminishing due to the decrease in birth rate, that relaxation of sanctions may provide a new incentive for evading military service on the pretext of conscience, that it may not be excluded as a possibility that an influential religious entity declares objection to bearing arms on the ground of

development in religious doctrine or a religious entity inculcating objection to bearing arms as its religious doctrine is newly established and abruptly proliferates thereby producing the conscientious objectors to an unbearable degree, and that the importance of the size and scale of the military force does not necessarily decrease due to the aspect of modern warfare as a scientific warfare and the relative balance in correlation with the size of the military capability of the hostile power should also be taken into account.

Therefore, when the prospect of the future situation with respect to whether national defense power may be maintained notwithstanding the relaxation of the sanction for the nonperformance of the duty of military service is unclear, if the legislators takes one of the situations that is possibly expected and conducts legislative formation corresponding thereto, this may not be criticized as arbitrary legislation in excess of the legislative discretion. According to this, in order to hold the statutory provision at issue in this case unconstitutional, it should be sufficiently proven that the legislators have arbitrarily legislated outside of the scope of legislative discretion while the relaxation of the sanction under the statutory provision at issue in this case will not harm the maintenance of the national defense power. However, examination *sua sponte* of the totality of the situations as seen above does not indicate that it is an arbitrary legislation, while the forecast of relevant future facts is unclear.

Therefore, the statutory provision that imposes the criminal sanction of incarceration of a maximum of three years without exception for the so-called conscientious objectors may not be deemed as clearly arbitrary legislation that imposes excessive criminal punishment.

(4) Subconclusion

Then, in whichever perspectives, the statutory provision at issue in this case is not unconstitutional beyond the limit of legislative discretion.

E. The majority opinion goes one step further from here and recommends the legislators with respect to the issue of conscientious objection to sincerely assess whether there is a solution to resolve the conflict between the legal interests of the freedom of conscience and national security for the coexistence of these two legal interests, whether there is an alternative solution to protect the conscience of the conscientious objectors while securing the realization of the public interest of national security, and whether our society is now mature enough to show understanding

and tolerance for the conscientious objectors. The majority opinion further recommends that the legislators earnestly consider whether to supplement legislation in the direction of permitting the institutions applying the law to take measures protecting conscience through the application of law that is favorable to conscience, even if the legislators decide not to adopt the alternative service system.

However, in a situation where there is remaining concern yet to be eliminated concerning whether such conscience deserves constitutional protection or whether it conforms to the principle of justice acceptable in our society as the conscientious objection has an aspect of antinomy as examined above by simultaneously pursuing contradicting values, I do not agree with the above position that recommends, without presenting any convincing answer to such inquiries of legal philosophy and political ideology, to favorably consider the conscientious objectors by declaring certain conscientious objectors as those claiming earnest conscience and also by considering the expressed opinions of the social organizations and international trends. Furthermore, especially under the situation where the expectation toward the possibility of maintenance of national defense power upon changes in system is unclear, making the above recommendations to the legislators who have a broad authority in recognizing the legislative facts and choosing the policy measures for the realization of the constitutional values contains a danger of being understood in false light as an interference with or intrusion upon the legislative power by the judicial power. It should be noted that it is undesirable as exceeding the limit of judicial judgment to make a recommendation to the legislators with respect to the legislative matters upon an issue that is irrelevant to the subject matter of this case, in a situation where there is yet to be any conviction with respect to the legitimate direction of legislation.

F. Conclusion

Although I agree with the conclusion of the majority opinion in that the statutory provision at issue in this case is constitutional, I respectfully disagree with the majority opinion in terms of the reasoning that supports the conclusion. My separate concurring opinion is thus stated as discussed above.

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

[Appendix] list of the attorneys of record for the petitioner[omitted]

3. *Refusal of the Participation of Attorney in the Interrogation of Suspects who are not in Custody*

(16-2(A) KCCR 543, 2000Hun-Ma138, September 23, 2004)

Held, the refusal by the prosecutor of the request made by complainants, who were suspects not in custody, for the participation of the attorney in the interrogation, was unconstitutional.

Background of the Case

The complainants in this case are the executive members of the non-government organization established prior to the 16th general election to constitute the National Assembly, which was held in April of 2000. On January 24, 2000, the above non-government organization publicly announced towards the political parties a list of the candidates whose nomination the organization opposed. The prosecution thereupon summoned the petitioners alleging crime. The petitioners requested that the prosecutor permit the participation of their attorney in the interrogation as suspects, however, the prosecutor refused such request. The petitioners thereupon filed a constitutional complaint on the ground that the above refusal violated their rights including the right to assistance of counsel.

Summary of the Decision

The Constitutional Court held, in a 6:3 opinion, that the above act of refusal violated the Constitution. The summary of the opinion is as follows.

1. Majority Opinion

The principle of government by law, the principle of due process, and the right to assistance of counsel under Article 12, Section 4, of the Constitution are guranteed for the suspect or the defendant who is not in custody. Also, seeking advice and consultation from the attorney appointed by the suspect or the defendant within the attorney's presence is always permitted from the outset of the investigation throughout the completion of the court procedure despite no specific express provision in the Criminal Procedure Act, unless there are certain special circumstances such as a concern for

illegal assistance.

In this case, the prosecutor refused the request of the complainants for the participation of the attorney for advice and consultation. However, in refusing the request, the prosecutor neither stated any reasons therefor nor submitted any materials thereon. Thus, the above act of refusal that curtailed the request made by the complainants for advice and consultation from the attorney during their interrogation as the suspects infringed the right of the complainants for the assistance of counsel.

2. Concurring Opinion of Two Justices

The facts alleged against the complainants as the suspects pertained to such abstract content as purposefulness, premeditation and voluntariness. The suspects therefore should know the exact legal meaning of their statement. Hence, there is an increased need for the appropriate assistance of counsel.

Participation of the attorney in the interrogation of the complainants would not increase the danger of the interference with the discovery of substantive truth or the destruction of evidence. Also, there is hardly any possibility of the infringement of legal interest such as life or bodily safety of the victim or the witnesses. Then, the public interest the prosecutor purports to achieve by limiting the participation of the attorney in the interrogation of a suspect in this case may not be deemed to outweigh the basic rights of the complainants limited thereby.

Therefore, the above act of refusal violated the right to assistance of counsel and the right to fair trial of the complainants.

3. Dissenting Opinion of One Justice

Article 12, Section 4, of our Constitution should be interpreted to guarantee the right to assistance of counsel for suspects under arrest or in custody and for the defendant in criminal proceedings only. The right to assistance of counsel for the suspect who is not in custody may not be deemed to be guaranteed at the constitutional level.

4. Dissenting Opinion of Two Justices

Among basic rights, neither procedural rights nor claim-rights may be directly applicable to individual cases without specific legislative formation by the legislator. Likewise, in the case of the

right to request the participation of the attorney that is at issue in this case, the content of the right to request the participation of the attorney may not be determined without specific decisions of the legislator with respect to in which circumstances this right should be guaranteed and to which extent. Therefore, the above act of refusal by the prosecutor does not constitute a violation of the right to assistance of counsel.

Aftermath of the Case

Following this decision, a new provision was added in the bill to amend the Criminal Procedure Act proposed by the Ministry of Justice, which was under preliminary announcement of legislation as of December 15, 2004, which permitted the participation of the attorney in the interrogation of the suspect(Article 243-2, Sections 1 and 2).

Parties

Complainants

Choi O, and 1 other

Counsel of Record: Cho Yong-Hwan, Esq. Horizon Law Group(*Ji-Pyung*)

Respondent

Prosecutor, at Seoul Central District Prosecutors' Office

Holding

The act of the respondent on February 16, 2000 of refusing the request made by the complainants for the participation of the attorney in the interrogation of the complainants as the suspects is unconstitutional, as it is an infringement upon the right of the complainants to the assistance of counsel.

Reasoning

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

A. Overview of the Case

Complainant Choi O served as the co-representative and complainant Park Won-Soon served as the executive committee permanent co-chair, respectively, of the "Citizen Alliance for the 2000 General Election," which was organized on January 12, 2000. On January 24, 2000, facing the general election for the 16th National Assembly that took place in April of 2000, the above citizen alliance for the general election publicly announced a list of individuals whose political party nomination as candidates the citizen alliance opposed.

The respondent thereupon summoned and interrogated the complainants as the suspects on February 16, 2000, on the ground that the above act of the complainants might have constituted a violation of the Public Office Election And Election Malpractice Prevention Act or defamation. Prior to the above suspect interrogation, the complainants requested verbally and in writing through their attorneys that the respondent permit the participation and the assistance of their attorneys during the interrogation of the complainants as suspects. The respondent refused the request, proceeded instead to interrogate the complainants as the suspects and documented such interrogation. The complainants thereupon filed the constitutional complaint in this case on February 24, 2000, claiming that the above act of refusal by the respondent violated the right to assistance of counsel, and they seek to confirm its unconstitutionality.

B. Subject Matter of Review

The subject matter of review in this case is whether the act of the respondent of refusing the request for the participation and the assistance of the attorney in the interrogation of the complainants as suspects notwithstanding the specific request from the complainants as such, which occurred on February 16, 2000 (hereinafter referred to as the "act in this case") violated the basic rights of the complainants. Although the complainants also seem to view as the subject matter of review in this case the act of the respondent of interrogating the complainants as the suspects while denying the participation of the attorney, as long as the act in this case is deemed to be an exercise of government power and therefore reviewed as the subject matter of the case, the subsequent acts taken by the respondent constitute factual acts and no more than the continuation of the unconstitutional and unlawful state of the act of refusal, therefore not separately constituting the subject matter of

review. The relevant provision of law is Article 243 of the Criminal Procedure Act, which provides under the title of Interrogation of Suspect and Attendant that, in case a public prosecutor interrogates a suspect, he shall have an investigator, court administrative officer, or clerk of the public prosecutor's office present at the place, and in case a judicial police officer interrogates a suspect, he shall have a judicial police official present at the place.

2. Complainants' Argument and the Opinions of the Relevant Parties

A. Argument of the Complainants

(1) Although the suspect interrogation by the respondent at issue in this case itself was already completed, the issue of whether the constitutionally guaranteed 'right to assistance of counsel' includes the 'right to have the attorney participate and assist the suspect during the interrogation of a suspect by the investigative authority is a matter of great significance that requires constitutional clarification. Further, such act of violation of fundamental right is at danger of repetition in the future. Therefore, there is a need that the act of violation in this case be ruled unconstitutional.

(2) Even though an individual is not under arrest or in custody by the investigative authority, the 'right to assistance of counsel' guaranteed by Article 12, Section 4, of the Constitution should be applicable as a matter of course in the case of investigation or trial where the suspect or the defendant is not in custody.

(3) The circumstance to which a suspect is subjected while investigated at the investigative authority renders it practically impossible that the suspect may defend herself or himself against the interrogation posed by the investigative authority while maintaining free state of mind. Not only is the fact of being summoned and interrogated by the investigative authority itself a very imposing and painful situation to the individual, but also is such an individual who lacks expert knowledge in substantive or procedural law is practically forced to make statements under insecure situation of not knowing the investigation procedures or the meaning of the question asked by the investigative authority. Even if a suspect is aware of such, should she or he be in fact interrogated in the status of a suspect, it becomes difficult to properly exercise normal power of judgment. Therefore, without sufficient assistance of counsel, a suspect is put in a vulnerable

situation where she or he has difficulty in defending herself or himself.

(4) The statement of a suspect given at the investigative authority becomes decisively unfavorable evidence against the suspect, Further, such statement made to the prosecutor is admissible as evidence notwithstanding the statement given by the same person at the court. Therefore, it is extremely important that a suspect, when making statement during the suspect interrogation by the prosecutor, is thoroughly guaranteed with all of the rights including the right to remain silent and allowed to feel free.

(5) Therefore, in order to guarantee the rights of the suspect who is under interrogation at the investigative authority, and to verify any assertion by the suspect of the violation of rights, the attorney should be able to participate to monitor illegal investigation and to provide necessary and proper advice from time to time, during the investigation of a suspect.

(6) Pursuant to the Korean-U.S. Status of Forces Agreement, the members and the civilian employees of the United States Army and their families are guaranteed with the 'right to have the attorney of their choice for their defense.' The lack of guarantee of the right to attorney participation when the Korean investigative authority interrogates the Korean citizens as suspects constitutes an unjust discriminatory treatment of the Korean citizens compared with the members and the civilian employees of the United States Army stationed in Korea, and, as such, is in violation of the right to equality.

B. Opinions of the Director of Seoul District Prosecutors' Office and the Minister of Justice

(1) The interrogation of the complainants at Seoul District Prosecutors' Office ceased on February 16, 2000 and the complainants were released on the same day. Therefore, any violation of basic rights ceased to exist and there remains no justifiable interest for which a constitutional complaint may be filed. The constitutional complaint in this case should thus be dismissed as moot.

(2) The 'right to assistance of counsel' guaranteed by Article 12, Section 4, of the Constitution is to enable a suspect or a defendant who is under arrest or in custody to immediately appoint a counsel and to freely meet and communicate with such counsel for sufficient defense against the facts accused or indicted against the suspect or the defendant, as well as to guarantee the inspection of

the litigation record by the attorney, yet not to guarantee the right of attorney participation during the interrogation of a suspect. The right of attorney participation at suspect interrogation is not a constitutional law issue, but instead an issue of legislative policy for the realization of the two basic principles of criminal procedure, the 'discovery of substantive truth' and the 'protection of human rights of the suspect and other relevant individuals.'

(3) The complainants assert that the 'participation of attorney in suspect interrogation is necessary in order for voluntary statement of the suspect.' However, our Constitution and Criminal Procedure Act sufficiently guarantee the voluntariness of the statement and the right to remain silent for the suspect under various provisions, and, should an investigative authority violate the above, the interrogation record becomes inadmissible as evidence and, further, such violation constitutes an illegal act, rendering the investigative authority legally responsible.

(4) The complainants assert that the 'right of attorney participation at suspect interrogation is a common standard in all civilized nations.' However, although it is true that this right is recognized in some nations, it is not a right commonly recognized in all nations. In Korea, compared with those nations recognizing the right of attorney participation as above, the duration of lawful custody is extremely short and the right to meet and communicate with the attorney is permitted without limit. In light of such particular nature, in this circumstance, recognizing the right of attorney participation at suspect interrogation as well might render investigation of important crimes practically difficult.

(5) Our investigatory institution's permitting the participation of attorney while investigating crimes committed by the members of the United States Army stationed in Korea and certain others pursuant to the minutes under the agreements such as Korean-U.S. Status of Forces Agreement is the result of a special provision to recognize the special status of the foreign citizens or to guarantee their rights comparable to those of the criminal procedure in their home countries. A different treatment of the Korean citizens compared with the members of the United States Army and certain others as the result thereof does not therefore constitute a violation of the right to equality.

3. Determination of the Court

A. Determination on the Legal Prerequisites of the Constitutional Complaint

(1) At the time the complainants filed the constitutional complaint in this case, the factual conduct(interrogation of the suspect) of the respondent that is the subject matter of this case had already ceased, by which the violation of the basic rights asserted by the complainants had also been completed. Therefore, the adjudication as sought at this Court will not relieve the subjective rights of the complainants.

(2) However, the issue that the complainants seek to adjudicate by pursuing the constitutional complaint in this case is whether the 'right to assistance of counsel' guaranteed by the Constitution also includes the right of attorney participation at the interrogation of a suspect who is not in custody. This issue pertains to the fundamental question of the scope of protection of the basic right of the 'right to assistance of counsel,' and, as such, the clarification on the constitutionality of the act in this case bears a significant constitutional meaning. Therefore, although the illegal and unlawful state allegedly caused by the act in this case that is the subject matter of review has already ceased to exist, there is a need to confirm the constitutionality of such an act. The constitutional complaint in this case is thus lawful as there is justifiable interest for requesting adjudication(*See* 3 KCCR 356, 367, 89Hun-Ma181, July 8, 1991; 9-2 KCCR 675, 688, 94Hun-Ma60, November 27, 1997, etc.).

B. Determination on the Merits

(1) Constitutional Ground for the 'Right to Assistance of Counsel'

The Constitution expressly states the 'right to assistance of counsel' as a constitutional basic right, as it provides in Article 12, Section 4, that "any person who is arrested or detained shall have the right to prompt assistance of counsel. When a criminal defendant is unable to secure counsel by his own efforts, the State shall assign counsel for the defendant as prescribed by Act. and, in the first paragraph of Article 12, Section 5, that "no person shall be arrested or detained without being informed of the reason therefor and of his right to assistance of counsel. It is clear that the main

provision of Article 12, Section 4, of the Constitution provides for the right to assistance of the 'attorney,' and its proviso provides for the right to assistance of the 'government-appointed attorney,' respectively. There is no doubt that the above right to assistance of the 'attorney' exists from the initiation of the investigation through the final and conclusive judgment. Further, should an indicted defendant be unable to obtain an attorney by herself or himself, the government is mandated to provide assistance of the 'government-appointed attorney' pursuant to the relevant statutes, thereby in the case of a defendant in the criminal procedure the right to assistance of counsel is declared in the Constitution not only as a mere personal right but also as, in certain circumstances, a public obligation.

The main provision of Article 12, Section 4, of the Constitution provides for the right to assistance of counsel when a person is 'under arrest or in custody.' Therefore, a question remains to be answered with respect to whether a suspect or a defendant who is not in custody is excluded from the scope of the right to assistance of counsel under this provision. However, the above provision does not intend to provide for the right to assistance of counsel merely in the case where a person is 'under arrest or in custody.' The reasons therefor are as follows:

First, the principle of the government by the rule of law, which is one of the fundamental orders of our Constitution, mandates a complete system for the effective relief of the rights against both the lawful and the unlawful exercise of the governmental power. An effective relief procedure for the rights applicable in the criminal procedure prohibits treating the suspect or the defendant as a mere object of the criminal procedure, and, further, requires that a relief procedure for the rights be structured pursuant to the procedural principle of equal arms under the principle of equality. Thus, the Constitution and the current Criminal Procedure Act guarantee, in order to realize the 'principle of equal arms,' various means and opportunities through which the suspect and the defendant may appropriately defend themselves, by enabling the suspect and the defendant to actively exercise their rights as the subject of the procedure, and, among these, the most substantial and effective means is the right to assistance of counsel. Here, the most fundamental element of the right to assistance of counsel is the right to obtain an attorney, and, it is a matter of course in light of the principle of due process that this should be guaranteed for all suspects and defendants regardless of whether they are in custody.

Second, Article 12, Section 4, of the Constitution consists of the main provision and the proviso. In general, a proviso is used in

order to establish an area that is specifically excluded from the main provision or to include an area that is specifically added to the main provision. Here, as the proviso in Article 12, Section 4, of the Constitution guarantees the right to assistance of government-appointed counsel solely for the defendant(whether in custody or not), the main provision should be interpreted to be based on the premise that the right to assistance of(privately obtained) counsel is guaranteed for both the suspect and the defendant(whether in custody or not), for a natural and logical relation between the main provision and the proviso. Therefore, the main provision of Article 12, Section 4, of the Constitution that provides for the right to assistance of counsel when 'under arrest or in custody' is not to exclude the right to assistance of counsel of the suspect or the defendant who is not in custody, but to specifically further underline, based on the above premise, the right to assistance of counsel of the suspect or the defendant who is under arrest or in custody.

In sum, although our Constitution does not expressly state whether or not the right to assistance of counsel is inclusively guaranteed for all suspects and defendants when not in custody, the right to assistance of counsel of the suspect who is not in custody should be read as a matter of course as the content drawn from the principle of the government by the rule of law and the principle of due process of our Constitution. Article 12, Section 4, of the Constitution should also be understood as separately providing expressly, based on this premise, for the right to assistance of counsel for those who are in custody or under bodily constraint in order to underscore such right.

(2) Scope of Protection of the 'Right to Assistance of Counsel'

(A) The right to assistance of counsel means the right of the suspect and the defendant to obtain the assistance of the attorney for the effective and independent exercise of the rights provided for the suspect and the defendant under the constitutional and the procedural law, against the unilateral exercise of the authority of the government to punish crimes.

The starting point of such right to assistance of counsel lies in the right to appoint an attorney, and this is the most fundamental element of the right to assistance of counsel and may not, as such, be limited even by statute. The specific contents included in the right to assistance of counsel beyond the right to appoint an attorney and, further, whether such right may be drawn directly from the above constitutional provision or provided only upon specific legislative formation, depend upon the perspective as to the

role and the function of the attorney in the criminal procedure.

The attorney in the criminal procedure serves on one hand a function of an assistant who supports the self-defense of the suspect or the defendant in the status of an adversarial party against the investigatory and the indicting institutions, and, on the other hand, a function of affecting the criminal procedure favorably to the suspect or the defendant and of monitoring and controlling the observance of the rights of the suspect or the defendant. The most important role of an attorney among the above is the one of an assistant, and the specific rights for the exercise of this role are in principle provided only upon the legislative formation. Thus, the Criminal Procedure Act thereupon provides with particularity the specific contents of the right to assistance of counsel, such as the right to inspect and photocopy the litigation record including the investigation record as well as the evidentiary materials, the right to request preservation of evidence, the right to collect other evidentiary materials, and the right to prepare attack and defense based on the result of inspection over such materials.

However, any and all exercise of the above specific rights may be undertaken only when the advice and the consultation through meetings with the attorney is guaranteed, following the appointment of an attorney. Should a suspect or a defendant be unable to seek advice and consultation of the attorney, the exercise of the specific rights such as the above may become impossible or disregarded, and, further, such inability may even damage the meaning of the existence of the right to assistance of counsel itself as the result of misuse. Therefore, whether or not a suspect or a defendant is in custody, the role of the attorney as an assistant that may be served by way of advice and consultation constitutes the most essential content of the right to assistance of counsel along with the right to appoint an attorney. The right to consult the attorney and to seek advice from the attorney is a necessary prerequisite for other procedural rights included in the right to assistance of counsel that require specific legislative act, and, as such, may be drawn directly from the right to assistance of counsel itself.

The Constitutional Court already declared that "freely meeting and consulting with an attorney is the most important content of the right to assistance of counsel guaranteed for those persons under bodily restraints or in custody, and, therefore, may not be limited under any justifications whatsoever such as national security, maintenance of order or public welfare(4 KCCR 51, 60-61, 91Hun-Ma111, January 28, 1992)." Although this precedent was on the right to assistance of counsel for the suspect who was in custody, this likewise applies in the case of the suspect or the

defendant who is not in custody. This is because our Constitution guarantees the right to meet and consult with the attorney as an essential content of the right to assistance of counsel regardless of the state of custody, and the only difference is that a suspect or a defendant who is not in custody may always leave to seek the advice and the consultation of the attorney during the investigatory and the trial proceedings therefore a provision that separately permits this is unnecessary, whereas a suspect or a defendant who is in custody may not freely leave thus the Criminal Procedure Act guarantees the right to free consultation and communication in express provisions therefor.

To recapitulate, in the case of a suspect or a defendant who is not in custody, such an individual may always have her or his attorney present and seek the advice and the consultation of an attorney from the initiation of the investigatory proceeding through the completion of the trial proceedings, in order to obtain the assistance of the attorney obtained by herself or himself, even without any specific express provisions in the Criminal Procedure Act. Therefore, for a suspect who is not in custody, having the attorney present and seeking the advice and the consultation of the attorney at the interrogation of a suspect is to avoid the trouble of seeking the advice and the consultation from the attorney by leaving whenever necessary during the interrogation, and, as such, is not fundamentally distinguishable at all from seeking the advice and the consultation of the attorney by leaving the place of suspect interrogation (for example, by visiting the office of the attorney). Then, should a suspect who is not in custody wish to have her or his attorney present in order to seek advice and consultation of the attorney during the suspect interrogation, the investigative authority may not refuse this request when there is no special circumstance.

Here, even though the right to have an attorney present and to seek the advice and the consultation of the attorney during the suspect interrogation directly applies to the criminal procedure as an essential content of the right to assistance of counsel, the above advice and consultation is not permitted when it obstructs the suspect interrogation or divulges the investigatory secrets. This is because the right to obtain the assistance of counsel by way of advice and consultation means the right to obtain 'lawful' assistance of the attorney, and not the right to obtain unlawful assistance as well.

(B) The respondent asserts that the investigative authority is not obligated to permit the participation of the attorney at the suspect interrogation whether or not the suspect is in custody, on the grounds that Article 243 of the Criminal Procedure Act does not

include the attorney in the list of individuals who must participate in the suspect interrogation, and that the Criminal Procedure Act does not have any provisions actively guaranteeing or permitting the participation of the attorney.

With respect to the above, Article 243 of the Criminal Procedure Act provides that "in case a public prosecutor interrogates a suspect, the public prosecutor shall have an investigator, administrative officer or clerk of the public prosecutor's office present at the place, and in case a judicial police officer interrogates a suspect, the judicial police officer shall have a judicial police official present at the place." However, the above provision merely provides for those individuals who must participate in the interrogation of a suspect, and does not actively exclude participation or presence of any individuals who are not included in the list. The above provision is merely intended to provide for the obligation that the investigative authority itself should observe in order to secure the accuracy of the documentation of the record and the fairness of the interrogation proceedings, and is not intended to limit the right of the suspect or the defendant under the procedural law including the right to assistance of counsel. Therefore, when a suspect who is not in custody wishes to obtain advice and consultation of the attorney during the interrogation of a suspect, unless there is a separate provision limiting this due to the concern of unlawful assistance as discussed above which applies to the suspect, the investigative authority may not refuse the above request made by the suspect.

(3) Constitutionality of the Act in this Case

In this case, the respondent refused the request for the participation of attorney in the interrogation of a suspect made by the complainants to seek advice and consultation. In doing so, the respondent did not state any reasons therefor, and also failed to produce any materials concerning such act. Therefore, the act in this case that curtailed with no reason the request of the complainants for the advice and the consultation of the attorney during the suspect interrogation violated the right of the complainants to assistance of counsel.

4. Conclusion

Then, the act in this case that violated the fundamental right of the complainants should be revoked without further reviewing upon the alleged violation of the right to equality as the complainants

assert. However, as the unlawful state caused by the act in this case already ceased to exist, instead of revoking the act in this case, the Court has determined to declare and confirm the unconstitutionality of the act in this case. It is so held.

This decision is according to a majority opinion of the Justices, with the exception of a concurring opinion of *Justices Kwon Seong* and *Lee Sang-kyung* as stated in paragraph 5. below, a dissenting opinion of *Justice Kim Young-il* as stated in paragraph 6. below, and a dissenting opinion of *Justices Song In-jun* and *Choo Sun-hoe* as stated in paragraph 7. below.

5. Concurring Opinion of Justices Kwon Seong and Lee Sang-kyung

We agree with the conclusion of the majority opinion, however, we respectfully disagree with its rationale, as indicated in the following paragraphs.

A. Constitutional Ground for the Right to Assistance of Counsel of the Suspect who is not in Custody

(1) The main provision of Article 12, Section 4, of the Constitution provides that "any person who is arrested or detained shall have the right to prompt assistance of counsel." The first paragraph of Article 12, Section 5, of the Constitution provides that "no person shall be arrested or detained without being informed of the reason therefor and of his right to assistance of counsel.

The Supreme Court and the Constitutional Court thereby draws the right of the suspect and the defendant who is under arrest or in custody to have the assistance of counsel directly from the main provision of Article 12, Section 4, of the Constitution(3 KCCR 356, 367-368, 89Hun-Ma181, July 8, 1991; 4 KCCR 51, 59-61, 91Hun-Ma111, January 28, 1992; 7-2 KCCR 94, 106-107, 92Hun-Ma144, July 21, 1995; Supreme Court Decision 2003Mo402, November 11, 2003).

Although the main provision of Article 12, Section 4, and the first paragraph of Article 12, Section 5, of the Constitution specifically list a person who is under arrest or in custody as the holder of the right to assistance of counsel, this is to underscore the importance of the right to assistance of counsel for someone who is under bodily restraint, and not to exclude a suspect who is not in custody from the definition of the holder of the right to assistance of counsel. With the exception of the resolution of conflict or collision of basic rights, no express constitutional

provision for the protection of basic right may be a ground for the restriction of other persons' basic right.

(2) The 'right to assistance of counsel' is a basic right in close relationship with the right to bodily freedom, which has been established, through historical experiences of many nations in the world, not as a right that is dependent upon the government's benevolent enactment of the procedure therefor, but instead as a right that should be protected to the maximum extent. Further, Sections 3(b) and 3(d) of Article 14 of the International Convention on Civil and Political Rights also provide for the right to assistance of counsel as the subjective public right of any and all persons. The second paragraph of Article 10 of the Constitution provides for the obligation of the state to recognize and guarantee, to the maximum extent, the inalienable basic rights of the individuals, and Article 37, Section 1, of the Constitution declares that even the freedom and the right not expressly provided in the Constitution shall be all guaranteed when necessary for the human dignity and value(*See* 14-1 KCCR 49, 57, 2001Hun-Ba43, January 31, 2002). Also, the right to general freedom of action is recognized as the content of the right to pursue happiness under the latter part of the first paragraph of Article 10 of the Constitution. In light of the above, under the logical and structural construction of the Constitution, the 'right of a suspect who is not in custody to have the assistance of counsel' is an inalienable basic human right under the Constitution.

Therefore, the 'right to assistance of counsel' is the right requiring the government to not intervene in or interfere with the suspect's having the assistance of counsel for a substantive guarantee of the bodily freedom. As such, the right to assistance of counsel is a basic right to request the removal of the government's infringement, and is not a right guaranteed only upon the specific enactment, by the legislator, of the form and substance of the system.

(3) The right of the suspect who is not in custody to have the assistance of counsel is also recognized under the principle of due process. The due process principle under Article 12, Section 1, of the Constitution is the constitutional principle widely applicable to all legislative functions and executive functions as functions of the state, mandating that the procedure be established in the form of a formal statute and comply with such statute, and also that the content of the statute be appropriate in terms of reasonableness and justifiability. Especially in criminal procedures, the principle of due process is a basic principle requiring that the entire process of exercise of authority to punish be established from the perspective of the guarantee of the basic right(8-2 KCCR 808, 819, 94Hun-Ba1,

December 26, 1996). Although bodily freedom, along with the spiritual liberty, constitutes the foundation for all basic rights, there have been many examples in history where it has been infringed by the state especially in the form of exercise of the authority to punish. The Constitution, therefore, declares in Article 12, Section 1, the principle of due process, and then enumerates in Sections 2 through 7 in the same Article some of the principles of particular significance among those that may be derived from the principle of due process(Refer to 6-1 KCCR 348, 355-356, 93Hun-Ba26, April 28, 1994; 9-1 KCCR 313, 319-320, 96Hun-Ba28, March 27, 1997, etc.).

In light of such structure of Article 12 of the Constitution, the principle of due process governing the entire criminal process is a principle that should also be applicable to the investigation of a suspect who is not in custody. The express provision of Article 12, Section 4, of the Constitution that anyone who is under arrest or in custody shall have the right to assistance of counsel is not more than an express statement of one of the principles of due process due to its particular significance.

In order not for a suspect to be reduced to a mere object of investigation and interrogation in the criminal procedure, even the discovery of substantive truth during the investigatory procedure should be limited by due process, and the basic human rights of the citizens may be guaranteed only by the observance of due process. The arrest or in-custody state does not fundamentally differentiate the status of a criminal suspect for whom the principle of due process should apply, and a suspect who is not in custody is in an unstable state in that such a suspect may be subject to custody at any time. Further, a suspect who is not in custody also needs to prepare to collect favorable argument and evidence and to rebut unfavorable argument or evidence, and should be protected from the possibility of the infringement of the human rights by the investigative authority.

(4) Also, the right to request trial under Article 27 of the Constitution includes not only the right to have trial under procedural and substantive laws that are constitutional, but also the right to have a fair trial by rejecting secret trial and by receiving interrogation and judgment under the monitoring of the general public. Such right to have a fair trial includes the right to have a trial at which the parties are sufficiently guaranteed with the right to attack and defend by way of, for example, answering to, proving, or rebutting the alleged facts upon which the prosecution is based(8-2 KCCR 808, 820, 94Hun-Ba1, December 26, 1996). Also, the principle of the government of the rule of law, which is one of the basic orders of our Constitution, mandates, for the guarantee of the

basic rights, a complete relief system against the exercise of governmental power that is both effective and conforming to the ideal of fair procedure.

In order to guarantee such right to have a fair trial, the principle of equal power between the investigative authority and the suspect should be realized from the investigatory stage. The result from the investigatory stage determinatively affects the findings of fact at trial, and the prosecutor's prosecution of the suspect and decision to not prosecute differ significantly. An attorney at the investigatory stage is indispensable in realizing the principle of equal power as an assistant who helps the suspect exercise the right to defend. Assistance of a legal expert is crucial for an appropriate exercise of the right to defend at the investigatory stage for the suspect who is psychologically intimidated and lacking knowledge in law. The suspect may form a substantively equal relationship with the investigative authority through the assistance of counsel, enabling the guarantee of due process and the specific realization of the right to fair trial.

(5) Then, the 'right of a suspect who is not in custody to have the assistance of counsel' is a constitutional basic right that is derived from the 'principle of due process' under Article 10 and Article 12, Section 1, of the Constitution, the 'right to fair trial' under Article 12, Section 4, and Article 27 of the Constitution, and the 'ideal of fair procedure' as one of the elements of the principle of the government of rule of law. As such, it is a right that should be guaranteed to the utmost extent in relation with governmental power.

B. The 'Right to have Counsel at Suspect Interrogation' of the Suspect who is not in Custody, and its Limits

(1) The content of the 'right of the suspect who is not in custody to have the assistance of counsel' includes, *inter alia*, the 'right to appoint an attorney.' The right to freely appoint an attorney is the starting point of the right to assistance of counsel, and also constitutes the essential substance thereof.

Next, the right to assistance of counsel should mean the right, for a suspect, to be guaranteed with substantive and effective defense through the attorney against the alleged facts. Therefore, a suspect who is not in custody has the right to understand her or his situation and devise proper responsive measures through counsel, the right to hear explanation upon the meaning of the alleged facts, the right to hear opinions with respect to the method,

degree and content, and so on, of her or his statement, and the right to receive advice concerning the meaning of and the method to exercise the right to remain silent or the right to refuse signature and seal(Refer to 4 KCCR 51, 59-60, 91Hun-Ma111, January 28, 1992).

Further, it is at issue whether or not a suspect who is not in custody has the right to have the attorney participate during the suspect investigation at the investigative authority.

(2) The Supreme Court, with respect to the right of a suspect who is detained to have the attorney participate during the suspect interrogation, held that, although there is no provision of law expressly recognizing such right, inference from Article 12, Section 4, of the Constitution and Articles 89, 209 and 34 of the Criminal Procedure Act permits a detained suspect to request the participation of the attorney at the suspect interrogation, that the investigative authority may not refuse such request, and that this interpretation conforms to the spirit of the Constitution declaring the principle of due process concerning the detention and the punishment of a person(Supreme Court Decision, 2003Mo402, November 11, 2003).

Likewise, in the case of a suspect who is not in custody, such a suspect also has the 'right to have the attorney participate in the suspect interrogation,' regardless of the existence of an express provision of law specifically stating such right. The 'right to assistance of counsel,' which is a constitutional basic right in order for the guarantee of the bodily freedom, maintains the identical nature regardless of the state of arrest or detention of the holder of the right. Neither the nature of the suspect interrogation nor its requisites vary, whether the suspect is in custody or not.

The right to assistance of counsel is demanded in order to prevent a consequence that will not conform with the principle of equal power resulting from the inappropriate defense against the investigation undertaken by the investigative authority due to the suspect's lack of legal knowledge, and this demand should not cease in the case of the suspect interrogation of a suspect who is not in custody.

(3) Although the interrogation of a suspect is a procedure meant to secure voluntary statements of a suspect, it is a procedure in which the investigative authority directly obtains evidence through the statement of a suspect who is accused of a crime, while, at the same time, it is an opportunity for a suspect to assert the facts favorable to herself or himself. As the result of a interrogation undertaken by the investigative authority during the investigatory procedure determines the direction of the investigation and is used

as the important evidentiary material at trial, the substantive and procedural fairness of the interrogation closely relates to the right of the suspect to have a fair trial.

Also, as obtaining the confession of a suspect through interrogation is utilized as an important method of investigation, there is an increased possibility that the human rights of the suspect might be infringed during such process. In order to prevent such elements of human right infringement, our legal system is equipped with many provisions of law pertaining to the exclusion of evidence, the notice of the right to remain silent, the participation of the investigatory officers, etc.(See Article 12, Section 7, of the Constitution; Articles 200(2), 309, 243 and 312 of the Criminal Procedure Act, etc.). However, a legal provision stating the right to remain silent does not amount to anything at all should a suspect not be able to actually exercise such right, and the exclusionary rule may only serve as an *ex post facto* and indirect relief method for the infringement of human rights during the suspect interrogation process. Furthermore, although such a passive method as the exclusion of probative value as evidence may function afterwards at trial, it can hardly be realistically expected at the stage of the determination of indictment by the prosecutor.

Therefore, in order also for the fundamental prevention of the possibility of the infringement of the suspect's basic right that might occur during the investigatory proceedings behind closed doors, the 'right to have the attorney participate during the suspect interrogation' should be guaranteed for the suspect who is not in custody.

(4) With the exception of the suspect who is accused of an extremely minor offense, the bodily freedom of a suspect who is not currently in custody might be subsequently restrained by detention or sentencing of a prison term according to the content of her or his statement at the suspect interrogation. Thus, such a suspect is subjected to a desperate situation that is no better than a detained suspect. Even for a suspect who is not in custody, it is not realistically expected that such a suspect can refuse to make a statement or leave the place of interrogation during the suspect interrogation, and a unilateral and active inquiry into the truthfulness of the statement of a suspect by the investigative authority does actually occur. Therefore, there is an urgent demand for the suspect who is not in custody for the 'right to have the attorney participate in the suspect interrogation' no less than for a suspect who is under arrest or detention.

Furthermore, compared with the suspect who is in custody, in cases of suspects who are not in custody, the suspicion for the

commitment of crime likely to be weak, the nature of the crime likely to be less offensive, or the likelihood of the destruction of evidence or flight tending to be less. Therefore, those rights recognized for the suspect who is under detention under the current criminal procedure should also be recognized for the suspect who is not in custody, as a matter of course.

(5) Although the statement included in the protocol containing the interrogation of a suspect significantly affects the determination of the prosecutor whether or not to prosecute and the formation of the result of a criminal trial, a suspect faces a risk of not being able to substantively exercise the right to defense during the suspect interrogation process due to the lack of legal knowledge. This also constitutes a ground for providing the suspect who is not in custody with the assistance of counsel who is an expert in law.

While a suspect who is not in custody tends to make statements by recalling the facts of the past under the standard of life experience of the general public in the society which does not necessarily reach the legal assessment of the facts alleged, a prosecutor, who is an expert in law, can induce the statement necessary for the legal judgment upon, for example, whether the elements of crime have been satisfied, during the process of questioning and answering. Especially in the case of those crimes that require subjective elements for commitment of the crime such as the subtle distinction between knowledge and reckless disregard, purpose, tendency and intent to obtain illegally, certain statements made after not much of consideration by an unaware suspect who is not in custody provided during the process of restructuring the facts in the past, might be used as important evidentiary materials determining guilt and innocence or finding an element constituting an aggravated offense punishable by heavier sentence. Therefore, in order for a suspect who is not in custody to correctly understand the legal meaning of her or his statement made during the suspect interrogation, it is required that such a suspect have the appropriate assistance of counsel who is a legal expert.

The principle of punishment of crime by due process under Article 12, Section 1, of the Constitution means not only that the procedure should be established in the form of the statute, but also that the content of the applicable statutes should be appropriate in terms of reasonableness and justifiability. This principle also requires that the procedure be established and maintained in a way that minimizes the possibility of the infringement of the basic rights held by the criminal defendant and others by governmental power, throughout the entire criminal procedure(Refer to 4 KCCR 853, 876-877, 92Hun-Ga8, December 24, 1992; 9-1 KCCR 245, 259,

96Hun-Ga11, March 27, 1997; 10-2 KCCR 218, 226, 97Hun-Ba22, July 16, 1998).

Therefore, should the suspect be treated as a mere object of the interrogation during the investigatory process, the principle of due process mandated by the Constitution may not be deemed to have been observed. Permitting the participation of attorney for a suspect during the suspect interrogation is for the substantively appropriate exercise of the suspect's defense right by helping the suspect properly understand the legal meaning of the questions posed by the prosecutor and investigation officer and the statement made by herself or himself and by preventing such human right infringement as leading questions, and is also for the substantive guarantee of the principle of due process and the right to fair trial of the Constitution.

(6) As above, the 'right to have the attorney participate in the suspect interrogation' should be guaranteed also for the suspect who is not in custody, in order to substantively guarantee the exercise of rights such as the right to remain silent by the non-custodial suspect, to prevent the possibility of human right infringement during the interrogation process, to protect the non-custodial suspect who is in an equally difficult situation compared with a detained suspect, and to enable a suspect who needs the assistance from a legal expert to substantively exercise the defense right. This is an essential content of the right to assistance of counsel. The 'right to have the attorney participate in the suspect interrogation' of the suspect who is not in custody, realizes the protection of the principle of equal power and the suspect's defense right literally and directly during the investigation process, thereby realizing the principle of due process and the right to fair trial guaranteed by the Constitution.

(7) There may be, however, certain restrictions upon the exercise of the 'right to have the attorney participate in the suspect interrogation' held by the suspect who is not in custody. However, such restriction may be imposed only by the statute and only where necessary for national security, maintenance of order, or public welfare, pursuant to Article 37, Section 2, of the Constitution. Furthermore, such restriction, even when permitted, may never infringe upon the essential substance of the freedom or the right.

Nowhere in the current statutes including the Criminal Procedure Act can be found a provision restricting the 'right to have the attorney participate in the suspect interrogation' held by the suspect who is not in custody. The only such provision is included in the 'Operation Manual for Attorney Participation in Suspect Interrogation' internal to the Public Prosecutors' Office and

the 'Manual for the Guarantee of Attorney Participation in Suspect Interrogation' internal to the Korean National Police Agency, which states that the participation of the attorney in the suspect interrogation may be limited when it causes significant hindrance to the investigation.

(8) The public interest for which the non-custodial suspect's 'right to have the attorney participate in the suspect interrogation' may duly be limited includes the public interest of discovering the substantive truth by the investigative authority by way of excluding the possibility of the suspect's refusal to confess, the justifiable purpose of the investigatory activities to prevent exposure of investigatory secrets, the interest of effective criminal prosecution, the prevention of the flight of the individuals relevant to the case including accomplices and of the destruction of evidence, and the protection of the life and bodily safety of the victim and the witnesses.

In the case of a suspect who is not in custody, the suspect herself or himself continues ordinary daily life following the closure of the interrogation process. Therefore, there already exists the risk of the flight of the accomplice and other individuals relevant to the case, of the destruction of evidence, or of the threat to the life or bodily safety of the victim or the witnesses, which might be committed by the suspect. Hence, the public interest achievable by restricting the participation of the attorney in such cases is neither clear in all cases nor greater than the right that is restricted. There may be a position that underscores the above public interest also in the case of a non-custodial suspect based upon the possibility of emergency arrest. However, the possibility of an emergency arrest of a non-custodial suspect during the process of interrogation, rather serves as a ground for indicating the necessity to guarantee the 'right to have the attorney participate in the suspect interrogation' for all suspects regardless of the state of arrest or detention.

Also, considering that the human right infringement by the investigative authority has resulted from the investigatory practices excessively bent on obtaining the suspect's confession, and that certain evidentiary rules of the Constitution and the Criminal Procedure Act are intended to secure voluntariness of the confession, restriction upon the suspect's right to request the participation of attorney on grounds of difficulty in the investigative authority's obtaining confession may hardly be justified.

(9) Therefore, restriction upon the 'right to have the attorney participate in the suspect interrogation' of the non-custodial suspect on grounds of public interest such as the discovery of substantive

truth by the investigative authority, the prevention of the flight of the accomplice or other individuals relevant to the case or of the destruction of evidence, or the life and the bodily safety of the victim or the witnesses may not be deemed to be justified in general in all cases.

Rather, only those restrictions upon the non-custodial suspect's 'right to have the attorney participate in the suspect interrogation' to the extent of necessary minimum limited to the case where the request of public interest is greater as the result of the prudent balancing between the 'right to have the attorney participate in the suspect interrogation' of the non-custodial suspect and other public interests under specific circumstances, may not be found in violation of the principle against excessive restriction.

C. Constitutionality of the Act in this Case

(1) The complainants were subjected to the interrogation of a suspect without participation or assistance of counsel due to the respondent's act in this case, and the statement of the complainants included in the protocol containing the interrogation of a suspect was taken as the evidentiary material during the investigation and trial process. Thus, the act in this case undertaken by the respondent has restricted the right of the complainants to request the participation of attorney. The question therefore is whether there has been a public interest sufficient to justify such restriction.

(2) The facts upon which the accusation against the complainants were based pertained to the suspicion of the violation of the Act On the Election of Public Officials and the Prevention of Election Malpractices or of defamation, and, at issue were the limits of and the restrictions upon such important constitutional basic rights as the freedom of expression, the freedom of election campaign, and the right to participate in government. Article 58, Section 1, of the Act On the Election of Public Officials and the Prevention of Election Malpractices defines the 'election campaign' as the 'conduct intended to be elected, to enable someone to be elected, or to prevent someone from being elected,' and the Constitutional Court previously held that "the election campaign is limited to the active and premeditated conduct with respect to which an objective intent purported for the election or the failure therein of a specific candidate exists, and the elements required for finding a punishable conduct of election campaign distinguishable from a simple expression of opinion include the purpose for election, obtention of votes or failure in election, the objectively recognizable purpose as such, the active nature of the conduct, and the

premeditation(6-2 KCCR 15, 33-34, 93Hun-Ga4, July 29, 1994; 13-2 KCCR 263, 274, 2000Hun-Ma121, August 30, 2001; Gazette No. 93, 588, 2004Hun-Na1, May 14, 2004)." The Supreme Court also held that "the election campaign within the meaning of Article 58, Section 1, of the Act On the Election of Public Officials and the Prevention of Election Malpractices refers to the active and premeditated conduct with respect to which an objective intent purported for the election or the failure therein exists, as a conduct necessary for and in favor of the election, the obtention of votes, or the failure in election, of a specific candidate(Supreme Court Decision 98Do1432, April 9, 1999)."

Thus, in order to find the complainants guilty of the alleged facts, the elements that had to be proven included the 'purpose for election, obtention of votes or failure in election, the objectively recognizable purpose as such, the active nature of the conduct, and the premeditation.' Therefore, the complainants in this case were much in need of appropriate assistance of counsel for the substantive guarantee of the exercise of defense rights, by making statement based upon precise understanding of the legal meaning of their statement during the suspect interrogation concerning the accused facts.

Furthermore, regardless of the qualifications or the social experiences of the complainants, as the suspects summoned to the investigative authority, there is also a concern that the complainants might have been psychologically belittled.

(3) On the contrary, in this case, there was no high risk of interference with the discovery of substantive truth or destruction of evidence to be caused by permitting the participation of the attorney in the suspect interrogation of the complainants as the conduct of the complainants had publicly been undertaken and had continuously been reported through various mass media, and there was hardly any possibility of harming such legal interests as the life or bodily safety of the victim or other witnesses due to the particular nature of the facts alleged. Therefore, the public interest that the respondent purportedly intended to achieve by restricting the participation of attorney in the suspect interrogation in this case may not be deemed to be greater than the complainants' basic rights thereby limited, and is thus insufficient to justify the infringement of the basic rights.

(4) Furthermore, as reviewed above, as there is no provision in the statute such as the Criminal Procedure Act restricting the 'right to have the attorney participate in the suspect interrogation' of the non-custodial suspect, the act in this case of the respondent violates the Constitution with respect to the formal aspect of the restriction

of the basic right as well.

(5) Therefore, the respondent's act in this case that completely prohibited the participation of the attorney in the suspect interrogation process despite the request from the complainants, without offering a justifiable ground therefor, infringed the right to assistance of counsel and the right to fair trial of the complainants.

D. Conclusion

Then, the respondent's act in this case that infringed the fundamental rights of the complainants should be revoked. However, as such act was previously completed, a declaratory judgment confirming the unconstitutionality of the above act instead of the revocation thereof is a proper remedy. The grounds therefor are as in the preceding paragraphs.

6. Dissenting Opinion of Justice Kim Young-il

I respectfully disagree with the holding of the majority that the act in this case unconstitutional, on the grounds indicated in the following paragraphs.

A. With respect to the Majority's Reasoning

(1) The majority opinion is that the constitutional right to assistance of counsel is guaranteed for all suspects and defendants regardless of their state of detention, that such right to assistance of counsel includes the right to request the participation of the attorney at the suspect interrogation, and that this right is recognized and applicable even without specific legislation. The primary ground for the above majority opinion is the principle of equal power based upon the principle of government by the rule of law; the secondary ground for the above majority opinion is that, as the proviso of Section 4 of Article 12 of the Constitution predicating the exception applies regardless of the state of detention, the main provision of Section 4 of Article 12 that states the principle should also apply regardless of the state of detention.

(2) The right to assistance of counsel - particularly the right to request the participation of the attorney, *inter alia*, which is at issue in this case - is a procedural right. Such procedural rights fundamentally have the nature of a claimable right. Although it is true that a stronger guarantee for the procedural right of the right to request the participation of the attorney has a corelation with a

stronger guarantee for the substantive right of the right to liberty such as the right to bodily freedom, the substantive right should be clearly distinguished from the procedural right that is needed to protect such substantive right. As such, the right to request the participation of the attorney which is a procedural right serving as means for the guarantee of the right to liberty should not be identified or confused with the right to liberty.

As the right to request the participation of the attorney has, as a procedural right, the nature of a claimable right, unlike the right to liberty that may be recognized and applied without specific express provisions, in order to recognize and apply the right to request the participation of the attorney in the case of a non-custodial suspect as a constitutional right, either there should be an express provision concerning such right or, should there be no such express provision, a construction by inference from related provisions should support the existence of such right.

The majority opinion reads to the effect that the main provision of Article 12, Section 4, of the Constitution is the constitutional provision that forms the ground for its conclusion. However, the main provision of Article 12, Section 4, of the Constitution clearly provides that the right to assistance of counsel is guaranteed upon "arrest or detention" and no more, and it is clear that this provision is silent with respect to whether such right is also guaranteed for the suspect who is not in custody.

The majority opinion is to the effect that the expression of "upon arrest or detention" in Article 12, Section 4, of the Constitution is merely to underscore the importance of the right to assistance of counsel for a person who is arrested or detained, considering such difference. However, the predication that the above expression is merely to underscore the importance and does not limit the scope of applicability, is no more than a far-fetched interpretation to support the conclusion of the majority opinion, and, may in no way be, a natural construction of the text of the above provision.

Should the main provision of Article 12, Section 4, of the Constitution been intended to be applicable regardless of the state of detention as the majority opinion asserts, then it could simply have been written that "all suspects and defendants have the right to assistance of counsel," which would have been a simpler and more precise expression; there is no reason whatsoever to distinguish the case for the suspects and defendants who are detained from the case for the suspects and defendants who are not when there is no difference according to the majority opinion in the legal meaning between these two cases, including then an express provision

merely for the former case. If it were for a specific emphasis, it would be a natural way to first clearly guarantee the general right in the Constitution and then to add a provision for an emphasis. It is rather unnatural to leave a provision for emphasis without any express provision for the guarantee of the general right.

The majority opinion is to the effect that, under the general relationship between the main provision and the proviso, the main provision of Article 12, Section 4, of the Constitution should be applicable regardless of the state of detention as the proviso of the same section of the same article applies regardless of the state of detention. This is based upon the presumption that the main provision and the proviso should have the same scope of applicability. However, under this same logic of the majority opinion, as the proviso of Article 12, Section 4, of the Constitution articulates as to the government-appointed attorney, the main provision of the same article of the same provision should also apply to the government-appointed attorney, thereby reaching the conclusion that the 'counsel' within the meaning of the main provision of the same article of the same provision includes both the government-appointed attorney and the privately-appointed attorney. This is in conflict with the understanding adopted by the majority opinion itself that the above 'counsel' means the '(privately-appointed) attorney.' Therefore, the relationship between the main provision and the proviso of Article 12, Section 4, of the Constitution should not be understood as in the majority opinion.

Rather, instead, the express provision of Article 12, Section 4, of our Constitution merely mentions the case of an individual under arrest or in custody, and the case of a criminal defendant. This should be understood as a statement of intention that our Constitution, at the time of its establishment, discerned the concept of non-custodial suspect on one hand and the concept of suspect under arrest or in custody and criminal defendant on the other hand, guaranteeing the 'right to assistance of counsel' for, among the above, the suspect under arrest or in custody and the criminal defendant, while, for the non-custodial suspect, not guaranteeing the 'right to assistance of counsel' at the constitutional level.

Next, whether or not Article 12, Section 4, of the Constitution may apply to the case of a non-custodial suspect by inference is examined.

It is true that all suspects who are subjected to interrogation by an investigative authority are of the same status in a sense, whether or not they are in custody. However, because the legal circumstance that a non-custodial suspect faces during the interrogation proceeding differs fundamentally from the legal

circumstance of a suspect or defendant under arrest or in custody, Article 12, Section 4, of the Constitution may not apply to the non-custodial suspect by a blind inference. Should there be an express provision guaranteeing the right to assistance of counsel for the non-custodial suspect while there is no provision for the suspect under arrest or in custody, such an express provision may be applicable to the suspect under arrest or in custody by inference unless against the nature of the provision. However, an express provision for the suspect or the defendant under arrest or in custody may not become applicable to the non-custodial suspect in turn unless there is a special circumstance therefor. When our Constitution, which is a written constitution, clearly distinguishes the concept of the non-custodial suspect on one hand and the concept of the suspect under arrest or in custody and the criminal defendant on one hand, with an express provision, among the above, solely for the suspect under arrest or in custody and the criminal defendant, such an express provision may not be rendered applicable to the non-custodial suspect by inference on the sole ground that there is an urgent need therefor. When reading an express provision, the thing that is not included therein should be read as not included.

On the other hand, in order to draw a concrete constitutional right from such abstract principles as the principle of the government by rule of law or the principle of due process, a minimum requirement therefor demands that no such right be in conflict with other express constitutional provisions. However, as examined above, Article 12, Section 4, of the Constitution intends not to guarantee the right to assistance of counsel for the non-custodial suspect at least at the constitutional level, drawing such right out of the abstract constitutional principles is not permissible as it conflicts with the above express provision.

(3) Thus, the right to assistance of counsel is not a constitutional basic right for the suspect who is not in custody. However, even assuming that it is, there is a gap in logic in the majority opinion.

The majority opinion is to the effect that the function of an attorney as an assistant by providing advice and consultation to the suspect is the most essential of the substance of the right to assistance of counsel, and that the right to request the participation of an attorney in the suspect interrogation in order to have such assistance is recognized without a concrete express provision in the Criminal Procedure Act.

In my humble opinion, a certain part of the substance of a right may be deemed to be the essence of such right only when the denial of this part denies the existence of the right itself or renders the existence of the right meaningless. Here, the right to appoint an

attorney and the right to meet and consult with an attorney that guarantee the existence of an attorney constitute the essence of the right to assistance of counsel. However, such further rights as the right to make a statement through an attorney, the right to inspect the record through an attorney and the right to request the participation of an attorney, although they may enrich the right to assistance of counsel, the lack thereof neither denies the existence of the right to assistance of counsel itself nor renders it meaningless. On this ground, I do not agree with the majority opinion that is premised upon the predication that the right to request the participation of the attorney constitutes the essence of the right to assistance of counsel.

(4) I have a strong suspicion that the majority opinion has failed in a systemic construction of the Constitution and reached a gap in logic as it puts too much emphasis on the purpose that the guarantee of the participation of the attorney for non-custodial suspects is desirable for the guarantee of the human rights of individuals. That something is desirable should be strictly distinguished from that something is guaranteed by our Constitution. Reasoning by a loose collage of various uncorroborated concepts to conclude that something is guaranteed by the Constitution is no more than confusing between a something and a necessary amendment thereto.

B. With respect to the Complainants' Argument that the Act in this Case Infringed the 'Right to Equality'

The complainants argue that the right to equality of the complainants is infringed as the members of the United States military stationed in the Republic of Korea and certain others are guaranteed with the 'right to have an attorney of one's own choice for one's defense' under 'Korean-U.S. Status of Forces Agreement,' while the right to request the participation of the attorney in the interrogation of a suspect is not guaranteed for the complainants.

However, although Article 22, Section 9, Subdivision(v), of the 'Korean-U.S. Status of Forces Agreement' applicable when the Republic of Korea exercises the right of criminal adjudication against the members of the United States military stationed in the Republic of Korea and certain others guarantees the 'right to have the attorney of one's own choice for one's defense,' it is a provision that is triggered 'upon indictment.' Also, the minutes for the 'Korean-U.S. Status of Forces Agreement' relevant to the above provision reads that 'the right to assistance of counsel begins to exist from the time of arrest or detention.' Therefore, it may not be

deemed that the 'Korean-U.S. Status of Forces Agreement' guarantees the right to request the participation of the attorney for all non-custodial suspects.

More fundamentally, the right to equality becomes an issue when the essentially identical objects are treated differently. Here, however, the Korean-U.S. Status of Forces Agreement is a treaty concluded between the Republic of Korea and the United States of America in light of the special nature of a foreign troop stationed in the Republic of Korea and the diplomatic relationship, and, while the regulation of the members of the United States military stationed in the Republic of Korea is undertaken by this treaty, the regulation of the complainants is undertaken by domestic law. Thus, these two may not be deemed essentially identical. Therefore, the above argument asserted by the complainants that is based upon the premise that these two are essentially identical is groundless even without further review.

C. Conclusion

For the foregoing reasons, I respectfully disagree with the majority opinion. I am in the opinion that the constitutional complaint in this case filed by the complainants is groundless, and should therefore be rejected.

7. Dissenting Opinion of Justices Song In-jun and Choo Sun-hoe

Unlike the majority opinion, we are of the opinion that the act in this case is not in violation of the Constitution. The reasons are indicated in the following paragraphs.

A. Legal Nature of the Right of the Non-Custodial Suspect to Request the Participation of the Attorney in the Suspect Interrogation

(1) The majority opinion states that, "the attorney in a criminal procedure serves on one hand a function of an assistant who supports the self-defense of the suspect or the defendant in the status of an adversarial party against the investigatory and the indicting institutions, and, on the other hand, a function of affecting the criminal procedure favorably to the suspect or the defendant and of monitoring and controlling the observance of the rights of the suspect or the defendant. The most important role of the attorney among the above is the one of an assistant, and the specific rights

for the exercise of this role are in principle provided only upon legislative action. However, the right to consult the attorney and to seek advice from the attorney is a necessary prerequisite for other procedural rights included in the right to assistance of counsel that require specific legislative formations, and, as such, may be drawn directly from the right to assistance of counsel itself." The majority opinion proceeds to assert that the right of a non-custodial suspect to have the attorney present and to seek advice and consultation from the attorney at the interrogation process, that is, the "right to request the participation of the attorney in the suspect interrogation," is drawn directly from the Constitution.

(2) However, the right of a non-custodial suspect to request the participation of the attorney in the suspect interrogation that is at issue in this case is a procedural basic right the content and substance of which may not be determined without concrete and specific decisions by the legislators with respect to 'in which circumstances and to which extent' such right is guaranteed. A procedural basic right or a claim-right may not be directly applicable to individual cases without the concrete and specific legislative enactment by the legislators, which is a basic theory of the Constitution. As a claim-right, which requests a specific act of the state, may be guaranteed only within the scope that is established in terms of its content, in order for the guarantee of a claim-right as a subjective right of an individual that can be legally enforceable, what may be claimed should be established in terms of content and scope. The object of request cannot be established for itself at the level of the Constitution. Instead, it needs a concrete and specific legislative enactment by the legislators.

Assuming, as the majority opines, that the right of a non-custodial suspect to request the participation of the attorney in the interrogation of a suspect were drawn directly from the Constitution even without legislative measures, then the content of such right to request the participation of the attorney would be the 'right to request the participation of the attorney in all circumstances without limit.' It is a matter of course that such unlimited right to request participation may not be recognized.

(3) Should the right to request the participation of the attorney guarantee the 'function of an assistant served through the advice and consultation for the suspect and the defendant' as the most essential function among the substance of the right to assistance of counsel, and should such right to request the participation of the attorney be the basic right directly applicable for all suspects regardless of the state of detention by the law enforcement institutions without supporting statutory provisions, as the majority

asserts, this would cause great confusion to the law enforcement institutions. On the part of the citizens as well, it would be undesirable from the perspective of legal stability due to the unpredictability concerning the law.

The law enforcement institutions would stand facing an extremely complex, difficult and uncertain mission as they would have to figure out the substance of a basic right for themselves from the constitutional provisions for the basic rights through constitutional construction and then apply it to individual cases. The citizens to whom the law applies would be in the situation where they could not predict 'in which circumstances they could request the participation of the attorney' or 'in which circumstances the participation of the attorney might be restricted.' Such a legal situation may not be tolerated in any state under the rule of law.

B. Whether the Act in this Case Infringes the 'Right to Assistance of Counsel' of the Suspect

The issue that the complainants has raised by filing the constitutional complaint in this case is whether the act of a prosecutor that did not allow the participation of the attorney in the interrogation of the non-custodial suspects infringed the 'right to assistance of counsel' held by the complainants who were the non-custodial suspects. This issue is carefully examined in the following paragraphs.

(1) Whether it is unconstitutional that the legislators have not recognized the right to have the attorney participate in the interrogation of a non-custodial suspect by the investigative authority.

The legislators, with respect to the participation of the attorney in the suspect interrogation, have not included the attorney in those in Article 243 of the Criminal Procedure Act who may participate in the suspect interrogation, nor are there other provisions that otherwise guarantee or allow the participation of the attorney. As a result, whether a suspect is in custody or not, the legislators have not provided for the obligation of the investigative authority to allow the participation of the attorney in the interrogation of a suspect.

Whether or not a procedural legal provision concretely and specifically formed by the legislators infringes the right to assistance of counsel, is determined by the principle of proportionality that requires balancing among conflicting legal interests for an appropriate balance and harmony. The right to fair trial is, along with other principles derived from the principle of the

government by rule of law, merely one mandate materializing the principle of the government by rule of law. Therefore, the 'right to assistance of counsel' that is a constituent element of the right to fair trial may also be restricted pursuant to the principle of proportionality based upon balancing, when a priority should be given to other mandates from the principle of the government by rule of law.

Now focusing only upon the 'non-custodial suspect' that is at issue in this case, whether the non-recognition by the legislators of the right to request the participation of the attorney in the interrogation for the non-custodial suspect infringes the right to assistance of counsel or not should be determined by balancing, on one hand, the 'mandate of effective defense' that is a basic determination internal to the right to assistance of counsel against, on the other hand, the 'legal interest justifying restrictions upon the assistance of counsel.' Here, the right to assistance of counsel is not a purpose in itself but, instead, a basic right constitutionally guaranteed as an important means to realize a fair procedure. Therefore, a determination on 'whether the right to assistance of counsel is infringed' is dependent upon whether a fair procedure can be guaranteed by the restriction on the possibility of the assistance of counsel.

Therefore, as the result of balancing, when the non-recognition by the legislators of the right to have the attorney participate, without being justified by reasonable public interest, renders the effective defense impossible or difficult and the fair procedure may therefore not be guaranteed, such determination by the legislators violates the mandate of effective defense and infringes the right to assistance of counsel as the result. Specifically, 'whether the right to assistance of counsel is infringed' should be determined from the perspective of 'whether fair procedure ultimately cannot be expected due to the restriction upon the participation of the attorney as the participation of the attorney, at the investigation procedure is an indispensable element for the effective defense,' after inclusively considering all perspectives of 'whether the restriction upon the participation of the attorney is justified by a reasonable public interest,' and 'to which extent the defense right of a suspect is guaranteed and to which extent an attorney may assist the suspect's defense under the current criminal procedure.'

Then, in the following paragraphs, we will examine whether the non-recognition of the right to have the attorney participate in the interrogation of a non-custodial suspect is justified by a reasonable public interest, and, in such a circumstance, whether an appropriate balance is maintained between the basic right of the suspect to

assistance of counsel and the public interest the restriction upon the right to attorney participation intends to achieve, despite the restriction upon the right to attorney participation.

(A) Public Interest that justifies Restriction upon the Right to Attorney Participation

Guaranteeing the right to have the attorney participate in the suspect interrogation at the investigatory proceeding might cause difficulty for the investigative authority in obtaining the confession from the suspect, hindrance with the investigatory activities by the attorney beyond defense activities, or hardship in maintaining investigatory secrets demanded for the purpose of the investigation due to the exposure of the investigation. That is, permitting the participation of the attorney in the suspect interrogation might undermine the investigatory activities by the investigative authority.

Especially, there is a concern that such investigatory secrets as the substance of the investigation or the evidence-gathering route might be revealed through the attorney who participates in the suspect interrogation undertaken by the investigative, thereby causing hindrance in the investigation of the related cases by the flight of the accomplice or other individuals relevant to the case or by the destruction, concealment or manipulation of evidence. Furthermore, disclosure of the substance of the investigation might cause harm to the life or bodily safety of the individuals relevant to the case, such as the victim and other witnesses.

Therefore, the restriction upon the participation of the attorney in the suspect interrogation at the investigatory procedure is to realize such important public interests in the state by the rule of law as the interest of effective criminal prosecution, the interest of discovery of substantive truth, and the interest of the life and the bodily safety of the third parties.

(B) Current Legal Provisions for the Guarantee of the Suspect's Defense Right and Fair Procedure

On the other hand, the current Constitution and Criminal Procedure Act have certain specific provisions for the protection of the suspect in the interrogation of a suspect by the investigative authority.

1) First, in order to guarantee the voluntariness of the statement made during the suspect interrogation, the Constitution guarantees the prohibition against torture by the state institution and the right to remain silent, in providing that " no citizens shall be tortured or be compelled to testify against himself in criminal cases(Article 12, Section 2)," and also that " in a case where a confession is deemed to have been made against a defendant's will

due to torture, violence, intimidation, unduly prolonged arrest, deceit or etc., or in a case where a confession is the only evidence against a defendant in a formal trial, such a confession shall not be admitted as evidence of guilt, nor shall a defendant be punished by reason of such a confession(Article 12, Section 7)."

Accordingly, the Criminal Procedure Act also requires that the right to remain silent be notified prior to the suspect interrogation, in order to remove the torture or other coercion exercised to obtain confession (Article 200, Section 2). Furthermore, the Criminal Procedure Act suppresses any probative value of the confession obtained through torture, violence or threat or when there is otherwise a suspicion of its voluntariness (Article 309); requires the participation of the investigatory officer at the Prosecutors' Office in the suspect interrogation undertaken by a prosecutor, and the participation of the junior judicial police officer in the suspect interrogation undertaken by a police officer (Article 243). Also, a suspect interrogation report has the probative value only under specific conditions. That is, A protocol which contains a statement of a suspect or of any other person, prepared by a public prosecutor, may be introduced into evidence, if the genuineness thereof is established by the person making the original statement at a preparatory hearing or during the public trial, and a protocol containing interrogation of a suspect prepared by investigation authorities other than a public prosecutor may be used as evidence, only in case where the person making the original statement verifies the contents of the protocol(Article 312).

In sum, the current law allows the use of the statement of a suspect as evidentiary material only when the statement is made voluntarily and when the suspect's right to remain silent is guaranteed.

2) In addition, those suspects who are not in custody as the complainants in this case may also at any time appoint as attorney and seek advice and consultation from the attorney, pursuant to Article 30 of the Criminal Procedure Act. Also, a suspect is not obligated to abide by the summons requesting appearance issued by the investigative authority, and, even if appearing pursuant to the summons, a suspect may always leave at will after the initiation of the investigation to seek consultation from the attorney by meeting with the attorney. Therefore, an attorney may, both prior to and during the suspect interrogation by the investigative authority, meet with the suspect, to devise appropriate responses, to explain the facts upon which the accusation is based, to discuss countermeasures by listening to the suspect's opinion upon such facts, to provide legal advice for the suspect upon the content and

the method of the statement, to raise cognizance concerning the importance of or the appropriate method to exercise the right to remain silent or the right not to provide signature and seal, or to make sure from time to time whether there is any inappropriate investigation on the part of the investigative authority, thereby providing necessary and sufficient assistance.

(C) Whether or not the Principle of Proportionality is Violated

In criminal procedure that is dedicated to the realization of the state authority for punishment, the interest of effective criminal prosecution for the discovery of substantive truth on one hand and the guarantee of the basic rights of the suspect and the defendant on the other hand are the two most important ideals and should be harmonized and balanced with each other as such. Here, as seen above, the current Constitution and Criminal Procedure Act provide for certain specific systems and rights for an effective guarantee of the basic human rights and defense right of the suspect at the time of suspect interrogation, by, for example, guaranteeing for the non-custodial suspects the right to remain silent and the right to meet and consult with an attorney and by limiting the probative value of the protocol containing the interrogation of a suspect prepared by the investigative authority.

Therefore, the absence of an express provision for the guarantee of the right to have the attorney participate in the interrogation of a non-custodial suspect chosen by the legislators, is for the realization of an important public interest of the discovery of substantive truth through effective criminal prosecution, and, in our opinion, even without acknowledging the right to attorney participation, an effective defense is possible as there is a sufficient possibility for a suspect to otherwise have the assistance of counsel thereby guaranteeing the defense right and the fair procedure for the suspect. Therefore, such absence may not be deemed to excessively infringe the right of the suspect to assistance of counsel in violation of the principle of proportionality.

(2) Constitutionality of the Act In this Case

As examined above, the legislative choice not guaranteeing the right to have the attorney participate in the suspect interrogation for a non-custodial suspect as the result of concrete and specific legislation of the right to assistance of counsel through the provisions of the Criminal Procedure Act, is not deviant of the right of the legislators of legislative policy-making, nor does it consequently violate the right to assistance of counsel.

In addition, the act of the respondent in this case does not

violate the 'right to assistance of counsel,' either. The absence of an express provision guaranteeing the right to attorney participation, as chosen by the legislators, does not mean the 'prohibition of participation' stating that 'the participation of the attorney at the investigatory procedure shall not be permitted.' Rather, such absence is a general expression that 'there is no obligation to permit the participation of the attorney in the interrogation of a non-custodial suspect at the investigatory procedure.' Such a decision by the legislators may not be deemed to obligate the investigative authority as the law enforcement institution to specifically determine whether or not to permit the participation of the attorney in the suspect interrogation by balancing the conflicting legal interests of the 'mandate of effective defense' and the 'legal interest justifying restrictions upon the participation of the attorney,' in each separate case.

Thus, in this case, the decision by the prosecutor not to permit the participation of the attorney for the purpose of the investigation is in conformity with the constitutional decision of the legislators, nor can there be seen any specific wrong in the exercise of discretion such as otherwise rendering the exercise of defense right or the effective defense of the suspect clearly difficult or impossible.

C. Then, the absence of a provision guaranteeing the right to have the attorney participate in the suspect interrogation for the non-custodial suspect as chosen by the legislators, does not excessively infringe the right to assistance of counsel against the principle of proportionality. The act of the respondent in this case was also taken pursuant to the above decision by the legislators, and, as such, may not be deemed to infringe the right to assistance of counsel. Our opinion with respect to the assertion of the violation of the right to equality is identical to the dissenting opinion of *Justice Kim Young-il*, therefore we hereby invoke the relevant part of Justice *Kim*'s opinion on this point. We respectfully disagree with the majority opinion.

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

4. *Relocation of the Capital City Case*

(16-2(B) KCCR 1, 2004Hun-Ma554, 566(consolidated), October 21, 2004)

Held, the Special Act on the Establishment of the New Administrative Capital that intended to relocate the capital of the Republic of Korea by constructing a new capital for administrative function in the Chungcheong Province area was unconstitutional.

Background of the Case

As one of the election pledges, Roh Moo-Hyun, who was then the presidential candidate of the New Millenium Democratic Party, announced the plan to relocate the administrative function of the capital that 'the Blue House and the governmental ministries will be moved to the Chungcheong area as a curb on the concentration and overpopulation at the capital and a solution for the lagging local economy.' Roh Moo-Hyun was elected as the President at the 16th presidential election held on December 19, 2002.

Subsequently, the bill for the Special Act on the Establishment of the New Administrative Capital to transfer the administrative function of the capital to the Chungcheong area, which was proposed by the administration, was enacted at the National Assembly, and the Special Act on the Establishment of the New Administrative Capital was promulgated on January 16, 2004.

The complainants in this case, who are Korean citizens domiciled across the nation, filed the constitutional complaint in this case on grounds that the above Act was unconstitutional in its entirety as it was an attempt to relocate the nation's capital without revision of the Constitution, and that the Act violated the right to vote on referendum and the right of taxpayers.

Summary of the Decision

The Constitutional Court, in an 8:1 opinion, held the Act unconstitutional, with a separate concurring opinion of one Justice. The grounds for the Court's opinion are summarized as follows:

1. Majority Opinion of Seven Justices

The Act at issue in this case determines the transfer of the capital of the nation, which falls within the meaning of the capital under the Constitution as the location of national institutions that perform pivotal functions of politics and administration of the nation. As such, the transfer of a new administrative capital pursuant to the Act at issue in this case means the transfer of the capital of the Republic of Korea.

The establishment or relocation of the capital is the geographical placement of the basis of the nation's organization and structure through determination of the location of the highest constitutional institutions such as the National Assembly and the President, and is thus a fundamental decision by the citizens concerning the nation, and, at the same time, a core constitutional matter that forms the basis for the establishment of a nation.

There is no express provision in our Constitution that states 'Seoul is the capital.' However, that Seoul is the capital of our nation is a continuing practice concerning the life in the national realm of our nation for a period of over six-hundred years since the Chosun Dynasty period. Such practice should be deemed to be a fundamental matter in the nation that has achieved national consensus from its uninterrupted continuance over a long period of time. Therefore, that Seoul is the capital is a constitutional custom that has traditionally existed since even prior to the establishment of our written Constitution, and a norm that is clear in itself and a premise upon which the Constitution is based although not stated in an express provision in our Constitution. As such, it is part of the unwritten constitution established in the form of a constitutional custom.

Constitutional custom is also part of the constitution and is endowed with the same effect as that of the written constitution. Thus, such legal norm may at the least be revised only by way of constitutional revision pursuant to Article 130 of the Constitution. That Seoul is the capital of our nation is unwritten constitutional custom, and, therefore, retains its effect as constitutional law unless invalidated by establishment of a new constitutional provision ordaining a new capital through the constitutional revision procedure. On the other hand, other than through formal constitutional revision, a constitutional custom may lose its legal effect by loss of the national consensus that supports it. However, in this case, such circumstance is not found.

Pursuant to Article 130 of the Constitution, national referendum

is mandatory for the constitutional revision. Therefore, the citizenry has the right to express its opinion with respect to the constitutional revision through a binary pro-and-con vote. Here, the Act at issue in this case realizes the transfer of the capital, which is a matter to be undertaken by the constitutional revision, merely in the form of a simple statute without following the constitutional revision procedure. Thus, the Act is in violation of the Constitution as it excludes the exercise of the right to vote on referendum, thereby violating such right, which is a fundamental right to participate in politics retained by the people at the constitutional revision pursuant to Article 130 of the Constitution.

2. Separate Concurring Opinion of One Justice

Article 72 of the Constitution provides 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 deems it necessary." The decision to transfer the capital falls within the meaning of the 'important policies relating to diplomacy, national defense, unification and other matters relating to the national destiny,' and, is therefore a matter to be determined by referendum.

The act by the President of submitting a matter to the referendum is a deferred discretionary act. However, the act of not submitting the decision to relocate the capital to the referendum is a deviation and an abuse of discretion, and is in violation of Article 72 of the Constitution that is the legal basis of the endowment of the discretion.

Should the President exercise the discretion in a lawful way, the only possible choice would be to bring the decision to relocate the capital before the referendum. Therefore, the President is obligated to submit this matter to the referendum, and the Korean citizens in turn have the right to request the submission of this matter to the referendum as they have a specific right to vote on referendum even prior to the actual submission by the President.

The Act at issue in this case unequivocally and conclusively excludes the referendum in determining the intention to relocate the capital. The complainants, who are Korean citizens, were therefore deprived of the right to vote on referendum of Article 72 of the Constitution by the enactment and enforcement of the Act at issue in this case.

3. Dissenting Opinion of One Justice

In a legal system under a written constitution, customary constitutional law may not be established or maintained apart from the written constitution, and, instead, is always given no more than supplementary effect as it may be established and maintained only when harmonized with various principles of the written constitution.

Also, the constitutional revision is a concept that pertains to the constitution in the formal sense, i.e., the written constitution. Therefore, the change of the customary constitutional law does not belong to constitutional revision, and may occur through the enactment or the revision of the statute that is the procedure for representative democracy established by the Constitution. In the case of a change in constitutional custom such as the transfer of the capital, as there is no particular constitutional provision that prohibits this, it may be done by the enactment of the statute by the National Assembly. Therefore, there is no possibility that the Act at issue in this case violates the right to vote on referendum under Article 130, Section 2, of the Constitution.

On the other hand, Article 72 of the Constitution endows the President with the discretion of whether or not to submit an 'important policy concerning the national security' to the referendum, which may not be interpreted to the effect that such discretion varies according to the significance of the matter. Further, such discretion is endowed directly by the Constitution. Thus, the legal principle of deviation and abuse of discretion of the administrative law may not apply. Therefore, there is no possibility that the right to vote on referendum of Article 72 of the Constitution is violated in this case. To conclude, the assertion of the complainants of the violation of the right to vote on referendum is unjustified, as the possibility of violation of the asserted right itself is lacking.

Aftermath of the Case

As the Special Act on the Establishment of the New Administrative Capital was held unconstitutional by the Constitutional Court, as an alternative reflecting the decision of the Constitutional Court and realizing at the same time the division of powers and the purpose and the intended effect of relieving overpopulation in the capital area, a new special act of the Special Act for the Construction of an Administrative-Function Hub City in the Yeongi-Gongju Area as a Countermeasure to the New Administrative Capital was enacted on March 2, 2005 and

promulgated on the 18th of the same month, to establish an administrative-function hub city in the Yeongi and Gongju area of South Chungcheong Province and to relocate thereto all administrative institutions of the central government with the exception of six government ministries of the Ministry of Unification, the Ministry of Foreign Affairs and Trade, the Ministry of Justice, the Ministry of National Defense, the Ministry of Government Administration and Home Affairs, and the Ministry of Gender Equality and Family. A separate constitutional complaint was filed on April 27, 2005 and is currently pending seeking to confirm the unconstitutionality of the subsequent Act, on the ground that the above subsequent Act splits the capital in two, thereby causing temporal and geographical inefficiency in the administration of national affairs and decrease in national competitiveness.

Parties

Complainants

1. Choi ○ Chul, and 168 other(the list of the complainants is attached as Appendix Ⅰ; 2004Hun-Ma554)

   Counsel of Record: Shinchon Law Firm
   Counsel in Charge: Kim Moon-Hee, and 1 other
   Counsel of Record includes Lee Seok-Yon

2. Chung ○ Myung(2004Hun-Ma566)

   Counsel of Record, Court-appointed counsel: Kim Young-Jin

Supplementary Participants:

Lim ○ Soo, and 229 other(the list of Supplementary Participants is attached as Appendix Ⅱ)
Counsel of Record: Shinchon Law Firm
Counsel in Charge: Kim Moon-Hee, and 1 other
Counsel of Record includes Lee Seok-Yon

Holding

The Special Act on the Establishment of the New Administrative Capital(January 16, 2004, Public Act No. 7062) is unconstitutional.

Reasoning

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

A. Overview of the Case

(1) On September 30, 2002, the then presidential candidate of the New Millenium Democratic Party, Roh Moo-Hyun, announced a plan, as an election pledge, to relocate the administrative function of the capital by moving 'the Blue House and the government ministries to the Chungcheong area as a curb on the concentration and overpopulation of the capital and a solution for the lagging local economy.' Roh Moo-Hyun was elected as the President at the 16th presidential election held on December 19, 2002. In April 2003, the Decree on the Composition and the Management of the Organization for the Planning of the New Administrative Capital and Others(April 17, 2003, Presidential Decree No. 17967) was issued, and, pursuant to the above presidential decree, the Organization for the Planning of the New Administrative Capital and the Organization for the Support of the New Administrative Capital were established under the Blue House and the Ministry of Construction and Transportation, respectively, which performed the tasks of drafting the policies with respect to the construction of the new administrative capital and of searching out the candidate sites therefor.

(2) In October 2003, the administration proposed the bill for the Special Act on the Establishment of the New Administrative Capital. On December 29, 2003, the National Assembly plenary session passed this bill by the votes of 167 members favoring the legislation out of 194 members who participated in voting(with 13 votes in opposition and 14 votes in abstention). On January 16, 2004, the Special Act on the Establishment of the New Administrative Capital was promulgated as Public Act No. 7062, and, pursuant to the supplementary provision to the Act, was enforced in 3 months therefrom. The above Act provides that the administrative function of the capital will be relocated to the Chungcheong area in order to rectify the adverse effect of the concentration and overpopulation in the capital and its vicinity, to promote the balanced development of the nation and to fortify national competitiveness. The Act establishes the Establishment of the New Administrative Capital Promotion Committee co-chaired by the Prime Minister and a civilian, under the President, newly adopts a special budget managed and operated by the Minister of the Ministry of Construction and Transportation, and includes the provisions to prevent uncontrolled

development and speculation in real estate.

(3) Following the enforcement of the above Act, the Establishment of the New Administrative Capital Promotion Committee was established on May 21, 2004. On July 21, 2004, the above Committee, at its 5th conference, entertained and determined that, among major national institutions, 18 Bu(ministries) and 4 Cheo(ministries) and 3 Cheong(offices) of the administrative organs of the central government should be relocated to the new administrative capital, and that, with respect to the constitutional institutions such as the National Assembly, the consent of the National Assembly should be sought upon the request for transfer on their initiation. On August 11, 2004, the above Committee, at its 6th conference, finalized the Yeongi-Gongju area(approximately 7,128,000㎡ of land over Nam-myeon, Gumnam-myeon and Dong-myeon of Yeongi-gun and Janggi-myeon of Gongju city in South Chungcheong Province) as the site for the new administrative capital.

(4) The complainants are public officials and members of the City Council of Seoul Special Metropolitan City, citizens domiciled in Seoul Special Metropolitan City, and the Korean citizens domiciled across the nation. The complainants filed two separate constitutional complaints on July 12, 2004(2004Hun-Ma554) and July 15, 2004(2004Hun-Ma566) against the above Act, seeking to confirm the unconstitutionality of the above Act on grounds that the above Act is unconstitutional in its entirety as it seeks to relocate the capital without the constitutional revision procedure, and that the Act thereby violates the right to vote on referendum, the right as taxpayers, the right to hearing, the right to equality, the right to travel, the freedom of occupation, the right to serve in public office, the property right and the right to pursue happiness, of the complainants.

B. Subject Matter of Review

The subject matter of review in this case is whether the Special Act on the Establishment of the New Administrative Capital(enacted January 16, 2004, Public Act No. 7062) infringes on the basic rights of the complainants and thus violates the Constitution. The content of the Act is indicated in Appendix III.

2. Summary of the Complainants' Argument and the Opinions of the Relevant Institutions

A. Summary of the Argument of the Complainants

(1) The Act at issue in this case was enacted as a means to fulfill the election pledge of the President, and it plans and promotes the relocation of the capital. That Seoul is the capital of the Republic of Korea is part of the unwritten Constitution under the constitutional law analysis. Therefore, the transfer of the capital may be constitutionally justified only when based on the national consensus among the citizens by way of the referendum, a procedure equivalent to that for the revision of the Constitution. In addition, the Act at issue in this case pertains to the matter of significant national policy concerning national security and there was sufficient time for referendum. Therefore the referendum pursuant to Article 72 of the Constitution should have been undertaken for the enactment of the Act, yet it was not. This is in violation of the Constitution, and it has infringed the right to vote on referendum of the complainants.

(2) The colossal cost for the transfer of the capital is to be disbursed from the national budget composed by taxes paid by the citizens. Such expenditure is unconstitutional as it is in disregard of the priorities for fiscal spending and of the constitutional principles. The Act at issue in this case, which enables such unconstitutional national fiscal expenditure, infringes the right of the taxpayers that is guaranteed as the 'right not enumerated in the Constitution' under Article 37, Section 1, of the Constitution.

(3) The transfer of the capital constitutes part of the restructure scheme of the nation or national territory, in which all citizens have very great interests. Therefore, pursuant to the principle of due process, the legislative process therefor must necessarily include a process to gather various opinions from every field and social group, such as a hearing. The failure to undergo such process infringed the right to hearing of all citizens including the complainants.

(4) For the complainants who are members of the City Council and the public officials of Seoul Special Metropolitan City, it is expected as the result of the legislation of the Act at issue in this case that they will be deprived of the status and the right entitled to them as public officials of Seoul Special Metropolitan City in the course of performing their public office, which will infringe such interests. This violates their right to serve in public offices and the

freedom to perform occupation.

(5) The Act at issue in this case is a statute intended to determine procedural matters for the construction of the new administrative capital. However, the Act regulates substantive matters. Moreover, the Act has the National Assembly decide with respect to the capital transfer plan prior to the approval by the President thereby implicating that the National Assembly is an institution inferior to the President, and conclusively finalizes a particular geographic area as the location for the transfer of the capital. Thus, the Act lacks structural justification that should be observed among different laws. In addition, compared with the Chungcheong area that is determined to be the location of the new capital, the Act discriminates against other regions without reasonable grounds, thereby violating the right to equality. For those complainants who reside in the capital and its vicinity, it is expected that the transfer of the capital will cause disadvantage in their economic and social life, which infringes the freedom to choose occupation and the right to pursue happiness of such complainants.

B. Opinions of the President, the Minister of Construction and Transportation, the Minister of Justice, and the Establishment of the New Administrative Capital Promotion Committee

(1) Each of the basic rights of which the complainants allege infringement lacks probability of the infringement. The content of the Act at issue in this case merely concerns general matters with respect to the implementation of the transfer of the capital and does not relate to the infringement of the basic right of the individual citizens, nor may it directly violate the basic right without intermediation of a concrete and specific act of execution. Furthermore, the Act at issue in this case was enacted by the National Assembly on December 29, 2003 and promulgated on January 16, 2004, therefore a constitutional complaint should have been filed within 90 days therefrom. However, the constitutional complaint in this case was filed beyond the time limit, on as late as July 12, 2004. Therefore, the constitutional complaint in this case is unjustified as untimely.

(2) The right to vote on referendum under Article 72 of the Constitution becomes available only upon the exercise of the President of the right to submission. Therefore, it may not be an issue in this case. Matters concerning the capital do not necessitate constitutional revision, and the fact that Seoul is the capital merely

has statutory ground thus may not be deemed as unwritten constitution that has constitutional effect. In addition, revision of unwritten constitution does not require revision procedures of the Constitution. Therefore, the Act at issue in this case may not possibly violate the right to vote on referendum of Article 130 of the Constitution.

(3) Although the citizens are taxpayers, they are not endowed with the right to litigate whether or not and how the government expends the taxes in the right amount for the proper items. This may only be monitored and controlled by the National Assembly, which is the representative of the citizens. Therefore, the right of the taxpayers asserted by the complainants may not, preclusively, be infringed.

(4) The complainants allege the infringement of the right to hearing. However, during the process of drafting the bill, the government previously held a hearing, and also made a pre-announcement of legislation upon proposition of the bill to the National Assembly by the administration. Also, during the legislative process in the National Assembly, the pertinent National Assembly standing committee in charge made a resolution to forego the hearing pursuant to the National Assembly Act. Therefore, there was no violation of due process or infringement of the right to hearing.

(5) As there is no contradiction or conflict among the provisions of the Act at issue in this case or between the Act and other statutes, the Act is not in violation of the principle of structural justification. Furthermore, although the Act sets forth the Daejeon and Chungcheong area as the expected location for transfer of the capital, as there are reasonable grounds therefor such as balanced development of the nation and settlement of the concentration and overpopulation in the capital area, the Act does not violate the right to equality of the complainants.

(6) As the transfer of the capital is relevant merely to the *de facto* incidental economic interests of the complainants, the Act may not be deemed to infringe the freedom to choose the occupation, the right to travel, or the right to pursue happiness.

C. Opinion of the Mayor of Seoul Special Metropolitan City

The opinion of the Mayor of Seoul Special Metropolitan City is identical to the assertion of the complainants in gist, with the exception that the opinion underscores that Seoul has the history from time immemorial and the most suitable geographical condition

as the capital, that relocating the capital is not an appropriate solution for the overpopulation in the capital area, and that no opportunity was given for Seoul Special Metropolitan City and its legislature to provide their opinions over the legislative process to enact the Administrative Capital Act.

3. Determination of the Court on the Legal Prerequisites for Constitutional Complaints

A. Probability of Violation of Basic Rights

The Act at issue in this case is a statute that conclusively determines the transfer of the capital and sets forth the procedures of the transfer. Although no constitutional provision expressively provides that the capital of our nation is Seoul, should it be confirmed, by construction of the Constitution, to be part of unwritten customary constitutional law as a fundamental constitutional matter established through a long tradition of life in the national domain, the Act at issue in this case to relocate the capital would be a change to the Constitution in the form of an inferior statute without constitutional revision procedures. Notwithstanding any express constitutional provision, constitutional custom is firmly a part of the constitution of the nation therefore may be revised only by the constitutional revision procedures. Article 130 of the Constitution requires that the constitution be revised upon proposition either by the majority of the entire membership of the National Assembly or by the President, followed by the resolution of the National Assembly by the minimum of two-thirds of the entire membership of the National Assembly in favor of the proposed revision, and thereafter a mandatory referendum where the minimum of the majority of the citizens entitled to vote on general election to constitute the National Assembly actually vote and the majority of those who participate in the referendum vote in favor of the proposed constitutional revision. Therefore, in this case, should it be held on the merit that the nation's capital is Seoul, as a customary constitutional law, then, as the Act at issue in this case forewent the referendum required as a mandatory procedure for the constitutional revision by determining in the form of a simple statute such a matter that should be determined by constitutional revision, the Act may have violated the above right to vote of the citizens.

Then, as the Act at issue in this case may have possibly violated the complainants' basic right to participate in politics for the constitutional revision in the form of the right to vote on

referendum, the probability of the violation of the right does exist.

B. Self-Relatedness, Directness and Presentness of Alleged Violation of Basic Right

The probability that the Act at issue in this case may have violated the fundamental right of the complainants is indicated above. Next, therefore, the directness and the presentness of such violation of right will be discussed below. The allegedly violated basic right here is the right to vote on referendum for the constitutional revision, which is one of the rights to participate in politics held by the citizens. Such right is a basic right held by each of the individual complainants who are the citizens of the Republic of Korea. Thus, there exists the self-relatedness of the violation of the right to the complainants with respect to the Act at issue in this case. Also, the Act at issue in this case assumes the transfer of the capital as a given premise and then provides for specific implementation thereof, hence requiring no further procedure or decision with respect to the 'relocation of the capital' itself. Therefore, as the Act at issue in this case directly excludes the basic right to vote on referendum entitled to the citizens for the constitutional revision, there exists the directness. In addition, as the transfer of the capital was statutorily finalized by the promulgation and enforcement of the Act at issue in this case thereby previously excluding the above right to vote on referendum of the complainants, the violation of the above right has become presently real and continues presently. Therefore, there also exists presentness. Then, there exists self-relatedness of the violation of the right to the complainants with respect to the Act at issue in this case which provides for the procedure of the relocation of the capital based upon the premise that the relocation of the capital has been determined, and there also exist the directness and the presentness of the violation of right held by the complainants.

C. Timeliness of Filing of the Constitutional Complaints

Article 69, Section 1, of the Constitutional Court Act provides that the constitutional complaint pursuant to Article 68, Section 1, of the same Act shall be filed within ninety(90) days of the knowledge of the ground therefor or within one(1) year of the occurrence of such ground, whichever is earlier. Thus, a constitutional complaint with respect to a law should be filed within ninety(90) days of the knowledge of the enforcement of that law or within one(1) year of its enforcement, whichever is earlier, in the case of violation of

basic right simultaneous of the enforcement of the law; and, within ninety(90) days of the knowledge of the occurrence of the ground for constitutional complaint or within one(1) year of the occurrence of such ground, whichever is earlier, in the case of violation of fundamental right by the occurrence of a ground in accordance with law subsequent to the enforcement of the law(Gazette No.92 554, 556, 2004Hun-Ma93, April 29, 2004).

In the present case, the constitutional complaints were filed on July 12, 2004 and July 15, 2004, within ninety(90) days from the enforcement of the Act at issue in this case on April 17, 2004. Therefore, the constitutional complaints in this case are timely in all regards.

D. Applicability of Doctrine of Political Question Inappropriate for Judicial Review

Now, whether or not the constitutional complaints in this case are unjustified on the ground that the determination of the President or the National Assembly upon the construction of the new administrative capital or the relocation of the capital is not subject to judicial review as such matter is of highly political nature is discussed in the following paragraphs.

(1) The existence of the state functions in our Constitution for which judicial review should be refrained due to the request for as much deference as possible to the determination of highly political nature reached by the President or the National Assembly upon such matters demanding such highly political determination, concerning, for example, the exercise of national emergency power or overseas dispatch of the National Armed Forces, may be acknowledged. However, pursuant to the principle of the rule of law that is a basic principle of our Constitution, any and all government power including the President and the National Assembly must be subject to the rule of law, and the limit that all state function is the means to realize the value of basic rights of the citizens must uncompromisingly be observed. Also, the Constitutional Court is a state institution that is dedicated to the protection of the Constitution and the guarantee of the basic rights of the citizens. Therefore, even those state functions exercised by highly political determination are subject as a matter of course to review by the Constitutional Court, when such functions directly relate to the violation of the basic right of the citizens(Refer to 8-1 KCCR 111, 115-116, 93Hun-Ma186, February 29, 1996).

(2) Although the political nature of the construction of a new

administrative capital or the relocation of the capital may be acknowledged, such matters may not be deemed in themselves, without further, as inappropriate to be subject to judicial review due to the request for highly political determinations. Furthermore, the subject matter of review in this case is the constitutionality of the Act at issue in this case and not the constitutionality of the act of the President. When the subject matter of constitutional adjudication is the constitutionality of a statute, it may not avoid judicial review on the mere ground that the statute concerns political matters.

(3) Here, should the decision of the President with respect to whether or not to submit the matter of relocation of the capital to a referendum be subject to judicial review as a preliminary issue for the determination of the constitutionality of the Act at issue in this case, it then may be desirable that judicial review is abstained from as such decision is of a highly political nature. Accordingly, it may be desirable that judicial review over the Act that is asserted to be unconstitutional based upon the defect in such decisionmaking is also abstained from. However, should the above decisionmaking of the President be directly relevant to the violation of the basic right of the citizens, such decisionmaking may be the subject matter of judicial review in the constitutional adjudication, and, accordingly, the Act relevant to the above decisionmaking may also be the subject matter of review in the constitutional adjudication.

As our Constitution provides for the direct right to participate in politics in the form of right to vote on referendum(Articles 72 and 130 of the Constitution), along with the indirect right to participate in politics such as the right to elect(Article 24 of the Constitution), the right to vote on referendum is one of the basic rights guaranteed in the Constitution(*Refer to* 13-1 KCCR 1431, 1439, 2000Hun-Ma735, June 28, 2001). Therefore, should the decisionmaking of the President violate the right to vote on referendum held by the citizens, even if the above decisionmaking is a conduct of highly political nature, it may be subject matter of review in the constitutional adjudication at the Constitutional Court for its direct relevance to the violation of the basic right of the citizens. Therefore, even if the constitutionality of the Act at issue in this case concerns the decision of the President, it may be subject matter of review by way of constitutional complaint.

(4) Then, even if the constitutionality of the decisionmaking of the President must be reviewed as a preliminary matter for reviewing the constitutionality of the Act at issue in this case, to the extent such review is for determining whether the right of the citizens to vote on referendum is violated, the Act at issue in this case may be subject matter of review of the constitutional

adjudication by the Constitutional Court, thereby permitting a constitutional complaint with respect to this. Therefore, filing of the constitutional complaint in this case may not be deemed unjustified due to the failure to state appropriate subject matter of review.

E. Subconclusion

As examined in the preceding paragraphs, there exist all legal prerequisites for the constitutional complaint in this case with respect to the above issues, and there are no other defects otherwise found concerning legal prerequisites. Therefore, filing of the constitutional complaint in this case is justified.

4. Determination of the Court on the Merits

A. Concept of the Capital under the Constitution

(1) In general, the capital of a nation means the geographic location where the national institutions and organizations implementing the core of state powers are concentrated thereby assuming pivotal functions of politics and administration and symbolizing the nation towards other nations. A capital should have the following characteristics in order to satisfy the normative requirements of the constitutional state: First, the capital of a constitutional state under representative democracy should be the location where the legislative function through the legislature that is an organ representing the citizens takes place. The "functional location" of the legislative organ is one of the important elements of the characteristics of a national capital. Next, the capital should be the location where the representative function and the unifying function of the nation take place. Under the constitution of a nation such as ours that adopts the presidential system, the President represents the nation and functions to maintain national unity, and such internal and external activities of the President endow one of the necessary elements of the "characteristics of the capital" to the location where such activities take place. Such activities of the head of state possess symbolic value in the sentiments of the citizens thereby serving as the psychological momentum for national unity. Therefore, such activities have a fundamental significance in determining the characteristics of the capital. In addition, the capital is the location where the activities of the national institutions and organs implementing governmental functions take place. The government leads the nation in politics and administration by responsibly implementing all domestic and international policies

including, especially, economic policies. Such governmental functions provide a basis as the capital to the geographic location where the governmental functions are exercised and realized. However, on the other hand, as government takes charge of and implements the administration that should be creative and proactive, its organs are specialized and expanded, therefore such organs do not have to be concentrated and located in one city. Multi-locational allocation of the governmental organization may be contemplated as a policy matter especially in consideration of the situation readily realizing organic cooperation of operation overcoming locational distance by utilizing such up-to-date information technologies as video conference and electronic approval due to the remarkable development in information and communication technologies in recent years. Especially under the presidential system of government, as the President is the chief of the executive branch as well as the head of the state, the location of the government may be deemed to be represented by the location of the President. Therefore, as long as the location of the President is viewed as a characteristic element of the capital, the location of various ministries of the government should not be necessarily viewed as a separately decisive element in determining the capital. On the other hand, neither the location where judicial power including constitutional adjudication is exercised, nor the economic capacity of a city, is an indispensable element for the determination of the capital. In sum, the capital means, at a minimum, the geographic location of the national institutions and organs that perform pivotal political and administrative roles.

(2) The highest constitutional institutions and organs under our Constitution are the National Assembly(Chapter III of the Constitution), the President(Chapter IV, Section 1), the Prime Minister(Section 2, Sub-Section1), the Executive Ministries(Section 2, Sub-Section 3), the Supreme Court(Chapter V), the Constitutional Court(Chapter VI), and the National Election Commission(Chapter VII). Among such constitutional institutions and organs, the location of the National Assembly that decides the political intent of the citizens as the representative organ of the citizens and the location of the President who superintends the administration and represents the nation are particularly decisive elements in determining the capital. The President symbolizes the nation as the head of state, while holding the highest reins of government in the national operation as the chief executive officer of the government. The National Assembly is a representative institution consisting of the representatives elected by the citizens as holders of the sovereignty, which assumes the pivotal role of representing the sovereign will and determining the important national intent under the present-day

governmental structure of indirect democracy. Therefore, these two national institutions, *inter alia*, stand at the center of state power, and express towards the outside the existence and the idiosyncrasy of the nation.

B. Whether the Act at Issue in this Case Involves the Decision to Relocate the Capital

The Act at issue in this case merely provides in an express provision that it "regulates the methods and procedures of the construction of the new administrative capital" under Article 1, and does not expressly include the decision itself to relocate the capital of the Republic of Korea from the current capital of Seoul Special Metropolitan City to a different location. In addition, under the Act, any plan established by the Establishment of the New Administrative Capital Promotion Committee with respect to the scope of the major national institutions and organs to be relocated should be approved by the President(Article 6, Section 1), and, especially, the consent of the National Assembly is required for the constitutional institutions and organs not belonging to the executive branch of the government(Article 6, Section 4). Thus, not all of the major national institutions and organs are included in the scope of relocation depending upon the approval and non-approval of the President and the consent and refusal of the National Assembly. Therefore, the Act at issue in this case does not directly mandate that all of the major national institutions and organizations including the National Assembly and the President be transferred to the new administrative capital.

However, on the other hand, the Act at issue in this case defines the new administrative capital as the "location to be determined by statute . . . newly constructed as the capital to assume the pivotal political and administrative function of the nation"(Article 2, Section 1) and provides that the prospective location of the new administrative capital is the "location to be identified and notified . . . for the relocation of the major constitutional and central administrative institutions and organs"(Article 2, Section 2), thereby clearly indicating that, consequently, the new administrative capital shall be the capital having the pivotal political and administrative function of the nation where major constitutional and central administrative institutions and organs are located. Therefore, the Act at issue in this case requires that the scope of the relocation be sufficient so that the new administrative capital may assume the pivotal political and administrative function of the nation, although it does not

individually identify the scope of the major national institutions and organs to be relocated. Then, the Act at issue in this case contemplates the transfer of the national capital within the meaning of the concept of the capital under the constitution as the location of the national institutions and organs performing the pivotal political and administrative function as indicated above. Thus, the relocation of the new administrative capital pursuant to the Act at issue in this case means the relocation of the capital of our nation.

Further, the Act at issue in this case provides that the prospective location for the relocation of the capital should be determined within the Daejeon Metropolitan City, North Chungcheong Province and South Chungcheong Province area(hereinafter referred to as the 'Chungcheong area')(Article 8); that the Establishment of the New Administrative Capital Promotion Committee shall be established under the President for effective implementation of the construction of the new administrative capital(Article 27); and that the Promotion Committee should manage all matters necessary for a smooth construction of the new administrative capital(Article 28), such as the planning to relocate major national institutions and organs to the new administrative capital(Article 6, Section 1), the establishment of a basic plan for the construction of the new administrative capital(Article 7, Section 1), the determination of the prospective location for the construction of the new administrative capital(Article 12), and the establishment of development plans concerning the construction operations(Article 19). Further yet, the Act at issue in this case provides for such matters as the determination of the entity in charge of the construction of the new administrative capital(Article 18), the establishment of a plan concerning the construction of the new administrative capital(Article 19), the establishment and the approval of the implementation plans therefor(Article 20), the establishment of the infrastructure therefor(Article 22), land expropriation(Article 23), and the inspection upon completion of the construction(Article 26).

As such, the Act at issue in this case provides for the operation to actually construct the new administrative capital beyond a mere establishment of plans for the relocation to the new administrative capital, and, particularly, endows the authority to establish and implement various plans for carrying out the relocation of the capital as indicated above to the Promotion Committee which is to be established pursuant to the Act at issue in this case, thereby enabling the administrative capital relocation operation to be carried out in actuality by the enforcement of the Act at issue in this case without any separate decision of the national will upon the relocation of the administrative capital.

Then, in sum, the Act at issue in this case contains within itself the decision to relocate major national institutions and organs performing pivotal political and administrative functions of the nation to the new administrative capital which is to be constructed in the Chungcheong area, thereby consequently involving within it the decision to relocate the capital of the Republic of Korea to the Chungcheong area.

C. Whether that the Capital is Seoul is the Customary Constitutional Law of our Nation

(1) Meaning of and Elements for Customary Constitutional Law under Written Constitution System

(A) Our nation has a written constitution, and, as such, fundamentally, the source of law for our constitutional law is the text of the Constitution of the Republic of Korea. However, notwithstanding the existence of a written constitution, it is impossible to completely provide without omission for all constitutional law matters in the written constitution, and, in addition, the Constitution pursues succinctness and implication as the basic law of the nation. Therefore, there is room for recognizing certain matters though not written out in the formal code of the Constitution as unwritten constitution or customary constitutional law. Especially, there may be certain circumstances where no express provision is necessarily included in the text for those matters that are self-evident or presupposed or that are general constitutional principles at the time of the establishment of the written constitution. However, not all practices or conventions formed concerning constitutional law matters may be recognized as customary constitutional law. Instead, strict elements should be satisfied in order for the recognition thereof as the constitutional norm with legal enforceability, and, only those customs satisfying such elements have the same legal force as the customary constitutional law as that of the written constitution.

(B) Article 1, Section 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." As such, as the citizens of the Republic of Korea are the holders of the sovereignty of the Republic of Korea and of the highest authority to establish the constitution, the citizens not only participate in the establishment and the revision of the written constitution, but also may directly form as necessary constitutional law matters that are

not included in the text of the written constitution, in the form of customs. Then, the customary constitutional law should be deemed as the expression of intent of the constitutional determination of the citizens as the holders of sovereignty, like the written constitution, and, should also be deemed to have the same force as that of the written constitution. As such, the formation of the constitutional norm through customs is one aspect of the exercise of the people's sovereignty. The principle of people's sovereignty or democracy requires the participation of the citizens in the establishment of the positive law, written or customary, in the entirety, and the customary constitutional law established by the people binds the legislator and has the force as constitutional law.

(C) In order for the establishment of a customary constitutional law, first, the matter concerning the custom which has been formed should be a constitutionally significant and fundamental matter to the extent that it may not be regulated merely by statute, yet should instead necessarily be regulated by the constitution to have superiority over statute in its legal force. Although in general a substantive constitutional law matter refers broadly to a matter pertaining, inclusively, to the organization and structure of the nation, the constitution and the authority of the national organizations and institutions, or the status of the individuals in relation to state power, the constitutional custom pertains to such matters especially fundamental and pivotal to the state among general constitutional law matters, which are not adequately regulated by the statutes. Specifically which among the general constitutional law matters falls into the category of these fundamental and pivotal constitutional law matters may not be tailored by employing a general and abstract standard, but should be determined in each of the individual circumstances by specific judgment through assessment of the closeness to the constitutional nucleus, the constitutional significance, and the constitutional principles.

(D) Next, in order for the establishment of the customary constitutional law, the general elements required for the establishment of customary law should be satisfied. Such elements include, first, the existence of a certain practice or convention with respect to the fundamental constitutional law matter, second, the repetition and the continuation of the practice for a sufficient period of time for the citizens to recognize its existence and to perceive it as a practice that will not disappear(repetitiveness and continuance), third, the maintenance of the practice without intervening opposing practices(maintainability), and, fourth, the unequivocal and clear content of the practice not permitting diverse interpretations

(unequivocalness). In addition, fifth, there should be an approval or conviction, or a wide consensus of the citizens with respect to the practice as a customary constitutional law, thus the people must believe in its legal enforceability(national consensus). Likewise, in order for the recognition of the establishment of a customary constitutional law, all of these elements should be satisfied.

(2) Issue of Location of Capital as Fundamental Constitutional Law Matter

Determining the location of the constitutional institutions and organs, and especially of the President who represents the nation and of the national legislature or the National Assembly that function as a pivotal role in democratic principle of government, is one of the substantive constitutional law matters expressing the identity of the nation. Here, the identity of the nation means the characteristic nature of the nation, as the source of emotional unification of the nation, which is formed by the composite expression of history, experience, culture, politics, economy, power structure and spiritual symbols, and so forth, of its people. Other than the determination of the location of the capital, the fundamental constitutional law matters include the determination of the official name of the nation, the adoption of the Korean language as the official national language and the Korean alphabet as the official national alphabet, the delimitation of the national borders, and the proclamation of the holder of the sovereignty. The establishment or the transfer of the capital is the locational allocation of the basis of the national organization and structure by determining the location of the highest constitutional institutions and organs such as the National Assembly and the President, and, as such, is the fundamental decision of the people with respect to the nation, while at the same time constitutes a pivotal constitutional law matter that forms the basic element of the nation.

Likewise, the issue of the location of the capital is a constitutional law matter in its substance, and, further, is a significant and fundamental constitutional law matter that pertains to the identity of the nation and its basic organization and structure. As such, it is a matter to be determined by the people themselves, and may not be subject to the decision of the President or the government, or the inferior institutions thereof.

(3) Whether that the Capital is Seoul is a Customary Constitutional Law

(A) There is no express provision within the code of our Constitution that states 'the capital is Seoul.' However, Seoul has the dictionary meaning of the 'capital.' Since the establishment of the Chosun Dynasty by Lee Seong Gye in 1392 and the construction of the capital in Hanyang, for over six hundred years, the present Seoul area has conventionally been termed as such, by transforming a general noun to a proper noun. Therefore, that the present Seoul area is the capital is self-evident by its term itself, and the people have already perceived it as such unconsciously or consciously as a historical and traditional fact since before the establishment of the Republic of Korea. By the time of the establishment of the Republic of Korea, there rose no question concerning this, either, as a given premise or self-evident fact with respect to the basic organization of the nation. Therefore, from the outset of the establishment of our Constitution including the inaugural Constitution, an inclusion of the constitutional provision stating that 'the capital(Seoul) shall be located in Seoul,' which would tautologically confirm a given fact, was meaningless and unnecessary. An express constitutional provision with respect to the location of the capital has never been established in our Constitution over subsequent constitutional revisions in several times. However, this never indicates that there exists no constitutional custom itself with respect to the location of the capital, in light of the historical, traditional and cultural circumstance of our nation. That Seoul is the capital is perceived by all citizens as a legal norm with legal force for the organization of our nation, as a self-evident or presupposed fact firmly formed through the long tradition and custom in the nation.

(B) On the other hand, in order to determine whether it should be approved as customary constitutional law that Seoul is the capital of our nation, the historical details that Seoul was established as the capital of our nation and has continuously functioned as the capital should be, *inter alia*, verified by corroboration.

1) Establishment of the Chosun Dynasty and the determination of Seoul as the location of the capital

a) From early on, Seoul functioned as Namgyung, or the southern capital, during the Koyro Dynasty, thus serving as the center of local administration, along with Pyongyang, the western capital, and Gyeongju, the eastern capital, together forming the three local capital system of the Koryo Dynasty(21st year of King Munjong, or 1067 A.D.). Namgyung or the southern capital directly

had jurisdiction over part of the present Seoul-Gyeonggi area, and, as the center of administration for the adjacent regions, there was a city of considerable size including the palace constructed therein, where the kings of the Koryo Dynasty used as quarters as they made their rounds past Seoul as well.

b) Immediately following the establishment of the Chosun Dynasty, a suggestion was made for the relocation of the capital. Lee Seong Gye, the inaugural king of the Chosun Dynasty who ascended the throne on July 17 of 4th year of King Gongyang or 1392 A.D.(hereinafter referred to as the "Taejo"), ordered the Dopyeonguisasa(Council of Ministers) to relocate the national capital to Hanyang on August 13 of the same year. However, this initial plan to transfer the capital was suspended, as Bae Guk Ryeom & Cho Jun and certain others petitioned on September 3 of the same year that "the transfer of the capital should be preceded by the construction of the palaces and the castles and the placement of the administrative offices, for in Hanyang the palaces are yet to be constructed and the castles are yet to be completed, which will result in confiscation of the commoners' abodes by the wealthy and powerful while those expelled subjects will be left with nowhere to return, as the weather turns cold," and Taejo accepted this petition.

c) Subsequently, the discussion for the relocation of the capital was transformed to the discussion upon where to relocate the capital, as such new candidates as Mount Gyeryong and Muak emerged therefor. In the case of Mount Gyeryong, Taejo himself made a survey of the candidate area at the foot of the Mount Gyeryong on February 8 of 1393, A.D.(2nd year of Taejo), and chose this area for the location of the new capital upon examining the features of the mountains and the watercourses and the conditions of the marine transportation and the roads, which was followed by the initiation of the construction work and the adjustment of the administrative districts. However, around December 11 of the same year, the construction of the new capital was again suspended due to the opposition raised by Ha Ryun, the then governor of Gyeonggi-do. At that time, Ha Ryun asserted that the construction of the capital should be terminated on the ground, among others, that, while the capital should be geographically located at the center of the nation, Mount Gyeryong is inclined to the south. Taejo accepted this assertion upon review by many government officials.

The place that subsequently emerged as the new candidate was Muak(currently the Yeonhui-dong and Shinchon-dong area in Seoul). Taejo made a survey of Muak himself on August 11 of 1394, A.D.(3rd year of Taejo), however, ordered to search for a new location for the capital as many government officials opposed to the

move to Muak and some of them were even in the opinion that the capital should remain in Songdo. At this point, Namkyung, that is, Hanyang, once again attracted attention. In the course of consequent survey over Hanyang by Taejo on the 13th day of the same month, Jacho(also named Muhak), a buddhist priest in the capacity of the royal counselor, and many of the Ministerss altogether were in the opinion that Hanyang was appropriate to be the nation's capital, thus Taejo finally determined to choose Hanyang as the capital.

d) Officially, the relocation of the capital to Hanyang was determined by way of Dopyeonguisasa(Council of Ministers)'s petition on the 24th of the same month to choose Hanyang as the capital and then Taejo's acceptance of such appeal from the Prime Ministerss. Subsequently, Seoul, or the capital, was moved to Hanyang on October 25 of the same year following the preparation for several months. On June 6 of 1395, A.D.(4th year of Taejo), Hanyang-bu was reorganized as Hanseong-bu, and, pursuant to the naming plate established by Hanseong-bu under Taejo's order, the then Hanseong area was organized as five(5) "bu"s and fifty-two(52) "bang"s altogether.

e) Subsequent to the relocation of the capital undertaken as such, with the exception of those several years from March 7 of 1399, A.D.(1st year of King Jeongjong) when the King and the lieges took a temporary refuge to Gaeseong to escape from calamity and disturbance to October 11 of 1405, A.D.(5th year of Taejong) when they returned to Hanseong, Hanseong, i.e., Seoul, uninterruptedly retained the status of the nation's capital throughout the Chosun Dynasty.

f) This status of Hanseong as the capital was directly reflected in the Gyeonggookdaejeon, which was the basic code of the laws of Chosun that was completed during the King Seongjong period. The provisions concerning Hanseong-bu were included under the Hanseong-bujo of the chapter of Central Administrative Offices under the title of Yijeon: the central administrative offices were distinguished from the local administrative offices of Weguanjik, and its jurisdiction was expressly indicated as matters pertaining to the capital area including, for example, the census registry and the markets of Seoul, thereby clearly providing for the status of Hanseong as the nation's capital. Such content of the Gyeonggookdaejeon remained unchanged throughout the existence of the Chosun Dynasty, without any revision.

2) Seoul's Maintenance of Characteristics as Capital during the Japanese Colonial Regime

In August of 1910, Japan's forceful colonial rule over our nation

began by the Annexation of Korea by Japan. Yet, Gyeongseong-bu or Seoul remained to function as the center of the administration of our nation, and Seoul was also the place where, during the state of deprivation of national sovereignty, the national representatives declared the independence of our nation on March 1, 1919. On the other hand, the Provisional Constitution of the Republic of Korea that was adopted by the Provisional Government on Exile of the Republic of Korea established in Shanghai, China, on April 13, 1919, following the March 1st Independence Movement subsequent to the above declaration of independence, did not mention anything particular with respect to Seoul, and merely provided under Chapter 4 that the provisional legislature of should consist of six members from each of the Provinces of Gyeonggi, Chuncheong, Gyeongsang, Jeolla, Hamgyeong and Pyeongan, and three members from each of the Provinces of Gangwon and Hwanghae and from the American continent(Article 20). The constitutions of the Provisional Government as subsequently revised remained unchanged in this regard. However, Seoul retained the symbolic nature in external relations as the capital of our nation despite the disintegration of the state organization and structure due to the forceful occupation of the national territory by Japan, in light of the fact that the unified provisional government formed on September 15, 1919 with the attributes of a constitution, a legislature, a declaration under oath, a platform and a program and comprised of multiple provisional governments established in three regions of Shanghai, Russian territory, and Hanseong(Seoul) among those provisional governments formed in various regions other than the Provisional Government on Exile of the Republic of Korea in Shanghai, located its headquarters for the communication system, the secret administrative network that the above unified provisional government operated. Also, the provisional government organized the independence activities against Japan on the given premise that Seoul was the capital, and the awareness and perception of the citizens remained unchanged. Therefore, the characteristics of Seoul as the nation's capital were duly maintained in actuality during this period of time as well.

3) Maintenance of Seoul's Characteristics as Nation's Capital following Independence and Establishment of the Republic of Korea, to Present

During this period from Independence to the establishment of the Republic of Korea, the constitution of our nation was ordained and established. However, no express provision concerning the capital was included in the text of the constitutional code. Yet, many of the individual statutes based on the premise of Seoul as

the nation's capital have historically existed.

a) The very first of such statutes was U.S. Military Order No. 106, "Order for the Establishment of the Seoul Special Metropolitan City," issued on September 18, 1946 during the U.S. military government regime following Independence, which provided in Article 2 that the city of Seoul was to be established as the Special Metropolitan City as the "capital of Chosun," with the same functions and the authorities as the Province or Do. The first discussion upon the status of the city of Seoul by the representatives of our own citizens was at the Provisional Legislature of South Chosun, which was established on August 24, 1946 by the U.S. Military Order No. 108, "Establishment of the Provisional Legislature of South Chosun," within the headquarter of the U.S. Military Government in Korea(USAMGIK). The draft bill for the "South Chosun Transition Government Organization Act" proposed to the above Provisional Legislature on February 27, 1947 expressly provided in the second paragraph of Article 52 that "the City of Seoul shall be the Special Metropolitan City and shall be directly under the executive branch of the central government," thereby specially treating Seoul, and no other. The bill for the "Local Government Organization Act" discussed on July 30 of the same year maintained the major contents of the above Military Order No. 106, expressly stating that "the City of Seoul shall be the Special Metropolitan City as the capital of Chosun, and shall have the same functions and authorities as the Province or Do."

b) The City of Seoul first obtained its status as the Special Metropolitan City by the legislation of the Local Autonomy Act(July 4, 1949, Statute No. 32). The above statute established in Article 2 the Provinces or Dos on one hand, and "Seoul Special Metropolitan City" on the other hand, as the local governments directly under the central government. Concerning this, Assemblyperson Na YongGyun, who then served as the committee chair for internal affairs and security, explained that "These were all 'Bu's and 'Gun's during the Japanese Occupation. During the Interim Government, Seoul was solely referred to as Seoul Special Metropolitan City and the rest as 'Gun's; . . . relating to this in terms of the population and the status of the capital, in Japan, for example, Tokyo is established as Do. Considering these, Seoul is named as the Special Metropolitan City," thereby confirming that Seoul was established as the Special Metropolitan City in consideration of its status as the capital.

c) Under the current law as well, at the revision of the Local Autonomy Act on April 6, 1988 by Statute No. 4004, a new provision was added as Article 161, which states that "With respect to the status, organization and administration of Seoul Special

Metropolitan City, a special treatment pursuant to the statute in consideration of its special characteristics as the capital may be adopted." Pursuant to this provision, the "Act on Special Cases concerning the Administration of the Seoul Special Metropolitan City" was enacted on May 31, 1991 by Statute No. 4371. Under this Act, Seoul Special Metropolitan City is under the direct control of the central government, and has the special status as the capital (Article 2). In order for the Ministry of Internal Affairs to decide whether to approve Seoul Special Metropolitan City's issuance of the local government bond or to audit its autonomous affairs, a mediation by the Prime Minister should precede(Sections 1 and 2 of Article 4). The mayor of Seoul Special Metropolitan City has a special authority over the appointment of and the conferment of decoration on the public officials of Seoul Special Metropolitan City(Sections 5 and 7 of Article 4). In addition, should the opinion of the head of the central administrative institution or agency and the opinion of the mayor of Seoul Special Metropolitan City differ with respect to the establishment and the execution of the plan for the road, traffic and environment, etc., around the capital region that is relevant to Seoul Special Metropolitan City, a mediation by the Prime Minister is mandatory(Article 5).

d) The legislations reviewed above indicate that, although there have continuously existed since Independence those statutory provisions stating that Seoul is the capital, such statutory provisions concede as a normative premise to the fact that Seoul has traditionally been the capital of our nation, and are merely to legally establish under this standard the special status of Seoul as the capital. This aspect of the legislation confirms the traditional legal conviction of our citizens that Seoul is the capital.

(C) As examined above, that the national capital is Seoul should be deemed to have been formed as an unwritten customary constitutional law, for it has had a legal effect as a basic legal norm of the nation for a long period of time since the establishment of the Chosun Dynasty as the Gyeonggookdaejeon expressly adopted it, and has constituted part of the most basic norm that is self-evident and presupposed in the structure of our constitution as a matter over which a firm belief has been formed among the citizens through the long history and custom since before the establishment of the inaugural Constitution of the Republic of Korea, although no express provision of the Constitution states it.

Examining this in further detail in light of the elements for the establishment of the customary constitutional law discussed previously, that Seoul is the capital of our nation has been a given normative fact concerning the nation for over six-hundred(600)

years since the Chosun period as the meaning of the word Seoul also indicates, therefore it can be estimated as a continuing convention practice traditionally formed in the nation(continuance); such practice has never been interrupted in the continuum as it has existed in actuality for a long period of time without change(maintainability); the fact that Seoul is the capital has a clear meaning to the extent that none among the citizens of our nation would hold a different opinion over it individually(unequivocalness); and, further, such practice is a basic element of the nation in whose effectiveness and enforceability the citizens believe, by obtaining the approval and the wide consensus of the citizens through firm establishment over a long period of time(national consensus). Therefore, that Seoul is the capital is part of the unwritten constitution established in the form of customary constitutional law, as it is a customary constitutional law that has traditionally existed since prior to our written constitution, and is a norm that is self-evident and presupposed in the constitution notwithstanding the absence of an express constitutional provision indicating this.

To recapitulate, the fact that Seoul is the capital, which satisfies all of the above elements, is not merely a factual proposition but instead a sublimed unwritten constitutional norm with the constitutional effect; it is not an extraction of normative proposition from a factual proposition but instead a dormancy of its normative nature behind the factual proposition as it has been uninterruptedly maintained with no dispute over its normative force.

(4) Constitutional Procedure to Eliminate Customary Constitutional Law of 'Seoul as the Capital'

(A) When a legal norm is acknowledged as a customary constitutional law, the corollary is the possibility of its revision. As the customary constitutional law has the same legal effect as that of the written constitution as part of the constitutional law, the customary constitutional law may be revised solely by the constitutional revision procedure pursuant to Article 130 of the Constitution. Therefore, it requires the resolution therefor of the National Assembly by the minimum of two-thirds of the entire membership of the National Assembly(Article 130, Section 1, of the Constitution), and then the minimum of the majority votes in its favor at a referendum in which the minimum of the majority of those who are entitled to vote at the general election participate(Article 130, Section 3, of the Constitution). Here, the only distinction between customary constitutional law and the written constitutional provision in this regard is that a customary

constitutional law is eliminated by adding a constitutional provision contrary to such customary constitutional law to the constitutional text, whereas a written constitutional provision is eliminated by striking out the relevant constitutional provision from the constitutional text.

On the other hand, other than by this formal constitutional revision, customary constitutional law may lose its legal force by the loss of the national consensus that supports it. A customary constitutional law exists as a valid constitutional norm, only with the duration of the acknowledgement thereof of the citizens as holders of sovereignty, and, should the national consensus that is one of the elements for the existence of customary constitutional law cease to exist, its legal force as customary constitutional law also ceases to exist. The elements of customary constitutional law are the elements not only for its establishment, but also for the maintenance of its legal force.

(B) The matters acknowledged as customary constitutional law under the system of written constitution subject to strict conditions for revision such as ours, may not be revised by statute that is in the form of an inferior law. In the system of unwritten constitution with lenient revision procedures such as that of the United Kingdom, there exists no such form of norms as a constitutional text that is superior to a statute, thus, the constitutional law matters may in general be revised only by way of statutory revision. However, in the case of our constitutional law, Articles 128 through 130 under Chapter 10 of the Constitution set forth a strict procedure for the constitutional revision that is different from the revision procedure for general statutes, and such constitutional revision procedure designates its object merely as the 'constitution.' Therefore, as long as customary constitutional law constitutes part of the constitution, it is within the meaning of the constitution that is the object of the constitutional revision procedure referred to here. As such, under our constitutional system clearly distinguishing the revision procedures for the constitution and the statutes and then setting forth a stricter revision procedure for the constitution, permitting the revision of customary constitutional law by way of the statute would be the recognition of the customary constitutional law as a mere constitutional 'statute' and the denial thereof as part of the 'constitution' any longer, thus it would eventually be the denial of the existence of customary constitutional law. Such a consequence may not be accommodated under our constitutional system, for it is logically incompatible with the major premise that recognizes customary constitutional law under the written constitution system.

(C) Then, in order to eliminate the customary constitutional law that the capital of our nation is Seoul, a constitutional revision pursuant to the procedure set forth by the Constitution is mandatory. In this case, a distinction from the case of a written constitutional provision is that, while a revision by striking out a written provision would be required had there existed a written constitutional provision establishing the capital, for the customary constitutional law, a mere insertion of a new written constitutional provision establishing a capital inconsistent with the substance of customary constitutional law would suffice for its elimination. For example, the customary constitutional law that Seoul is the capital can be eliminated by inserting a provision establishing a certain district in the Chungcheong area as our new capital. However, even for the custom established as the constitutional norm, should an encroachment thereupon occur along with the passage of time and the change in the constitutional situations and should the generalization of such encroachment result in the loss of the national consensus with respect to its legal force, such customary constitutional law will naturally become extinct. In order to recognize such extinction, there may be room for consideration of such a method such as national referendum, in which all can trust, in order to confirm the national consensus. However, there is no confirmation of such extinction in this case. Therefore, as stated previously, that the capital of our nation is Seoul is a matter established as customary constitutional law under our constitutional law concerning which there has been no change of circumstances, therefore, the constitutional revision process is mandatory for the elimination thereof.

D. Constitutional Permissibility of the Act at Issue in this Case that Relocates the Capital

(1) As examined above, that the capital of the Republic of Korea is Seoul is part of the so-called unwritten constitution, as customary constitutional law that has been established over a long period of time notwithstanding the nonexistence of an express provision in our Constitution. The Act at issue in this case is a statute that is to ascertain the relocation of the capital of our nation to a certain location in the Chungcheong area and to regulate the procedure of such relocation, and, as such, is of the substance of changing the above unwritten constitutional law that the 'capital is Seoul.'

(2) Here, however, there is no particular circumstance whatsoever to deem that a national consensus has newly been

formed to the effect that, with respect to the establishment of the capital of our nation, Seoul has become inappropriate as the capital, nor is there presently any basis to deem that the legal conviction of the citizens with respect to the fact that Seoul is the capital has changed or ceased to exist. In addition, there has been no constitutional revision pursuant to the procedure set forth by the current Constitution undertaken to insert an express provision for the relocation of the capital from Seoul in the text of the Constitution.

(3) Then, the Act at issue in this case is in violation of the Constitution, as it is not only inconsistent with the unwritten customary constitutional law that the capital of our nation is Seoul, but also as it is to change an important constitutional law matter that may only be changed by constitutional revision, in the form of a simple statute and foregoing such constitutional procedure.

E. Violation of the Right to Vote on National Referendum

(1) If a particular statute, in lieu of the constitution, regulates a basic constitutional law matter that shall be regulated in the constitutional text, such a statute is unconstitutional as violative of the constitutional system of rigid conditions for revision, regardless of whether its substance is contradictory to the superior constitutional norms. In general, the unconstitutionality of a statute becomes an issue when its substance is violative of the constitutional provisions or the constitutional principles. However, beyond such extent, when a particular statute at issue regulates in the form of a simple statute a matter that should be regulated and revised pursuant to the constitution, this is a direct infringement upon the authority the citizens possess with respect to the establishment and the revision of the constitution as holders of sovereignty.

(2) Here, as examined above, the determination of the intent concerning the establishment and relocation of the capital is a basic constitutional law matter with respect to the identity of the nation, and, as such, is a matter the citizens should determine themselves pursuant to the constitution. In addition, that Seoul is the capital of our nation is an unwritten customary constitutional law, therefore, as long as it does not become invalid by the adoption of a new constitutional provision establishing a new capital, it maintains legal force as constitutional law. Therefore, the enactment of the Act at issue in this case that relocates the capital to a particular location in the Chungcheong area without constitutional revision procedure is a purported revision of the constitutional law matter in the form of

a general statute inferior to the constitution.

The constitution may be revised only when the revision is proposed either by the majority of the entire membership of the National Assembly or by the President(Article 128, Section 1, of the Constitution), subsequently resolved therefor by the minimum of two-thirds of the entire membership of the National Assembly in its favor(Article 130, Section 1, of the Constitution), and then approved within thirty days of the National Assembly resolution by the minimum of the majority votes at the national referendum in its favor in which those citizens who are entitled to vote at the general election participate(Article 130, Section 3, of the Constitution). Therefore, a national referendum is mandatory for the constitutional revision, and the citizens thus have the right to express their opinions with respect to the constitutional revision through vote in its favor or opposition.

Here, the Act at issue in this case is to implement the relocation of the capital, which is a constitutional law matter subject to constitutional revision for its revision, in the form of a simple statute while foregoing the constitutional revision procedure indicated above. As such, the Act eventually excludes the exercise of the right to vote on the national referendum, which is a basic right to participate in politics, entitled to the citizens with respect to the constitutional revision under Article 130 of the Constitution, thereby infringing upon this same right.

F. Subconclusion

Then, without even further reviewing other issues raised by the complainants, the Act at issue in this case that is to ascertain the relocation of the capital and to determine the procedure for such relocation is in violation of the Constitution, as purporting to change the unwritten constitutional custom that the capital of our nation is Seoul by way of a statute without following the constitutional revision procedure, thereby infringing in its entirety upon the right to vote on the national referendum for constitutional revision entitled to the citizens including the complainants.

5. Conclusion

As examined above, the Act at issue in this case is in violation of the Constitution as it infringes upon the right to vote on the national referendum entitled to the complainants with respect to the national decision concerning the relocation of the capital. We hold the Act at issue in this case unconstitutional by the unanimous

opinion of the participating Justices, with the exception of the separate concurring opinion of Justice Kim Young-il in Paragraph 6. below and the dissenting opinion of Justice Jeon Hyo-sook in Paragraph 7. below.

6. Separate Concurring Opinion of Justice Kim Young-il

I agree with the conclusion of the majority opinion. However, I believe that the Act at issue in this case is unconstitutional because it infringes upon the right to vote on the national referendum guaranteed for the complainants by Article 72 of the Constitution, than because, as the majority asserts, it infringes upon the right to vote on the national referendum under Article 130 of the Constitution. Thus, I respectfully disagree with the reasoning adopted by the majority opinion. The grounds for my separate concurring opinion are as follows.

A. Content of the Act at Issue in this Case

I generally agree with the majority opinion with respect to the following points: that the 'new administrative capital' provided for by the Act at issue in this case is not different from the 'capital of the Republic of Korea'; that, therefore, the relocation to the new administrative capital means the relocation of the capital of the Republic of Korea; and that the Act at issue in this case is not a statute merely to execute the capital relocation policy previously determined by other methods of national decisionmaking or to regulate no more than the preparation stages for the relocation of the capital in expectation of the national decisionmaking in the future for the relocation of the capital, instead, the Act itself contains and implicates the decisionmaking for the relocation of the capital.

B. Whether Decisionmaking Concerning Relocation of Capital should be Subject to National Referendum

Article 72 of the Constitution provides 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 deems it necessary," thereby subjecting the 'important policy relating to national security such as diplomacy, national defense, unification and other matters' to the national referendum. Therefore, whether the decisionmaking concerning the relocation of the capital is an 'important policy relating to national

security such as diplomacy, national defense, unification and other matters' is now examined.

(1) Whether Relocation of Capital is a Policy relating to National Security

(A) 'National security' within the meaning of Article 72 of the Constitution is a concept relevant to the existence of the nation, and, as such, means the existence and the abolition of the nation. This not only has to do with the existence or the abolition itself, but also includes such matters related to the existence and the abolition, thus including matters critically determining the existence of the nation itself and also the matters affecting the meaning of the existence of the nation.

'National security' within the meaning of Article 72 of the Constitution does not necessarily mean a state of national emergency or a national crisis equivalent thereto. The temporal imminency such as in national emergency or national crisis is a constituting element for such concepts in the legal text of the constitutional provisions as 'internal turmoil, external menace, natural calamity or a grave financial or economic crisis' in Article 76, Section 1, of the Constitution, 'major hostilities' or 'when it is required to take urgent measures' in Article 76, Section 2, of the Constitution, 'in time of war, armed conflict or similar national emergency' in Article 77, Section 1, of the Constitution; however, it is not intrinsic in the concept of 'national security' itself. as Article 72 of the Constitution does not impose any conditions requiring temporal imminency.

'Diplomacy,' 'national defense,' and 'unification' enumerated in Article 72 of the Constitution are examples of policies relating to national security. Therefore, policies relating to diplomacy, national defense or unification are policies relating to national security per se. Further, even if not relating to diplomacy, national defense or unification, should it be a policy relating to national security, it may be subjected to the national referendum.

(B) Relocation of the Capital is a Matter relating to National Security.

The capital of a nation is the city symbolizing that nation, and, at the same time, functions as the afferent center of the nation. Therefore, the location of the capital determinatively affects the meaning of the existence of the nation, and, as such, is one of the core elements in determining the identity of the nation.

Furthermore, even assuming the case where the capital does not

function as the only centripetal city in all domains of politics, economy, society and culture, the location of the capital widely and significantly influences the life of the people in all of the above domains. Therefore, the location of the capital in this situation also affects the meaning of the nation. Therefore, in all cases, determining the location of the capital is a matter relating to national security.

Then, constructing a new administrative capital that will have the pivotal function in the nation's politics and administration, and relocating major state institutions and organs to the new administrative capital pursuant to the Act at issue in this case is undeniably a matter relating to national security. This would not be different even if Seoul Special Metropolitan City were to maintain the unchanged function as the centripetal city in all the rest of the areas of economic, societal and cultural domains with the exception of the political and administrative domains.

(C) Relocation of the Capital is Also a Matter relating to Unification specifically referred to in Article 72 of the Constitution.

In our nation, as a divided country, the location of the capital has an important meaning not only in the present time of unachieved unification, but also in the future during the unification process and post-unification.

Should South Korea and North Korea discuss matters for unification, those cities that will be functioning at that time or will have functioned until then as the central cities in the respective areas(viewed under current circumstances, for example, Seoul and Pyongyang) will be considered as candidates for the location of the capital of the unified Republic of Korea. Therefore, the location of the capital has a greatly significant meaning in the process of unification.

Also, Article 3 of our Constitution provides that the territory of the Republic of Korea consists of the Korean Peninsula and its adjacent islands. Therefore, the capital of the Republic of Korea is a symbolic city not only for the territory that is south of the Military Demarcation Line under the actual control of the Republic of Korea, but also for the entire Korean Peninsula encompassing the territory that is north of the Military Demarcation Line. Thus, when the unification recovering actual control over the part north of the Military Demarcation Line is achieved, as long as it is not decided otherwise, the capital of the Republic of Korea will have the status as the capital of the unified Republic of Korea. Therefore, the location of the capital will have a greatly significant meaning subsequent to unification as well.

As such, the location of the capital does have a greatly significant meaning prior to and subsequent to the unification and also during the unification process. Therefore, the relocation of the capital is undeniably a matter relating to unification.

(D) Furthermore, Relocation of the Capital is also a Matter relating to National Defense specifically referred to in Article 72 of the Constitution.

As the capital is where the core of state power and authority exists, its location is undeniably one of the most important elements of consideration for the national defense strategy. In addition, in our nation where politics has had an abstruse impact upon the overall economy, society and culture, the degree of impact of the location of the capital on the national defense strategy is extraordinarily high. Therefore, the relocation of the capital inevitably results in and should result in a fundamental change in the defense strategy for the Republic of Korea in its entirety.

Therefore, the relocation of the capital is inevitably a matter relating to national defense.

(E) In sum, decisionmaking concerning the relocation of the capital is a policy relating to unification and national defense, and, at the same time, a policy also otherwise relating to national security.

(2) Whether Relocation of Capital is an Important Policy

A national referendum results in the exclusion of representative democracy with respect to the matter subjected thereto. Therefore, in determining whether a matter is an 'important policy' within the meaning of Article 72 of the Constitution, the appropriate standard for judgment is whether a specific policy is worth confirming the actual intent of the citizens separately from the intent of the citizens presumed from that of the representative organ.

Assessing the matter of relocation of the capital from this standard, the matter of relocation of the capital is sufficiently worth confirming the actual intent of the citizens separately from the intent of the citizens presumed from that of the representative organ, in light of the facts that it is a historic issue relevant to the future of the nation and the destiny of the entire citizenry, that there is a concern for crisis over unity of the citizens due to the current division of nation's opinions and sentiments on the subject, and that it draws attention and interest of the entire citizenry as the entire citizenry has interests therein.

Therefore, decisionmaking concerning the relocation of the capital is an 'important policy' within the meaning of Article 72 of the Constitution.

(3) Subconclusion

The decisionmaking concerning the relocation of the capital is an 'important policy relating to national security such as diplomacy, national defense, and unification,' therefore is subjected to the national referendum.

C. Whether President's Submission of a Matter to National Referendum is a Discretionary Act

With respect to the nature of the act of the President submitting a matter to the national referendum, the President's submission of a matter to the national referendum is an act of absolute discretion, considering that: first, Article 72 of the Constitution that is the legal basis for act of submission to the national referendum provides, unlike Article 130 of the Constitution, that the President may submit a matter to the national referendum as the President deems it necessary, thus, seemingly vesting a wide discretion under the structure and the language of the provision's text; second, submission of a matter to the national referendum is undertaken by the President when a national consensus is requested concerning an important policy relating to national security, therefore, as such, is an act in the area where political considerations are requested; and, third, submission of a matter to the national referendum, by its own nature, should be decided by the President following a comprehensive consideration of the totality of the circumstances to assess what fits the national interest and serves to guarantee the fundamental rights of the citizens and not simply through the interpretation of Article 72 of the Constitution, therefore should be determined by assessing what best serves the purpose beyond a judgment over what is the law.

D. Whether Non-Submission of Matter of Relocation of Capital is beyond Limit of Discretion

(1) Limit of Discretion upon Submission to National Referendum

The principle of the government by the rule of law requires that none of the exercise of public power or authority be free from law,

but merely permits a difference in the degree to which a particular exercise of public power or authority is bound by law. Therefore, even if the President's submission of a matter to the national referendum is an act of absolute discretion, this may not be free from law.

Thus, even when a particular exercise of public power or authority is an act of absolute discretion, the discretion allowed for that act should be exercised within the limit of discretion permitted by law(external limit), and, also, even the exercise of discretion within the external limit should be appropriate for the purpose for which the law vests such discretion and observant of the constitutional law principles and the general principles of law(internal limit). Therefore, in the case of a deviation from discretion in excess of the external limit of the discretion or an abuse of discretion beyond the internal limit, such exercise of the discretion is in violation of the legal provision that is the basis of the discretion.

This legal principle is not only appropriate in the field of administrative law, but is also applicable to the exercise of public power in general. As such, also to the act of the President submitting a matter to the national referendum, apart from the difference in the degree of discretion vested thereto, this legal principle applies as is.

Therefore, in the President's decision concerning the submission of a matter to the national referendum, where there is a deviation from or an abuse of discretion, such an exercise of discretion is in violation of Article 72 of the Constitution that is the basis of the discretion.

(2) Deviation from or Abuse of Discretion

In determining whether or not there is a deviation from or an abuse of discretion, specific standards for the judgment include (i) the conformity to the legislative purpose and spirit of the legal provision vesting the discretion, (ii) the observance of the constitutional principles and the general principles of law and (iii) the justness of the motive, of the particular exercise of discretion in question.

(A) Conformity to Legislative Purpose and Spirit

1) Bound by Legislative Purpose and Spirit

The discretion in exercising public power is vested to the state organs by law, thus should be exercised in a way appropriate to the legislative purpose and the legislative spirit of the legal provision

that is the basis of the discretion. Therefore, in the President's exercise of discretion concerning the submission of a matter to the national referendum, such discretion should be exercised in a way appropriate to the legislative purpose and the legislative spirit of Article 72 of the Constitution, which is the basis of such discretion. An exercise of discretion that is not in conformity with such legislative purpose and spirit, that is, the intended purpose of the system set forth by Article 72 of the Constitution, is a deviation from and abuse of discretion, and, as such, is in violation of Article 72 of the Constitution.

2) Intended Purpose of System Set Forth by Article 72 of the Constitution

Our Constitution adopts the representative democracy as the principle under which the national decisions are made by the President and the members of the National Assembly who are elected directly by the citizens, on behalf of the citizenry. At the same time, our Constitution adopts the elements of the direct democracy by setting forth the circumstances in Article 72 and Article 130, Section 2, of the Constitution, under which the citizenry directly makes the national decision by way of national referendum. Thus, Article 72 of the Constitution is not a provision simply providing for the authority of the President concerning the submission of a matter to the national referendum, but instead understood to be a provision providing for the systemic basis of the governing structure under our Constitution that also provides for the right of the citizens to vote on national referendum(Refer to, for example, 93 Gazette 574, 592, 2000Hun-Na1, May 14, 2004; 15-2(Vol. II) KCCR 350, 360, 2003Hun-Ma694, November 27, 2003; 13-1 KCCR 1431, 1439, 2000Hun-Ma735, June 28, 2001).

In a pure representative democracy, the representative institution is in a delegation-representation relationship under which it represents the entire citizenry in abstract form. Specifically, this presupposes the free delegation relationship under which the voters may control the representative institution only by election, yet may not order or direct the representative institution concerning specific matters. On the contrary, a direct democracy is premised upon an order-bound delegation relationship under which, when the citizenry exercises sovereign power through the representative institution, the citizens in non-abstract form issue upon the representative institution a concrete order with binding force, and, upon failure to follow the order, the citizens may dismiss the representative institution.

Our Constitution, as indicated above, adopts a governing structure compromising the pure representative system and direct

democracy, by adopting the representative system as the principle while employing direct democracy concerning national referendum. Therefore, the relationship between the representative institution and the citizenry that is presupposed by our Constitution is a free delegation relationship based upon the representative system in the area of general national policies, however, the order-bound delegation relationship based upon the direct democracy in the area of national referendum, i.e., concerning the policies that are subjected to the national referendum.

Therefore, concerning policies that are subjected to national referendum, the representative institution is bound by the actual intent of the non-abstract, actual, citizens. The representative institution may not make a decision that is inconsistent with the actual intent of the non-abstract, actual, citizens, nor may it disregard such actual intent in decisionmaking when its own decision is expected to be different from the citizens' actual intent.

3) Relation between Discretion and Actual Intent of the Citizens

The delegation concerning policies that are subjected to national referendum is an order-bound delegation, therefore, the citizens, who are the delegators as holders of sovereignty, may withdraw the delegation for a particular matter by specifying such a matter. Undertaking of national referendum upon a particular matter means that the citizens have withdrawn their delegation to the representative institution upon that matter and directly made a decision thereupon. Furthermore, when there is sufficient reason to deem that a majority of the citizens have the intent to withdraw delegation, that is, the intent to directly make a decision upon a particular matter and forego the decisionmaking by the representative institution, if the representative institution made its own decision in disregard of such intent, this would be directly against the legislative purpose and the legislative spirit of Article 72 of the Constitution adopting the national referendum system, and, as such, it would be a deviation from and abuse of discretion. This is equally applicable regardless of whether the decision of the representative institution and the actual intent of the citizens coincide with the merits of that particular matter.

On the other hand, as the representative institution may not make a decision that is inconsistent with the actual intent of the citizens concerning policies that are subjected to national referendum, decisionmaking inconsistent with the actual intent of the citizens is in itself beyond the limit of delegated authority, and, as such, a deviation from discretion in excess of the external limit of the discretion. Furthermore, even when the actual intent of the citizens has not yet been confirmed, when there is sufficient reason

to deem that the intent of the representative institution is different from the actual intent of the citizens, if the representative institution disregarded the intent presumed to be the actual intent of the citizens and made a contrary decision, it would be against the legislative spirit and the legislative purpose of Article 72 of the Constitution and thus a deviation from and abuse of discretion.

4) Actual Intent of Our Citizens Concerning Relocation of Capital

The public opinion poll around January of 2004 when the Act at issue in this case was legislated and promulgated indicates that there were approximately equal opinions in favor of and opposition to the relocation of major national institutions and organs to a new administrative capital, while the public opinions at that time were undergoing a shift towards gradually decreasing approval and gradually increasing opposition. The January 2004 public opinion poll also indicates that, although there were more opinions in favor when the political authorities made a promise to determine this matter by national referendum, the opinions in opposition gradually increased as the possibility of national referendum diminished by the proposition of the bill for this Act at issue in this case and the President's statements. Public opinion polls after June of 2004 indicate that those who were of the position that the matter should be determined by national referendum were around sixty(60) per cent.

Pursuant to the above facts, it is concluded that there is sufficient reason to deem that, concerning the relocation of the capital including the relocation of major national organs to a new administrative capital, our citizens intended to withdraw delegation, that is, to directly determine this matter without delegating the matter to such representative institutions as the President or the National Assembly. Also, upon the merits of the matter, there is a sufficient reason to deem that our citizens have an intent opposing the relocation to the new administrative capital.

5) Subconclusion

Non-submission of the matter concerning relocation of the capital to national referendum notwithstanding the circumstances indicated above is against the legislative purpose and the legislative spirit of Article 72 of the Constitution. As such, such non-submission is an unconstitutional exercise of discretion as a deviation from and abuse of discretion.

(B) Violation of Constitutional Principles and General Principles of Law

In light of the fact that the decisionmaking by way of National Assembly's legislation has caused a deeper division of national

opinions concerning the matter upon which many of the citizens desire and the President himself previously indicated his intent to submit to the national referendum, it is objectively clear that non-submission of the decisionmaking concerning the relocation of the capital to the national referendum lacks rationality. Therefore, such non-submission is in violation of the principle against arbitrariness.

In addition, the facts of the case indicate that the President publicly made an election pledge as a presidential candidate that he would submit the matter concerning the relocation of the capital to national referendum, and, after being elected as the President, promised to submit the matter to national referendum as an alternative; that the President did not completely exclude the possibility of national referendum until immediately after the enactment and the promulgation of the Act at issue in this case on January 16, 2004; and that the President, however, publicly announced non-submission to the national referendum subsequent to the seventeenth general election to constitute the National Assembly that took place on April 15, 2004. Adding to these facts the result of the public opinion polls indicated previously, it is ratified that the citizens have the trust in the submission to the national referendum and the trust in the representative institution that it will not act against the intent of the citizens, concerning the matter of the relocation of the capital. Non-submission of the matter of relocation of the capital notwithstanding such trusts is a betrayal of the above trusts of the citizens, and is thus against the principle of protection of expectation interest.

Then, non-submission of the decisionmaking concerning the relocation of the capital to national referendum is against the constitutional principle and the general principle of law, therefore, it is an unconstitutional exercise of discretion as a deviation from and abuse of discretion.

(3) Obligation to Submit to National Referendum

As examined above, non-submission of the decisionmaking concerning the relocation of the capital to the national referendum is a deviation from and abuse of discretion. Thus, should the President lawfully exercise discretion without deviation therefrom or abuse thereof, the President has no other choice but to submit the decisionmaking concerning the relocation of the capital to the national referendum. Therefore, the President is obligated to submit the decisionmaking concerning the relocation of the capital to the national referendum.

E. Whether the Complainants Have Right to Vote on National Referendum for Decisionmaking Concerning Relocation of Capital

(1) Content of Right to Vote on National Referendum

The right to vote on national referendum of Article 72 of the Constitution is a right to participate in politics, and one of the basic rights guaranteed in our Constitution(13-1 KCCR 1431, 1439, 2000Hun-Ma735, June 28, 2001).

The right to vote on national referendum as a basic right is, *inter alia*, in its substance, the right to request the guarantee of a free democratic national referendum system. Therefore, when, for example, a statute diminishes the scope of an important policy to a further extent than what is intended by Article 72 of the Constitution or corrodes the general, equal, direct, secret and free vote, its unconstitutionality may directly and actually be asserted on grounds of the right to vote on national referendum.

The right to vote on national referendum of Article 72 of the Constitution also includes the right to vote on national referendum upon a particular matter. Here, however, the right to vote on national referendum upon a particular matter is a right qualified by a condition precedent of the President's submission of that particular matter to the national referendum, therefore, this right becomes real only upon the act of the President submitting the matter to the national referendum. The right to vote on national referendum likewise realized encompasses the right to hold an actual national vote upon the particular matter.

The right to vote on national referendum of Article 72 of the Constitution further encompasses the right to request the submission of a particular policy to the national referendum, when the President does not submit such policy to national referendum notwithstanding the legal obligation to submit such policy to national referendum. The obligation of the President to submit to the national referendum is an obligation towards the citizens, therefore, the citizens as the holders of the right have the right to request submission to national referendum that is on the other side of the coin. In this case, the President is in breach of the obligation to satisfy the above condition precedent, while the right to request submission to the national referendum is a type of claimable right, requesting the performance of the above obligation. Therefore, the right to request submission to the national referendum in such a case is a right as an instrumental and procedural right to restore to the lawful state

the state of unlawful infringement upon the citizens' right to vote on national referendum upon particular policy caused by the President's failure to perform the submission obligation.

As the right to request submission to the national referendum presupposes the existence of the right to vote on national referendum which is a substantive right, in such a case, the citizens have the right to vote on national referendum upon the particular matter from the substantive aspect of the right to request submission to the national referendum, even prior to the actual submission to the national referendum by the President. That is, the right to vote on national referendum encompasses as a partial content thereof the right to request submission to the national referendum.

(2) Right to Vote on National Referendum upon Decisionmaking concerning Relocation of Capital

As examined above, when the President is obligated to submit a particular policy to the national referendum, the citizens have the right to request submission of that policy to the national referendum and the right to vote on national referendum encompassing such right, even prior to the President's submission of that policy to the national referendum. In this case, as the President is obligated to submit the decisionmaking concerning the relocation of the capital to the national referendum as examined in Paragraph D(3) above, the citizens have the right to request the President to submit the decisionmaking concerning the relocation of the capital to the national referendum, and the concrete and actual right to vote on national referendum upon the above decisionmaking even prior to the actual submission by the President.

Therefore, the complainants who are the Korean citizens have the actual right to vote on national referendum of the above substance.

F. Whether the Act at Issue in this Case Infringes the Complainants' Right to Vote on National Referendum

(1) Infringement by Substance of the Act at Issue in this Case

There had been no decisionmaking by way of national referendum concerning the relocation of the capital, prior to the enactment and the promulgation of the Act at issue in this case. Here, as indicated in Paragraph A above, the Act at issue in this

case connotes by presupposition within itself the decisionmaking to relocate the capital, and also Article 1 of its supplementary provision provides that "This Act shall come into force by the passage of three months of time of the promulgation," thereby providing that the Act at issue in this case will become unconditionally valid by the passage of three months of time without any separate undertaking of national referendum.

Therefore, the Act at issue in this case, in determining the national intent concerning the relocation of the capital, conclusively excludes national referendum therefor and has the final decision rendered in the form of the statute. Such exclusion of the national referendum inevitably results in the infringement upon the above-examined right of the complainants to vote on national referendum upon decisionmaking concerning the relocation of the capital, by the enforcement of the statute by and in itself.

(2) Infringement by Succession of Defect in Proposition of the Bill

The bill for the Act at issue in this case was proposed by the government. The legislative bills proposed by the government are proposed in the name of the President following the review by the State Council(Articles 82 and 89 of the Constitution). Here, the bill for the Act at issue in this case was, as is identical to the above-examined Act at issue in this case, to exclude the right of the citizens to vote on national referendum, concerning the relocation of the capital. Therefore, the government's proposition of the bill of such substance may be judged to be a public decision by the President not to undertake the national referendum concerning the relocation of the capital.

Here, as examined in Paragraph D above, non-submission by the President of the decisionmaking concerning the relocation of the capital to national referendum is a deviation from and abuse of discretion. Thus, the act of the President as indicated above to propose the bill for the Act at issue in this case based upon the decision not to undertake national referendum, is a defective conduct in violation of Article 72 of the Constitution, as a deviation from and abuse of discretion.

The act of the President of proposing a bill to the National Assembly is no more than a conduct internal between state organs and institutions, and is not a conduct executing legal effect directly upon the citizens. Therefore, such act is not an exercise of public power within the meaning of Article 68 of the Constitutional Court Act, thus may not be a subject matter of review by way of

constitutional complaint(6-2 KCCR 249, 265, 92Hun-Ma174, August 31, 1994).

However, the act of the President of proposing a bill to the National Assembly constitutes the core procedure in the legislative process of a statute, together with the resolution of the National Assembly enacting a statute. These two acts are in the relationship under which one precedes the other for a single purpose. Thus, should there lie a defect in the act of the President of proposing a statutory bill to the National Assembly, such defect may in itself be deemed as the defect in the enactment of the statute, or, at least, may be deemed as the defect in the enactment of the statute by succession of such defect in the act of proposing the statutory bill to the act of resolution of the National Assembly in enacting the statute.

As examined above, as there is a defect of violation of Article 72 of the Constitution in the act of the President proposing the bill for the Act at issue in this case to the National Assembly, such defect is succeeded by the act of the National Assembly enacting the above bill into the statute. Therefore, the Act at issue in this case itself is deemed to have the same defect, thus eventually infringing on the right to vote on national referendum, which is a constitutional basic right of the complainants.

(3) Subconclusion

The enactment and promulgation of the Act at issue in this case has infringed the right of the complainants to vote on national referendum under Article 72 of the Constitution, which is a constitutionally guaranteed fundamental right.

G. Customary Constitutional Law and the Right to Vote on National Referendum of Article 72 of the Constitution

(1) Object of National Referendum Under Article 72 of the Constitution and Customary Constitutional Law

The 'important policy concerning national security such as diplomacy, national defense and unification' that is the object of the national referendum under Article 72 of the Constitution does not require as an element that it be a constitutional law matter. Thus, such a policy needs not be a constitutional law matter.

Therefore, even assuming, as the majority opinion does, the existence of the customary constitutional law that "the capital of the Republic of Korea is Seoul," the decisionmaking concerning the

transfer of the capital is still an object of national referendum under Article 72 of the Constitution, which obligates the President to submit this matter to the national referendum for the reason discussed above, while entitling the complainants with the right to vote on national referendum upon this matter.

(2) Relationship Between Right to Vote on National Referendum Under Article 72 of the Constitution and Right to Vote on National Referendum Under Article 130 of the Constitution

(A) If the location of the capital is a constitutional norm, decisionmaking concerning the change therein, that is, decisionmaking concerning the transfer of the capital, should be rendered pursuant to the constitutional revision procedure under Chapter 10 of the Constitution, therefore by way of the resolution of the National Assembly and the national referendum pursuant to Article 130 of the Constitution, which entitles in turn the citizens with the corresponding right to vote on national referendum.

(B) On the other hand, even for a matter eventually requiring a constitutional revision, a national referendum pursuant to Article 72 of the Constitution may be undertaken in order to inquire into the actual intent of the citizens prior to the proposition of the bill for the constitutional revision. It is because the direction of the policy may be determined by such national referendum and then a concrete constitutional revision procedure may proceed based thereupon. Therefore, the national referendum under Article 130 of the Constitution does not preemptively exclude the national referendum under Article 72 of the Constitution.

However, national referendum under Article 72 of the Constitution may be lawfully undertaken to the extent that it does not preclude the national referendum under Article 130 of the Constitution. As the undertaking of national referendum under Article 72 of the Constitution is meaningless once national referendum under Article 130 of the Constitution is undertaken, the right to vote on national referendum under Article 72 of the Constitution exists upon the condition subsequent of the undertaking of the national referendum under Article 130 of the Constitution.

The above relationship between the two rights to vote on national referendum equally stands whether a policy matter is a matter of written constitution or of unwritten constitution, as long as that policy matter is one requiring constitutional revision.

(C) Further Relationship in the Case of Matter of Customary Constitutional Law, in Addition Thereto

The legal conviction among the citizens with respect to the constitutional practice as one of the elements constituting the customary constitutional law(that is, the 'national consensus' mentioned in the majority opinion) is, at the same time, an element for the maintenance of the customary constitutional law. Therefore, even a constitutional custom previously established as such may no longer have the force as the constitutional norm, the moment it loses the legal conviction of the citizens thereupon.

Judgment upon the existence of such legal conviction of the citizens is subject to the authority and the obligation of the Constitutional Court, which interprets the existence and nonexistence of the constitution. Therefore, the adjudication by the Constitutional Court is one of the methods of confirmation thereof.

Also, as determining the existence and nonexistence of such legal conviction of the citizens is within the meaning of the important policy concerning the national security set forth in Article 72 of the Constitution(that is, the above determination itself is an important policy concerning national security, however, even assuming different opinions, there would hardly be an opinion denying that determination of the existence and nonexistence of the legal conviction of the citizens upon the location of the capital is such a policy), such determination is an object of national referendum under Article 72 of the Constitution. Should there be a decision reached by way of national referendum that is inconsistent with the previously existing customary constitutional law, as this will be the confirmation for the loss of legal conviction of the citizens, the national referendum under Article 72 of the Constitution may be yet another method of conclusive confirmation thereof.

Then, in order to make a decision that is inconsistent with the previously existing customary constitutional law in a constitutional way, it should be rendered by way of one of the following methods: (i) constitutional revision procedure under Article 130 of the Constitution; (ii) national referendum under Article 72 of the Constitution to confirm the loss of legal conviction of the citizens, as a preliminary procedure; or (iii) confirmation of the loss of legal conviction of the citizens by way of the judgment of the Constitutional Court, as a preliminary procedure. The citizens have the right to vote on national referendum under Article 130 of the Constitution with respect to the method (i) above, and the right to vote on national referendum under Article 72 of the Constitution with respect to the method (ii) above. The above respective rights to vote on national referendum are alternative to each other.

(3) Infringement Upon Right to Vote on National Referendum by the Act at Issue in this Case

In light of the above in totality, upon the premise that the customary constitutional law that the "capital of the Republic of Korea is Seoul" has existed, the complainants, as Korean citizens, have the right to vote on national referendum of Article 130 of the Constitution, the right to vote on national referendum of Article 72 of the Constitution on the condition precedent of undertaking of the national referendum under Article 130 of the Constitution, and the right to vote on national referendum of Article 72 of the Constitution that is an alternative right to the right to vote on national referendum of Article 130 of the Constitution, upon the decisionmaking concerning the relocation of the capital.

Here, the Act at issue in this case excludes all of the above respective rights to vote on national referendum. Therefore, upon the premise of the existence of the above customary constitutionallaw, the Act at issue in this case is a statute infringing all of the above respective rights to vote on national referendum.

(4) Questions Concerning Majority Opinion

(A) The majority opinion admits the possibility of national referendum under Article 72 of the Constitution as a method to confirm the extinction of the customary constitutional law. Yet, the majority opines that, as the change in or the extinction of the legal conviction of the citizens that the capital of the Republic of Korea is Seoul may not be confirmed, the abolition thereof should be by way of the constitutional revision procedure, thus, the right to vote on national referendum of Article 130 of the Constitution is infringed.

Such reasoning is to the effect that, where there is no confirmation of the change in or the extinction of the legal conviction of the citizens, the national referendum under Article 72 of the Constitution may not be undertaken, but, instead, the national referendum under Article 130 of the Constitution should always be undertaken. This reasoning leads to the conclusion that the sole occasion where the existence or nonexistence of the legal conviction of the citizens may be confirmed by way of the national referendum of Article 72 of the Constitution is when the change in or extinction of the legal conviction of the citizens has already been confirmed by other means. However, when the change in or extinction of legal conviction of the citizens has already been confirmed by other means, there is no need for the undertaking of the national

referendum under Article 72 of the Constitution. Rather, when such fact is not confirmed, there is a need for the undertaking of the national referendum under Article 72 of the Constitution, in order to conclusively confirm such change or extinction.

Furthermore, beyond the case where the existence or nonexistence of the legal conviction of the citizens is unclear, even when the existence of such legal conviction is still presumed, the national referendum under Article 72 of the Constitution may be used in order to officialize, over the enforcement of national policy that is contrary to the legal conviction of the citizens, the continuing existence of such legal conviction. Thus, the national referendum may be undertaken not only when the result is the extinction of the legal conviction, but also when the result is the continuing existence of the legal conviction. As such, the existence of the right to vote on national referendum is not dependent upon the expected result of the national referendum. In addition, such expectation over the legal conviction may differ from reality. Also, the legal conviction is subject to change, and a firm legal conviction at one point of time may become extinct subsequently, which solemnly leaves the possibility of national referendum concerning this. Therefore, unless the existence and the nonexistence of the legal conviction of the citizens is confirmed by a constitutional and official means such as the national referendum under Article 130 of the Constitution, the citizens retain the right to vote on national referendum of Article 72 of the Constitution, as an alternative thereto.

Therefore, there remains a question with respect to the reasoning of the majority opinion that the constitutional revision process is mandatory as the change in or the extinction of the legal conviction of the citizens is not confirmed.

(B) Pursuant to the majority opinion, the decisionmaking concerning the relocation of the capital should only be by way of the constitutional revision procedure, the result of which is that any subsequent change in the location of the capital will have to be expressly included in the text of the Constitutional.

Even assuming that the location of the capital is a constitutional norm, it may exist either in the form of written constitutional provision or in the form of unwritten constitutional norm, of which our citizens have chosen the form of unwritten norm so far. Whether to have a constitutional norm in the form of written provision or in the form of unwritten norm may be determined solely by the holder of the authority to establish and revise the constitution. Should the form of the norm with respect to the location of the capital change from a customary constitutional law

into a written constitutional norm as the result of the majority's decision of the Constitutional Court, this is not different from the *de facto* exercise of the authority to revise the constitution by the Constitutional Court.

Rather, pursuant to what is examined in Paragraph D(2) above, it is inferred that national referendum desired by the actual intent of our citizens is the one under Article 72 of the Constitution, rather than the national referendum under Article 130 of the Constitution as part of the constitutional revision procedure premised upon the resolution of the National Assembly. Therefore, should the majority opinion lead to the above result, this is against the intent of the holder of the authority to revise the constitution.

On the other hand, the majority opinion may be understood to mean that the form of the constitutional norm with respect to the location of the capital is not limited to the written provision because, while a constitutional revision procedure is mandatory when the legal conviction continues to exist, the change of the location of the capital upon extinction of the legal conviction may be regulated by a new customary constitutional law. However, while this is premised upon the possibility of subsequent extinction of the legal conviction and the possibility of national referendum to confirm such extinction, if the Act at issue in this case that excludes the constitutional revision procedure also excludes the possibility of national referendum to confirm the extinction of the legal conviction, it is an infringement not only upon the right to vote on national referendum of Article 130 of the Constitution, but also upon, additionally, the right to vote on national referendum of Article 72 of the Constitution. The citizens, just as they may disapprove the change of the location of the capital during the constitutional revision procedure, may disconfirm the extinction of the legal conviction at the national referendum under Article 72 of the Constitution.

Furthermore, even if the majority's opinion in this case is understood to confirm by their judgment the continuing existence of the legal conviction of the citizens, as long as there remains the possibility of the national referendum of Article 72 of the Constitution that may be undertaken as a preliminary procedure for the constitutional revision procedure, it is clear that the Act at issue in this case infringes upon the right to vote on national referendum under Article 72 of the Constitution.

(C) Upon occurrence of a situation where the right to vote on national referendum is infringed with respect to a matter of an important policy concerning national security which is not a constitutional law matter, the majority opinion is not clear as to in

which method the basic right of the citizens shall be guaranteed. Abstention of judgment upon the above situation of infringement based on a different reasoning, when it is clear that the Act at issue in this case infringes upon the right to vote on national referendum of Article 72 of the Constitution, does have an inappropriate aspect, considering its pervasive effect upon similar issues that may subsequently be raised.

(D) More fundamentally, there may be different opinions with respect to whether the location of the capital is a constitutional law matter that should always be regulated by the constitution, and, there may be difficulty in concluding that it is a customary constitutional law. In my opinion, the majority opinion has taken a rather overstrained way that adopts the method of constitutional revision as its logical premise, while there are ample means to rectify the unconstitutional state within the frame of the current constitution without necessarily borrowing the form of constitutional revision.

(5) Subconclusion

Even assuming, as the majority opinion does, that there exists the customary constitutional law that the capital of the Republic of Korea is Seoul, it is soundly judged that the Act at issue in this case infringed the right of the complainants to vote on national referendum of Article 72 of the Constitution, while there are unreasonable aspects in judging that the Act infringes the right to vote on national referendum of Article 130 of the Constitution by the majority's reasoning.

H. Whether there is Justifiable Ground for Infringement of Fundamental Right

(1) Function of Article 37, Section 2, of the Constitution in the System of National Referendum

Although the complainants have the right to vote on national referendum under Article 72 as a basic right, this may be limited by statute when it is necessary for national security, public order or public welfare, pursuant to Article 37, Section 2, of the Constitution. Therefore, even when, for example, there is a substantial reason to conclude that the actual intent of the citizenry is to determine a particular policy by national referendum and non-submission of such policy to the national referendum is thus a deviation from and abuse of discretion, thereby obligating the President to submit such policy

to the national referendum and entitling the citizens to have the right to vote on national referendum upon such matter, should the limitation of the right of the citizens to vote on national referendum by non-submission of the policy to the national referendum be justified under Article 37, Section 2, of the Constitution, that is, if the limitation is appropriate under the requirements for the limitation of the basic rights in terms of the purpose, form and means, the limitation of that particular right to vote on national referendum is not in violation of the Constitution.

Therefore, the concern that some individuals might challenge the constitutionality of each of the national policies by alleging the infringement of the right to vote on national referendum is no more than a groundless apprehension. As long as the limitation upon the right to vote on national referendum is imposed in a reasonable fashion under the requirements of Article 37, Section 2, of the Constitution by way of the statute enacted by the National Assembly, there is no violation of the Constitution.

(2) Whether the Act at Issue in this Case is Justifiable

The Act at issue in this case states its purpose in Article 1 by providing that "the purpose of this Act is to provide for the means and procedures to establish a new administrative capital, in order to remedy the adverse side effects of the concentration of pivotal functions in the Metropolitan area, and to follow the trend of concurrent globalization and localization, thereby contributing to the balanced development and strengthened competitiveness of the nation." However, among such purposes, no legislative purpose is included that will determine the intent concerning the relocation of the capital solely by the resolution of the National Assembly by foregoing the national referendum, nor is there any need to exclude national referendum for the national security, public order or public welfare.

Therefore, there is no justifiable ground for the limitation of the right of the complainants to vote on national referendum by the Act at issue in this case.

I. Conclusion

There is no express provision within the Act at issue in this case that declares the fact itself that the decisionmaking concerning the relocation of the capital is to be rendered by excluding the right to vote on national referendum. The provisions that have the substance similar to the above, however, include Subsections 1 and

2 of Article 2, Article 6, Article 8 and Article 12 of the Act, and also Article 1 of the Supplemental Provisions to the Act.

However, as examined above, the interpretation of the Act at issue in this case as rendering the decisionmaking concerning the relocation of the capital by excluding the right to vote on national referendum is reasonably inferred from the Act at issue in this case in its entirety, as well as the above provisions. Therefore, not only the provisions specified above but also the Act at issue in this case in the entirety infringes the right of the complainants to vote on national referendum.

In addition, even assuming that only above-specified provisions are held unconstitutional, the rest of the provisions meaningfully exist on the premise of the decisionmaking of the relocation of the capital thus may not be validly enforced by and in themselves. Therefore, the entire Act at issue in this case becomes unenforceable, and it is appropriate to hold the Act unconstitutional in its entirety.

Then, the Act at issue in this case is violative of the Constitution in its entirety as it infringes the right of the complainants to vote on national referendum that is a basic right guaranteed by Article 72 of the Constitution. Therefore, the Act at issue in this case is hereby held unconstitutional, without further review upon other issues asserted.

7. Dissenting Opinion of Justice Jeon Hyo-sook

A. I agree with the majority opinion with respect to the point that the Act at issue in this case includes and presupposes the decisionmaking of the relocation of the capital. However, I respectfully disagree to the reasoning of the majority that the Act at issue in this case infringes the right of the complainants to vote on national referendum as the relocation of the capital may only occur by way of constitutional revision procedure, under the interpretation of our constitution. Thus, I state my opinion as follows.

(1) First, we should consider the degree of the constitutional importance of the location of the nation's capital under the current constitutional theory of constitutionalism and the welfare state.

Historically, the location of the capital was an important matter concerning the identity of the nation. However, under the Constitution of the current constitutionalism, this can hardly be deemed as either a fundamental matter of the constitution or a matter that should be determined directly by the citizens under the

principle of people's sovereignty. The fundamental purpose of the constitution is the realization of the liberty and the right of the citizens through the control and the rationalization of the state power. That is, the basic principle of our constitution is the realization of government by the rule of law that is dedicated to protecting the basic rights of the citizens against the abuse of state power(4 KCCR 225, 230, 90Hun-Ba24, April 28, 1992). The location of the capital is no more than a "tool" to realizing such purpose of the constitution, and may hardly be deemed as a matter that directly affects the realization of such purpose. There is still currently a demand for a 'source of emotional unity' among the citizens, yet, as long as free democracy and constitutionalism are the major values of our nation, the location of the capital in and by itself cannot decisively be a matter that should be necessarily determined directly by those with the authority to establish or revise the constitution.

(2) The customary fact that "Seoul is the capital" may hardly be recognized as the legal norm of "customary constitutional law" as the majority opinion states.

Even if the fact that Seoul is the capital is a customary practice that has self-evidently been perceived by our people for a long period of time as the majority opinion demonstrates through detailed materials from the aspect of long history and tradition, it may hardly be recognized to have legal conviction, that is, as "something of which all citizens have the cognizance as an enforceable legal norm concerning the Constitution and organization of our nation," as the majority opinion states. The majority opinion may be valid when the object of such legal conviction is not only in the form of a norm that Seoul is where major constitutional institutions and organs are located in the symbolic meaning, but also containing the meaning that it is above the general statutes as the constitution in the substantive sense and that it has the force equivalent to that of the written constitution, that is, the force to the degree that it should be revised only by the constitutional revision procedure. However, concluding that it has all of such legal convictions is unreasonable in light of the fact that the relocation of the capital has only recently been a major issue in our society. More than anything else, in the legislative process of the Act at issue in this case, the members of the National Assembly from both the ruling party and the opposition party gave overwhelming support to the bill for this Act, while there was no indication whatsoever, manifested during the legislative review process, of the perception of the members of the National Assembly concerning that the matter of relocation of the capital was a constitutional law matter over which the citizens had constitutional conviction or that it could

not be an object of their legislation as a change thereto should be through the constitutional revision procedure.

The majority opinion has an unavoidable gap in its legal logic as it infers a normative constitutional proposition that "Seoul should be the capital" from a factual proposition that "Seoul is the capital."

(3) Under the legal system of written constitution, customary constitutional law may not be deemed to have the "same" force as that of the written constitution, or force that "may invalidate particular provisions of the written constitution."

The reason why customary constitutional laws are recognized and acknowledged is, as the majority opinion indicates, that it is "impossible for a written constitution to completely regulate therein all constitutional law matters without omission." However, even if the customary constitutional law is recognized and acknowledged, no ground exists for the recognition of the force identical to that of the written constitution merely by the fact that it is established as the customary constitutional law, for the code of written constitution has the utmost superiority within the nation's legal system as it is established directly by the citizens who are the holders of the authority to establish the constitution through "express" representation of the intent, and the revision of its content is governed by a rigid procedure. Such codification of the constitution is to realize, with firm stability that is objectively unchallengeable, the control of state power and the maximum guarantee of human rights intended by the constitution. The characteristic of the written constitution is, *inter alia*, its retention of the strong power binding all state powers as the supreme legal norm, which is rendered possible by convergence of express intent of the people's sovereignty through specific constitutional establishment procedure. As custom alone may not retain such supreme power that characterizes the constitution, the rationale of the majority opinion that the written constitution and the customary constitutional law have the identical force lacks constitutional ground. The construction of the constitution by the Constitutional Court should begin from the Constitution, and the unwritten constitution that appears in the form of case law should also be based upon the Constitution.

Customary constitutional law under the written constitution system should be deemed to have no more than a supplementary force. As long as a written constitution with rigid requirements for revision exists, no customary constitutional law or unwritten constitution may be established or may exist apart from the written constitution, and, the customary constitutional law or unwritten constitution may be established and may exist only by developing,

completing and constantly forming various principles of the written constitution, and by harmonizing with such principles. Otherwise, it would mean that constitutional practices might vary with the written constitution, ultimately resulting in the precedence of unwritten constitutional practices over the text of the written constitution and the overwhelming control of the nation by such practices. Therefore, the customary constitutional law may only be recognized to the extent it supplements the written constitution, and no force changing the written constitution may be recognized for the customary constitutional law.

This legal principle equally applies when the substance of the customary constitutional law is a "constitutional law matter" that is significant to the extent that it should be regulated directly by the constitution. There is no ground to recognize the force changing the substance of the written constitution by the existence of such customary constitutional law. This would harm the constitutional stability and it would not conform to the will of the framers of the constitution that established the written constitution with rigid requirements for revision. Even with respect to matters for which there was no need for codification as self-evident at the time of the establishment of the constitution, the citizens may always exercise the authority to revise the constitution to include in text such constitutional law matter existing in the form of a custom through their representatives and by way of national referendum, thereby endowing the force of the written constitution. Just as we may not punish a matter that should be punished as long as it is not regulated by the statute as punishable, the legal force cannot but differ depending upon whether it is regulated in the written constitution or not.

(4) The majority opinion reasons that customary "constitutional" law as opposed to the customary "statute" is part of the "constitution" thus its change should follow the constitutional revision procedure. However, this is excessive adherence to a formalistic conceptual logic and fails to adequately reflect the substance.

The written constitution does not possibly contain all of the constitutional law matters, and statutes and customary laws occasionally contain such matters which are commonly referred to as the "constitution in the substantive means." The "customary constitutional law" merely means that the constitutional law matters in the substantive means are regulated by customs, and the "customary constitutional law" does not immediately have the force identical to that of the "written constitution." While the strong force of the written constitution is due to the representation of the

express intent of the people's sovereignty through the specific constitutional revision procedure, the custom is recognized not through such express intent or specific procedures, but by the elements of the existence of the practice and the legal conviction of the citizens that are not easily perceived objectively or clearly.

The majority opinion, in order to recognize a force identical to that of the written constitution by bypassing this problem, limits the customary constitutional law to the "fundamental matter of constitutional importance that should be regulated by the constitution and have superiority in its force over statute" or the "core fundamental matter that may not be appropriately regulated by statute." Such limitation of the concept is inappropriate as, *inter alia*, it excessively narrows the "constitutional custom necessary for the supplementation of the written constitution" and makes it difficult to recognize customary constitutional law in the future.

On the other hand, the "fundamental matter of constitutional importance that should have superiority in its force over statute" is not determined *a priori*, nor is it interred by logic from any proven proposition. Further, there is no standard under the constitutional logic for the "matter that may not be appropriately regulated by statute." Even a matter that may be regulated by statute is given constitutional force when it is regulated in the constitution, and it may not be deemed as a fault when a matter that may deserve regulation in the constitution is regulated by statute. The majority opinion mentions the capital, the Korean language as our official language and the Korean alphabet as our official alphabet that are not regulated in the Constitution as the matters concerning the identity of the nation, however, there is no clear logical ground why such matters should not be regulated by statute. The majority opinion states that such matters are the "matters upon which the citizens should directly make decisions." However, it is questionable why the National Assembly as the representative institution may not determine such matters by collecting the democratic intent of the citizens, and whether the result will vary if the constitutional revision procedure takes place inside the legislature and does not mandate the national referendum as in certain other nations. In the cases of the national flag, i.e., the Taegukgi, and the Korean alphabets as our official alphabets, although these are also fundamental matters relevant to the identity of the nation, they are respectively regulated by the Regulation on the Official Flag of the Republic of Korea(Issued February 21, 1984, Presidential Decree No. 11361) and the Exclusive Usage of the 'Hangul' Act(October 9, 1948, Statute No. 6). Such forms of regulation may not be deemed as a fault.

Decision of the location of the capital is also a constitutional law matter in the substantive sense, and the regulation thereof at the level of statute may not be deemed as a violation of the constitution. The matter that should be regulated in the text of the Constitution or the matter that should have the force of the supreme law may not be logically drawn by inference. Neither the regulation of the capital by statute nor the relocation of the capital by the legislative process at the National Assembly without constitutional revision procedure causes a contradiction in our legal system or impairment to the meaning of the written constitutional provisions.

The customary constitutional law such as the capital does not necessarily have to be changed in the legislative form of a constitutional revision. The revision of the constitution means an express alteration or change of the provision or the language in the constitutional text pursuant to the specific procedure in order to enhance the normative function of the constitution. Therefore, the revision of the constitution is a concept relevant to the constitution in the "formal sense," that is, the written constitution. The reason the framers of the constitution set forth a far more rigid procedure for the revision of the constitution than the general statute is, to deter arbitrary changes of the substance of the constitutional text, which is an express representation of the will of the sovereign. On the contrary, changes in the constitutional law matters that are not contained in the constitution or the unwritten constitution do not constitute constitutional revision, and may be handled by the general procedure of representative democracy established by our constitution, that is, the enactment of statute. Then, in order to accept the customary constitutional law as the object of the constitutional revision, there should be an extremely strict logical justification beyond a "formalistic logic of concept," which the majority opinion fails to present.

The majority opinion seemingly assumes that the National Assembly enacted the Act at issue in this case without adequate collection of the intent of the citizens. However, if the National Assembly hastily enacted the Act under party politics while failing to represent the will of the people with respect to such an important matter as the relocation of the capital, as long as it was not violative of the procedures of the Constitution and the National Assembly Act, as the National Assembly is no more than a representative institution that is to represent the will of the citizens, the citizens who had constituted such National Assembly are, unavoidably, ultimately responsible for such legislation.

On the other hand, pursuant to the reasoning of the majority opinion, no matter how the National Assembly employed sufficient

procedures to collect the will of the citizens such as a hearing in the legislative process of the Act at issue in this case and unanimously passed the bill as the Act, the Act is unconstitutional solely on the formalistic ground that the constitutional revision procedure was not followed. Such a conclusion can hardly be deemed as reasonable.

(5) Should the constitutional revision be mandatory for the change of the customary constitutional law that "Seoul is the capital," this may not be permissible as an alteration by the customary constitutional law of the legislative power of the National Assembly endowed by the Constitution.

The interpretation that the Act at issue in this case is unconstitutional, which the majority opinion adopts, on the ground that the Act alters the customary constitutional law without constitutional revision procedure, is a recognition of the power of the customary constitutional law that is superior to the legislative power of the National Assembly. The Constitution provides that "The legislative power shall be vested in the National Assembly."(Article 40), and the object of the legislative power of the National Assembly is general, unless otherwise provided in the Constitution. The subject of legislative power is none other than the representative institution that is directly elected by the citizens as representatives of the citizens. The Constitution adopts as a basic form representative democracy as a means to realize the people's sovereignty and free democracy, rendering the representative institution whose democratic justification is endowed upon by election by the citizens, implement the ideology through the legislative function. Therefore, the legislation by the National Assembly pursuant to the procedure and substance established by the Constitution is the representation of the intent of the entire citizenry and is justified as such. The recognition of the "sovereignty of the Parliament" in the United Kingdom and the irrebuttable presumption of the statute enacted by the legislature as the 'expression of the general intent' of the citizenry in France show the close relationship between the citizens and the legislature. Then, it is hard to find any substantive reason why the change of the customary constitutional law such as the relocation of the capital cannot be done by the enactment of a statute by the National Assembly, where there is no particular constitutional provision limiting this. Many of the nations allow the legislature to revise the Constitution merely by way of an increased quorum(commonly by the vote of the majority of the entire membership and the minimum of two-thirds of the votes in favor thereof) compared with the statutory revision without direct

vote(i.e., the national referendum) of the citizens. This is because the National Assembly is none other than the representative institution of the citizens, a major state organ that executes the sovereignty of the citizens as the representative. The Act at issue in this case was passed by 167 votes in its favor out of 194 members who participated in the vote(13 oppositions and 14 abstentions), thus by an overwhelming majority beyond the majority of the entire membership and two-thirds of the votes. It may not be, at least from the aspect of the constitutional law, concluded that such legislation was "beyond the authority of the members of the National Assembly," aside from the possibility that such legislation may be politically blamed as an inadequate reflection of or a betrayal of the intent of the citizens. Such a conclusion should not be permitted as it denies the legislative power and authority of the National Assembly under the Constitution by way of the customary constitutional law, which is the alteration of the constitution.

The customary constitutional law that has not followed the procedure for the establishment or revision of the constitution should not be given force "identical" to that of the written constitution or one that "alters other constitutional provisions." This logic is beyond the written constitution system, and acknowledges in the form of case law the exercise of the people's sovereignty that is not by a method intended by the Constitution. The exercise of the people's sovereignty under the written constitution system should be within the boundary of the written constitution, unless it falls into a special exception such as the exercise of the right to resistance. It is realistically difficult for the state institutions or the Constitutional Court to confirm what is a true intent of the citizens, and there may be disagreements and conflicts among the citizens over particular matters. Therefore, recognizing the "exercise of the people's sovereignty" in a way external to the constitutional law that is not an institutionalized procedure objectively regulated by the Constitution, should not be permitted.

The majority opinion presents the principle of the people's sovereignty by indicating that "the formation of the constitutional norms by way of custom is one aspect of the exercise of the people's sovereignty." However, it is unclear what extent of the intent of the citizens such exercise of the people's sovereignty pertains to, and whether the procedure of collecting the intent is equivalent to the procedure for the establishment and the revision of the constitution. It is inappropriate to acknowledge such exercise of the people's sovereignty by way of constitutional interpretation, which is not by way of a method expressly and objectively institutionalized by the Constitution.

Should the exercise of the people's sovereignty in a way not institutionalized in the Constitution be permitted, neither procedural justification nor democratic justification would be guaranteed; rather, it would endanger the constitutional order of the nation by causing a confusion therein. Such a result should be avoided no matter how important and exceptional a matter is. A matter that is not regulated in the Constitution should be dealt with by the political decisionmaking structure, as long as it does not concern the emergency circumstance of the state. If the Act at issue in this case has failed to adequately represent the intent of the citizens, the citizens may even at this point attempt to revise the Act by conveying their intent through the representative institution. If the members of the National Assembly ignore such demand at the dimension of party politics, they will fail to win at the next election, and, currently, the citizens who elected such members of the National Assembly are politically responsible for this.

(6) In conclusion, the change of the customary constitutional law that Seoul is the capital is not a matter mandating constitutional revision, nor is there any ground under the current Constitution to deem that it may not be undertaken by the legislation by the National Assembly. Therefore, it may not be deemed that there is a possibility for the Act at issue in this case to infringe the right to vote on national referendum of Article 130, Section 2, of the Constitution.

B. On the other hand, although I agree with the separate concurring opinion that a prudent procedure to collect the public opinion is necessary for the relocation of the capital as it is an important state policy, I respectfully do not agree with its reasoning that the Act at issue in this case infringes the right to vote on national referendum of Article 72 of the Constitution. My opinion with respect to this point is stated as follows.

The separate concurring opinion opines that the President's non-submission of the matter concerning the relocation of the capital to the national referendum under Article 72 of the Constitution is an abuse of discretion and thus infringes the right to vote on national referendum.

However, as far as Article 72 of the Constitution endows discretion upon the President with respect to whether to submit an 'important policy concerning the national security' to a national referendum(16-1 KCCR 609, 649, 2004Hun-Na1, May 14, 2004), an interpretation that the President's discretion varies dependent upon the importance of a matter does not stand.

Aside from a discussion of whether Article 72 of the Constitution endows excessive discretion upon the President and can therefore be an effective system to realize the principle of people's sovereignty and direct democracy, there is no ground under the current Constitution for an interpretation different from the above.

As far as the above provision endows upon the President the discretion to determine whether or not to submit a matter to the national referendum, the right to vote on national referendum under this provision is a right that may be exercised upon the President's submission, and the scope of protection of this right may not be expanded to include a demand to obligate the President to submit a particular important policy matter to the national referendum. In addition, as such discretion is endowed directly by the Constitution, the legal principle of deviation from and abuse of discretion of the administrative law may not apply. Should the President submit a matter that is not an object of Article 72 of the Constitution as in the case of national referendum requesting a confidence vote on the President, this is a violation of the requirements under the express provision of Article 72(an "important policy concerning the national security"), yet, it is not a deviation from or abuse of discretion. In addition, as our Constitution adopts as the foundation the representative democracy, under which the representatives of the citizens directly elected by the citizens determine the intent of the nation on behalf of the citizens, as long as such representative democracy functions normally, there is no constitutional ground to deem that such a matter as the relocation of the capital should necessarily be determined by the direct vote of the citizens.

Then, in this case, although the President did not submit the policy concerning the relocation of the administrative capital to the national referendum thus resulting in the non-exercise of the right to vote on national referendum, there is no possibility that this has infringed the right of the complainants to vote on national referendum.

C. For the foregoing reasons, the assertion of the complainants that their right to vote on national referendum has been infringed is inappropriate, as the possibility of infringement upon such right itself does not exist. The assertion of the complainants in this case of the infringement upon other basic rights, although not discussed in detail here, also lacks the requirements of self-relatedness, directness or presentness of the infringement of the basic right. In conclusion, this case is inappropriate for a review on its merits by the Constitutional Court upon constitutional complaint, which is the last and supplemental resort for the relief of the "infringement of

the basic right."

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

[Appendix Ⅰ] the list of the complainants [omitted]
[Appendix Ⅱ] the list of Supplementary Participants [omitted]

Ⅱ. Summaries of Opinions

1. *Internet Filtering for Protection of Minors*
(16-1 KCCR 114, 2001Hun-Ma894, January 29, 2004)

Held, the relevant provisions of the Act on Promotion of Information and Communications Network Utilization and Information Protection and its enforcement decree and of the relevant public notice of the Ministry of Information and Communication, which enable Internet filtering by obligating to mark the Internet sites harmful to minors with the 'electronic indication,' are not in violation of the Constitution.

Background of the Case

The Juvenile Protection Act provides that the Juvenile Protection Committee, and the Information and Communications Ethics Committee in the case of Internet-related media content, shall review and determine the media content that is harmful to minors(hereinafter referred to as the 'media content harmful to minors'), and prohibits the selling, renting, distributing, or offering for viewing and listening, showing, or usage, to the minors, of items categorized as media content harmful to minors, by criminally punishing the violation of such prohibition(hereinafter referred to in the entirety as the "system concerning media content harmful to minors"). On the continuum of this system, the above statute and its enforcement decree and the public notice at issue in this case prepared a technological protection mechanism, by taking the characteristics of the Internet into account, to protect minors from the media content harmful to minors on the Internet. That is, in case an Internet site, directory or page is determined to be a media content harmful to minors, the provider of such media content is obligated thereunder to mark a specific indication by electronic method under the PICS or the Platform for Internet Content Selection, in order for the software filtering the media content harmful for minors to detect this. When such an 'electronic indication' is marked, should individual information users install the relevant filtering software on their computers, such media content harmful to minors is automatically blocked and does not appear on the screen. On the other hand, if the relevant software is not installed, there is no screening effect, and, even when the software is installed, blocking may be disabled by manipulation. Therefore,

should the 'electronic indication' be marked pursuant to the legal provisions at issue in this case, the Internet filtering in the limited sense as indicated above becomes possible.

The complainant in this case opened and operated a website concerning homosexuality, and the Information and Communications Ethics Committee determined this site as the media content harmful to minors pursuant to the Juvenile Protection Act. However, the complainant did not mark the 'electronic indication,' and the Information and Communications Ethics Committee notified that the complainant should mark the 'electronic indication' and that a criminal sanction might be imposed for the failure to perform this obligation.

The complainant thereupon filed the constitutional complaint in this case, claiming that the freedom of expression of the complainant was violated by the above legal provisions enabling Internet filtering.

Summary of the Decision

The Constitutional Court has held, in the unanimous opinion of all justices, that the provisions at issue in this case are constitutional. The summary of the grounds for the Court's decision is stated in the following paragraphs.

1. Even such information on the Internet or media contents that are determined to be media contents harmful to minors take the form of either the expression or the distribution of opinions which function to form the opinion. Therefore, they are the media of expression of opinions that are protected by the freedom of speech and press. The above legal provisions require the provider of the information on the Internet that is determined to be the media content harmful to minors to mark the 'electronic indication' thereby restricting the freedom of expression. Therefore, the issue is whether such restriction violates the principle of prohibition against excessive restrictions under Section 2 of Article 37 of the Constitution.

2. Minors are in a state of immaturity both mentally and physically, thus must be protected until they grow to be responsible individuals of personality within the social community. Due to the characteristics of the Internet, however, the information harmful to the minors is indiscriminately posted and distributed for commercial purposes, and the anonymity of the Internet exacerbates the possibility that such information will be directly delivered to the

minors without filtering. Therefore, it is justifiable that the legislators have adopted, for the protection of minors against the inundating harmful information on the Internet, the method that uniformly blocks minors from harmful information containing obscenity or violence in case the blocking software is installed, by obligating to mark a specific 'electronic indication,' as it is for the public welfare of the protection of minors.

3. Should the 'electronic indication' be marked, installing the pertinent blocking software has the effect of blocking the Internet site or page categorized as the media content harmful to minors. Therefore, this is a means that is effective and appropriate for achieving the legislative purpose of protecting minors from the harmful media content on the Internet.

4. As the harmful information on the Internet has strong anonymity and diffusion, the indication of "not permissible for anyone under the age of nineteen(19)" marked off-line and not on-line, in general, has a meager impact of blocking such information from minors. In addition, with respect to the media content on the Internet, unlike other general tangible media items such as audio or video discs, there exists a way through which the purpose of protecting minors may be achieved more effectively by way of technological and electronic manipulation. Other than the 'electronic indication,' there may be other methods as well of blocking the access to the harmful media content on the Internet by minors, such as the verification of the name and resident registration number, credit card information, or electronic signature system through the public authentication certificate. However, the resident registration number verification method accompanies the concern for the theft of identity information of others, the usage of credit card information risks a readily exposure of the credit card information while an adult without a credit card may not use this, and the electronic signature by way of the public authentication certificate is yet to be available for a wide usage. Furthermore, the burden of the cost for such alternative methods will mostly be borne by the Internet site operators. Then, it may hardly be deemed that the above alternative methods other than the 'electronic indication' method are less restrictive methods that limit the freedom of expression of the information providers to a lesser degree.

In the Internet environment where technology is developing at such a high speed, there is an inappropriate aspect in the government designating a particular technology standard such as the PICS and a particular meta-tag. However, presently, it may not be deemed that there clearly exists a means to achieve the legislative

purpose in other alternative methods.

5. Considering that the obligation of the 'electronic indication' merely determines a technological method of blocking harmful media content from minors as an *ex post facto* measure rather than controlling the substance or content of the applicable information, and that its effect lies only when the parents or adults install the blocking software while the software, even after installation, may discretionarily be removed, the above legal provisions have not digressed from the balance between the public interest in pursuit (i.e., protecting minors from harmful information on the Internet) and the private interest thereby under restriction, in terms of the effect and the substance of the restriction of the fundamental right.

2. *Uniform Inspection of Driving under the Influence of Alcohol*

(16-1 KCCR 146, 2002Hun-Ma293, January 29, 2004)

Held, police officer's blocking the street and subjecting all drivers in the traffic to a sobriety test to detect driving under the influence of alcohol(DUI) does not, without further, violate the fundamental right of the individuals subjected to the sobriety test.

Background of the Case

With respect to the control of driving under the influence of alcohol(DUI), the Road Traffic Act provides that police officers may test by measuring whether the driver of a vehicle is under the influence of alcohol when the officer determines that it is necessary for the safety of the traffic and the prevention of danger, or when there is a sufficient ground to determine that a person has been driving a vehicle under the influence of alcohol, and that all drivers should obey such measuring by the police officer. The police thereupon have detected drivers under the influence of alcohol by designating an unannounced checkpoint and subjecting all drivers passing that point to the sobriety test by measuring the degree of the influence of alcohol, in order to effectively prevent driving under the influence of alcohol. The complainant thereupon filed a constitutional complaint in this case, claiming that the fundamental right such as the right to humane livelihood had been violated by the above control over driving under the influence of alcohol.

Summary of the Decision

The Constitutional Court in a unanimous opinion of all justices dismissed the constitutional complaint on the merits. The summary of the grounds for the Court's decision is stated in the following paragraphs.

1. As vehicles operate at a high speed unlike pedestrians, it is impossible to perceive the state of the person riding in the vehicle without bringing the vehicle to a halt. Furthermore, due to the attribute of speed associated with the vehicle, the danger of traffic accident occurs instantly, and, once the danger occurs, the result of the danger becomes realized in many occasions even without any chance not only for the drivers themselves but also for those pertaining to the traffic such as police officers to timely respond thereto. Therefore, in order for the prevention of danger caused by driving of vehicles, it is unavoidable to halt a vehicle operating on the road for inspection, and there is also a very high demand for preventively blocking the occurrence of the danger itself prior to the realization of the danger.

Considering the characteristics of the danger caused by driving of vehicles, it is necessary to block the occurrence of the danger in advance prior thereto even when the individual and specific danger has yet to be expressed. Thus, an act of such preventive blocking is also included in the danger-prevention activity. Therefore, the condition required for the request of measuring the intake of alcohol pursuant to the Road Traffic Act of the "need for the traffic safety and danger prevention" should be broadly interpreted not only to include the case necessary for the prevention of the individual and specific danger caused by driving under the influence of alcohol, but also to be satisfied as long as there is a possibility of maintaining traffic safety and preventing danger in general, by preventively blocking drunken driving by the general public who might dare to drive under the influence of alcohol should there be no uniform inspection of driving under the influence of alcohol. Further, as far as the above necessity requirement is satisfied, it should be deemed that the act of installing a checkpoint on the road and inspecting each of the drivers' intake of alcohol by stopping all vehicles passing that checkpoint is permissible, in light of the attribute of driving of vehicles.

2. Prevention of damage caused by driving under the influence of alcohol is an extremely important public interest, and the uniform inspection of driving under the influence of alcohol is an effective means to achieve the above public interest. To the contrary, the disadvantage on the part of the citizens due to the uniform

inspection of driving under the influence of alcohol, such as some loss of time caused by traffic jam and the subjective and emotional discomfort, is relatively minor. In addition, the method of measuring is also appropriate, as the driver is merely required to blow onto the alcohol-intake measuring device while remaining seated in the driver-seat and the result of the sobriety test becomes available instantly.

3. Even if the uniform inspection of driving under the influence of alcohol is in itself a police operation based upon the relevant provisions of the Road Traffic Act, the principle of prohibition against excessive restrictions should be observed. Therefore, the time and place expected for frequent occurrences of driving under the influence of alcohol thus greatly necessitating the inspection of drunken driving should be designated for the checkpoint, and the inspection causing extreme discomforts to citizens concerned such as the drivers should be avoided as much as possible. Furthermore, the limits in terms of the method such as the prior notice ahead of the checkpoint, or the prompt execution of test for a brief period of time should also be observed.

3. *Restriction upon Standing for Request of Detention Legality Review*

(16-1 KCCR 386, 2002Hun-Ba104, March 25, 2004)

Held, the relevant provisions of the Criminal Procedure Act providing that the detention legality review proceeding may no longer proceed upon prosecution against the suspect are not in conformity with the Constitution.

Background of the Case

The Criminal Procedure Act provides that, once a judge determines to issue an arrest warrant upon request for the issuance of arrest warrant by a prosecutor, the suspect under detention shall be entitled to request the court to review the legality of detention, while, however, once the prosecutor formally prosecutes the suspect by filing a complaint, the judge may no further proceed upon detention legality review and the person under detention may only use the system of cancellation of detention or bail.

The complainant requested the court to review the legality of

detention subsequent to the detention pursuant to the arrest warrant issued by a judge. However, the prosecutor filed a formal complaint against the complainant without waiting for the decision of the court upon the above request to be handed down. The complainant thereupon petitioned the underlying court to request a constitutionality review, claiming that the relevant provisions of the Criminal Procedure Act that limit the qualifications for those who may request detention legality review to the suspects only are in violation of Section 6 of Article 12 of the Constitution. The underlying court overruled the above petition, and the complainant thereupon filed the constitutional complaint in this case.

Summary of the Decision

The Constitutional Court has held, in a six-to-three decision, that the relevant provisions of the Criminal Procedure Act are not in conformity with the Constitution. The summary of the grounds for the Court's decision is stated in the following paragraphs.

1. Summary of the Majority Opinion

A. Section 6 of Article 12 of the Constitution provides that "Any person who is arrested or detained, shall have the right to request the court to review the legality of the arrest or detention." Although this provision guarantees a specific procedural right of the 'right to request the court to review the legality of detention' in the constitutional dimension with respect to a very specific circumstance of 'upon arrest or detention,' there exists no means in reality for the court to review with respect to the 'right to request review over the legality of arrest or detention' of the parties concerned without formative statutes legislated by the legislators. Therefore, the holder of the right may substantively exercise such right only if the legislators have formed the specific content thereof in the form of the statute. Furthermore, as such right to request arrest or detention legality review is endowed with an independent status at the constitutional level, the legislators are obligated to offer throughout the overall system of law a minimum of one opportunity in which the relevant parties may properly exercise the specific procedural right thereof.

B. The relevant provisions of the Criminal Procedure Act permit only the suspect at the pre-prosecution stage to request detention legality review, thereby requiring the status of the 'suspect' which is the standing for the detention legality review proceeding not

merely as the 'condition for the initiation of the process' but also as the 'condition for the maintenance of the process.' Therefore, subsequent to the exercise of the right to request detention legality review by a suspect, should the prosecutor file a formal complaint prior to the court's decision upon such request(so-called 'blitz prosecution'), the court has no other alternative but to dismiss the request without being able to review in substance the legitimacy of the detention pursuant to a warrant as above. This results in the deprivation of the 'procedural opportunity' of the requesting party intending to have a substantive review of the court, by the unilateral act of the prosecutor who does not have the authority to determine the constitutional legitimacy of the above warrant itself. When a suspect under detention has exercised the right to request detention legality review, the prosecutor has no more than the status of an adverse party in opposition to the detainee, in the legality review proceeding. There is no reasonable ground for the restriction of the 'procedural opportunity' of the requesting party who intends to have a review by an independent judge under the Constitution, by the unilateral act of 'blitz prosecution' of the opposing party, in such an adversarial proceeding as above. Although there is a subsequent proceeding of the 'detention cancellation system' guaranteed for the requesting party following the 'blitz prosecution' of the prosecutor under the current Criminal Procedure Act, this alone may not justify the complete deprivation of the procedural opportunity of the requesting party who may otherwise have a substantive review by the court over the request for detention legality review that has already been exercised. Then, to the extent that the 'procedural opportunity' of the requesting party is unreasonably deprived as above, it should be deemed that the legislators have failed to appropriately realize the essential substance of the right to request detention legality review.

C. The statutory provisions at issue in this case affirmatively form a procedural right to request in a specific form pursuant to the constitutional delegation based upon the specific provision of the Constitution. Should a decision of simple unconstitutionality be issued thereupon, while there would be no effect of relief for the right in such cases where there was a blitz prosecution subsequent to the exercise of the right to request detention legality review by the suspect, instead, it would rather result in the invalidation of the provisions which form the basis of the general exercise of the suspect of the right to request detention legality review in the entirety. Therefore, we hereby issue a decision of nonconformity to the Constitution, to the effect that the legislators shall be obligated hereby to affirmatively complement the current system by choosing one of the various alternative reform legislations, and order that the

statutory provisions at issue in this case shall continue to apply until such reform legislation is enacted.

2. Summary of the Dissenting Opinion of Three Justices

The right pertaining to the review of the legality of arrest or detention pursuant to Section 6 of Article 12 of the Constitution has the nature of the procedural right, and particularly of the basic right to judicial procedure. Thus, the legislators are endowed with a broad legislative discretion with respect to the formation of the fundamental right of judicial procedure. It is hardly deniable that in certain situations there occurs an unjust result from the deprivation of the procedural opportunity of the detainee by the unilateral act of blitz prosecution by the prosecutor. However, this may be effectively counteracted by the pertinent court through an active utilization of the system of detention cancellation or bail. On the other hand, there are various grounds for the prosecutor to prosecute prior to the court's decision on the request for detention legality review, and it may hardly be judged that there is an unjust blitz prosecution in each of such cases. In sum, considering in totality the degree of discretion endowed to the legislators in forming the basic right to judicial procedure, the diverse systems controlling unlawful and unjust detention of human body, and the public interest that the statutory provisions at issue in this case intend to achieve, the degree of the restriction of the fundamental right due to the statutory provisions at issue in this case is reasonable as not exceeding the necessary degree. Therefore, the statutory provisions at issue in this case are not unconstitutional provisions excessively infringing upon the fundamental right of the citizens in violation of the principle of proportionality of Section 2 of Article 37 of the Constitution.

Aftermath of the Case

The relevant provisions of the Criminal Procedure Act, which were the subject matters of this case, were revised on October 16, 2004 pursuant to this decision, to the effect that the court should still determine upon the request for detention legality review even after the prosecution against the suspect by filing of a formal complaint subsequent to the request for review.

4. *Prohibition of Political Party Membership of Primary and Middle School Teachers*
(16-1 KCCR 422, 2001Hun-Ma710, March 25, 2004)

Held, the relevant provisions of the Political Parties Act and the former Act On the Election of Public Officials and the Prevention of Election Malpractices, as revised on August 5, 2005 as the Public Election Act prohibiting the political party membership and the election campaign activities of the primary school and middle-school educational civil servants are constitutional.

Background of the Case

The complainants are the public officials who are teachers at middle-school. The complainants intended to conduct election campaign activities by becoming the members of a political party for the election of the members of the local legislature and the head of the local government that took place on June 13, 2002. However, they were not able to conduct election campaign activities due to the statutory provisions at issue in this case prohibiting the political party membership and the election campaign activities of the general public officials with the exception of the university professors and certain others. The complainants thereupon filed the constitutional complaint in this case, claiming that their freedom of political expression, freedom of political party membership and party activities, freedom to conduct election campaigns and the right to equality had been violated.

Summary of the Decision

The Constitutional Court dismissed the constitutional complaint on its merits in the unanimous opinion of the justices, holding that the provisions at issue in this case are not in violation of the Constitution. The summary of the grounds for the Court's decision is stated in the following paragraphs.

1. First, Section 1 of Article 7 of the Constitution provides that "All public officials shall be servants of the entire people and shall be responsible to the people," thereby clearly indicating that the public officials are in the position to serve the interest of the entire citizenry and not in the position to serve the interest of particular sections of the citizens or a particular political sector or political party. Section 2 of Article 7 of the Constitution provides for the

"political neutrality of the public officials" so that the consistency and continuance of the administration will not be deprived by the change of the political powers and the administration will not be depended upon the political beliefs of the public officials, by expressly providing that "The status and political impartiality of public officials shall be guaranteed as prescribed by Act."

Second, Section 4 of Article 31 of the Constitution declares that "political impartiality of education shall be guaranteed under the conditions as prescribed by Act." thereby institutionally guaranteeing the political neutrality requested for the public officials upon the educational civil servants serving in the area of education. The political neutrality of education means not only that the education should be free from unjust interferences from state authority or political power, but also that education should not intervene in the realm of politics in deviation from its original or primary function. The ground for the Constitution's request of the *"political neutrality of education"* is that it is desirable to keep a certain distance between education and politics, as education is in its essence in pursuit of ideals and not prone to power, while politics seeks reality and power.

Third, it is true that the political fundamental right of the complainants is restricted by the prohibition of the freedom of political party membership and election campaign activities of the teachers of primary school and middle-school in the entirety including off-duty hours. However, the impact of the political activities of the teacher upon the students at primary school and middle-school who are fully sensitive, imitative and receptive is massive; the activities of the teacher over both on-duty and off-duty hours constitute part of the potential education process significantly affecting the formation of the personality and the basic life-style habits of the students; and the political activities of the teacher might infringe upon the right to learn in class from the perspective of the students who are the beneficiaries of the education. Considering in totality that the priority should be given at the current point to the public interest that may be achieved by further guaranteeing the fundamental right of education of the citizens, the restriction of the freedom of political party membership and election campaign activities of the primary school and middle-school educational civil servants is constitutionally justifiable.

2. The current education law provides that the teachers at the primary school and the middle-school are to educate the students, while the teachers at the college and the university are to educate and guide the students and to conduct research and learning while

they may exclusively concentrate on research and learning, thus differently regulating the tasks of the two. In addition, compared with the education at primary school and middle-school which focuses on the delivery of the generally recognized basic knowledge, the education at college and university needs to advance science and learning and to heighten the quality of education for college and university students by organically combining research and activities of learning and the inculcation function, which therefore requires that the capability to perform such functions is needed for the qualification of college and university professorship. Then, even if the freedom of political party membership and election campaign activities is prohibited from the primary school and middle-school teachers while permitted to the college and university professors, this is a reasonable discrimination considering the difference in the essential nature and content of the tasks and the mode of employment, thus not in violation of the right to equality.

5. *Restriction of Right to Vote of the Inmates*
(16-1 KCCR 468, 2002Hun-Ma411, March 25, 2004)

Held, the relevant provision of the former Act On the Election of Public Officials and the Prevention of Election Malpractices, as revised on August 5, 2005 as the Public Election Act restricting the right to vote of the inmates is not in violation of the Constitution.

Background of the Case

The former Act on the Election of Public Officials and the Prevention of Election Malpractices provides that "those who have been sentenced to imprisonment without labor or higher punishment, if the execution thereof has not been terminated on the day of the election, shall not have the right to vote." The complainant was serving the criminal sentence of imprisonment in Yeongdeungpo Prison upon the final sentencing on February 26, 2002 of the imprisonment for the period of three(3) years and six(6) months following the trial for robbery with the infliction of bodily injury, and was not able to vote at the local election that took place on June 13, 2002 due to the above provision. The complainant thereupon filed the constitutional complaint in this case on June 20, 2002, claiming that the statutory provision at issue in this case violated the right to political participation of the inmates such as

the complainant.

Summary of the Decision

The Constitutional Court, in an eight-to-one opinion, has issued a decision dismissing the constitutional complaint of the complainant on the merits, on the ground that the statutory provision at issue in this case is not in violation of the Constitution. The summary of the grounds for the Court's decision is stated in the following paragraphs,

1. Summary of the Majority Opinion

A. Article 24 of the Constitution provides that "all citizens shall have the right to vote under the conditions as prescribed by Act." In Korea that adopts indirect democracy, such right to elect public officials is the most important fundamental right among the citizens' rights to political participation. At the same time, however, the right to elect is also guaranteed by the regulations of the statutes under our Constitution. Therefore, in the legislators' legislation of the election law, choosing which of the specific methods for the achievement of which specific legislative purpose while respecting the principles of election system expressly indicated in the Constitution, falls within the discretion of the legislators as far as it is not clearly unreasonable or unfair.

B. The statutory provision at issue in this case is based upon the basic perception that it is not desirable to allow those individuals who have deserted the basic obligations that must be observed by the members of the community and harmed the maintenance of the community, to directly and indirectly participate in constituting the governing structure leading the operation of the community, and has a meaning as the social sanction against such anti-social behavior. In addition, in order for a fair and just exercise of the right to elect, there should be the provision of sufficient information as the prerequisite, while it is difficult in reality to provide such sufficient information for the inmates who are isolated and incarcerated in the particular facilities. Furthermore, while the method of voting would inevitably be absentee voting should the inmates be endowed with the right to elect, allowing absentee voting within the incarceration facilities would risk damage to the fairness of the election due to the possibility of unjust exercise of influence and distortion of information by those managing the correction facilities who are in superior position, and would also risk negative impact on securing the effectiveness of the

enforcement of the criminal sentence due to the communication with the outside conspirators abusing the opportunity of absentee voting as a pretext. Therefore, suspending the exercise of the civil rights of the inmates during the period of execution of criminal sentence in consideration of the above aspects is something that may be pursued prima facie by the legislators in order to secure the effectiveness of the enforcement of the criminal sentence and for the fairness of the election, and satisfies the legitimacy of the legislative purpose and the appropriateness of the means.

C. The statutory provision at issue in this case does not restrict the right to elect of all persons who have been sentenced to criminal punishment for an indefinite period of time. Instead, the statutory provision at issue in this case restricts the right to elect of those who have been sentenced to incarceration or severer punishment, if the execution thereof has not been terminated. Thus, the restriction is limited to those cases where the restriction of the right to elect is agreeably reasonable for the execution of the criminal punishment in isolation from the society due to the commitment of the considerably serious crime. Furthermore, the requirement of balance between the legal interests is also satisfied, as the public interest of securing the fairness of the election and the effectiveness of the execution of criminal punishment intended to be achieved through the restriction of the right to elect of the inmates is greater than the disadvantage of the restriction of the fundamental right on the part of the individual inmates caused by the inability to exercise the right to elect. Therefore, the statutory provision at issue in this case is not in violation of the Constitution.

2. Summary of the Dissenting Opinion of One Justice

Our Constitution expressly indicates the principles of universal, equal, direct and secret vote as the basic principles of the election system(Section 1 of Article 41, Section 1 of Article 67) with no separate language for the statutory reservation, thereby making it clear that the observation of the basic principles of the election system may not be subject to the discretion of the legislators. Therefore, for the legislation restrictive of the right to elect and especially for the legislation restricting the right to elect in violation of the basic principles of the election system, the principle under Section 2 of Article 37 of the Constitution of prohibition against excessive restriction with respect to the legislation that restricts the fundamental right should be strictly observed. However, with respect to the statutory provision at issue in this case, (i) the majority opinion has not indicated sufficient grounds for the

restriction of the right to elect and the principle of universal vote to be the legitimate legislative purpose; (ii) the fundamental right of the complainant is excessively restricted beyond the degree of necessary minimum for the achievement of the legislative purpose, as all inmates sentenced to the actual prison term or severer punishment are prohibited from exercising the right to vote irrespective of the type and the substance of the crime committed; and (iii) there is no appropriate harmonization between the public interest of the fairness of the election system and the fundamental right to elect held by the inmates. Therefore, the statutory provision at issue in this case is unconstitutional, as it excessively restricts the right to elect in violation of the principle of prohibition against excessive restriction, and violates the principle of universal vote and the principle of equality to be realized by the principle of universal vote.

6. *Prohibition of Illicit Delivery and Reception of Political Funds*

(16-1 KCCR 759, 2004Hun-Ba16, June 26, 2004)

Held, the relevant provisions of the Political Funds Act prohibiting the illicit delivery and reception of political funds and punishing the violation thereof are not in violation of the Constitution.

Background of the Case

With respect to the delivery and reception of political funds, the Political Funds Act has separate provisions to punish the violation of various provisions of restriction, obligation and supervision, and, in addition thereto, has a general provision to punish those who either deliver or receive political funds in a method not regulated by the above statutory provisions, i.e., in an illicit method. The complainant is an individual who ran for the vacancy election to fill vacant seats at the National Assembly, with no political party affiliation. The complainant was prosecuted for allegedly having received political funds in the amount of approximately seventy million Korean Won(₩70,000,000) in the 'method not regulated by the Political Funds Act.' While the above litigation was pending, the complainant filed the constitutional complaint, claiming that the above relevant provisions were unconstitutional as violative of the principle of *nulla poena sine lege* or principle of punishment by

statute and also of the principle of equality.

Summary of the Decision

The Constitutional Court, in a unanimous opinion, has issued the decision holding that the statutory provisions at issue in this case are not in violation of the Constitution. The summary of the grounds for the Court's decision is stated in the following paragraphs.

1. Although Section 3 of Article 8 of the Constitution provides that the state may subsidize funds necessary for the operation of the political parties pursuant to the regulations of the statute, it is difficult under the fiscal restraint to subsidize funds in the sufficient amount. In addition, although Section 1 of Article 116 of the Constitution declares the election campaign governed by statute and the principle of equality in opportunity and Section 2 of Article 116 provides that neither the political party nor the individual candidate shall be burdened to bear the cost of election unless otherwise regulated by the statute, there is no provision for the subsidy of the cost necessary for other political activities of politicians. On the contrary, as the political activities tend to become highly organized in the present-day state through the modern age, the cost necessary for the political activities inevitably has greatly increased as well. Accordingly, securing political funds has inevitably become part of the important political activities for the political parties or the individual politicians. Should there be no regulation upon the supply of political funds while leaving the matter of securing political funds to the political parties or the individual politicians, the collusion between political power and money will become pervasive, and, as a corollary, the political influence of the donators will increase. However, should the political decisions be rendered in a way benefiting the wealthy minority with vested rights, this would seriously injure the principle of equal opportunity of one-person one-vote that is the foundation of democracy. Therefore, the regulation of political funds is the inevitable corollary of representative democracy.

2. The complainant claims that the language of the "method not regulated by this Act" is in violation of the rule of clarity required by the principle of *nulla poena sine lege* or principle of punishment by statute. However, as this may sufficiently be understood to mean any and all methods other than the methods that are specifically regulated in the Political Funds Act, there is no textual vagueness here caused by the use of an uncertain or equivocal concept. Further, the act of illicitly delivering and receiving political funds

has an innate nature that it is impossible to regulate such act by enumerating each and every one of its individual and particular patterns. That is, as the interest of the person who gives illicit political funds and that of the person who receives illicit political funds coincide, it is possible to evade the law in yet another novel way even if the patterns of delivering and receiving illicit political funds are enumerated. Thus, there is a sufficient ground for regulating the essential constituting elements in a passive way as above, for it would be impossible to achieve the legislative purpose without employing the form of legislation of comprehensive prohibition as adopted by the statutory provision at issue in this case. In addition, as the respective provisions of the Political Funds Act describe in detail the methods of giving and receiving political funds, any ordinary person with sound commonsense and a general sense of law may capably understand the methods of giving and receiving political funds that are permitted by the above statute. Therefore, the statutory provision at issue in this case may not be deemed to leave room for arbitrary interpretation due to the lack of clarity of the content that it intends to regulate.

3. The complainant argues that the imposition of the severer statutory punishment for those delivering and receiving political funds in the "method not regulated by this Act," which may be described as a comprehensive constituting element, than the cases of violation of the constituting elements respectively and specifically regulated in the Political Funds Act is against the principle of equality.

However, considering the purpose of this statute of contributing to the sound development of democratic politics by way of guaranteeing appropriate supply of political funds and disclosing income and expenditure, and also the principle of disclosure of political funds that the accounting concerning political funds should be publicly disclosed, there may well be a case where the illegality of act is greater when receiving illicit political funds in a method not expected by the above statute in disregard of the above purpose and principle, than the violation of the prohibition or the restriction respectively regulated in the above statute. Further, as the statutory provision at issue in this case merely imposes a severer maximum of the statutory sentence, if in a particular case the illegality of the violation of comprehensive prohibition provision is very light, a criminal sentence appropriate for the degree of illegality can be determined by the judge. Thus, in an actual case, there occurs no problem of unbalanced sentencing that the complainant has indicated. Therefore, the statutory provision at issue in this case is not in violation of the principle of equality.

7. *Refusal to Approve Collective Agreement*

(16-2(A) KCCR 260, 2003Hun-Ba58 and other(consolidated), August 26, 2004)

Held, the relevant provision of the National Health Insurance Act validating the regulations concerning the personnel decision and the compensation of the National Health Insurance Corporation subject to the approval of the Minister of Health and Welfare is not in violation of the Constitution.

Background of the Case

Pursuant to the relevant provision of the National Health Insurance Act, the regulations concerning the organization, personnel decision, compensation and accounting of the National Health Insurance Corporation(hereinafter referred to as the 'Corporation') should be determined by the resolution of the board of directors and then the approval thereof by the Minister of Health and Welfare. Here, the Minister of Health and Welfare did not approve the collective agreement concluded between the Corporation and the labor union of the Corporation to which the complainants belonged as members, with respect to the treatment(specifically the promotion) of the employees in continuous service for a long term, and as a result, the provision for the promotion by reason of continuous service in the above collective agreement failed to become enforceable. The complainants thereupon filed the constitutional complaint in this case, claiming that requiring the approval of the Minister of Health and Welfare even for the regulations concerning personnel decision and compensation included in the collective agreement violated the right to collective bargaining and the right to equality guaranteed by the Constitution.

Summary of the Decision

The Constitutional Court, in a six-to-three opinion, issued the decision holding that the statutory provision at issue in this case is not in violation of the Constitution. The summary of the grounds for the Court's decision is stated in the following paragraphs.

1. Summary of the Majority Opinion

A. Section 1 of Article 33 of the Constitution provides that " to

enhance working conditions, workers shall have the right to independent association, collective bargaining and collective action." Section 2 of Article 33 provides that these three labor rights are not guaranteed for the public officials unless the exception thereto is provided in the statute.

The employers of the Corporation are not public officials, hence there is no provision within the Constitution restricting their right to collective bargaining. Thus, in principle, the Trade Union and Labor Relations Adjustment Act applies to them as in the case of the workers in the private sector. However, the Corporation is a non-profit corporation specially incorporated under public law established to perform health insurance business for the purpose of enhancement of public health and promotion of social welfare. As such, the state takes part in the appointment of its directors and officers, the cost necessary for the operation of health insurance business is subsidized from the state budget, and the Corporation is subject to strict state supervision and control over the overall management and operation of the Corporation including its budget and accounting. Due to such nature of the Corporation, the employers of the Corporation stand in the middle area between the public officials and the employers of a public corporation that has both aspects of public nature and business nature. Therefore, in reality, certain restrictions such as the approval of the minister of pertinent ministries of government or the budgetary limits do follow, even after the conclusion of the collective agreement.

B. The statutory provision at issue in this case has a legitimate legislative purpose, as it is to promote smooth execution of business of a public corporation that performs health insurance business upon delegation from the state, by way of adequate control over the exercise of the authority and operation of the Corporation by the chairman of the board of directors of the Corporation, and also to secure the authority of the Minister of Health and Welfare to guide and supervise the Corporation in order to prevent careless operation with respect to such matters as personnel and compensation that are connected to the national treasury. In addition, in the Corporation's determination or alteration of the matters concerning personnel and compensation, when the content of such decision is against the public nature of the Corporation or the execution thereof is implausible due to the lack of secured budget, enabling the Minister of Health and Welfare to halt such decision from becoming enforceable by not approving the decision is an appropriate means for the achievement of such legislative purpose.

Furthermore, the matters concerning personnel and compensation among those included in the collective agreement of the Corporation

inevitably accompany changes in the business plan and the budget of the Corporation, as they result in a burden on the national treasury, beyond their meaning as the collective agreement between the labor and the management. Should the collective agreement increasing compensation or retirement pay be concluded and executed as is with no control whatsoever, the meaning of the overall provisions of the National Heath Insurance Act intended to control the business plan and the budget would be reduced and state supervision and control over the Corporation would become impossible in general. Therefore, also in the case where matters concerning personnel decision and compensation are determined by the collective agreement, it is unavoidable to require the approval thereupon of the Minister of Health and Welfare to be obtained. In addition, when the Minister of Health and Welfare does not approve a regulation concerning personnel decision or compensation that is included in a collective agreement, this can be challenged by way of administrative litigation, therefore, there also exists an available remedy therefor. Then, as the degree of restriction upon the right to collective bargaining due to the statutory provision at issue in this case falls within the appropriate scope thereof in light of the public nature of the Corporation, such restriction is not in violation of the Constitution.

2. Summary of the Dissenting Opinion of Three Justices

In light of the inclusion of the special provisions in the Constitution of Sections 2 and 3 of Article 33 with respect to the three labor rights of the workers who are public officials and who are in service for the major defense industries, the restriction of the three labor rights of the rest of the workers may be justified only when it satisfies stricter prerequisites. The Trade Union and Labor Relations Adjustment Act established for the substantive realization of the three labor rights under the Constitution recognizes the normative effect for the provisions concerning the working conditions and other treatment of the workers included in the collective agreement. Thus, in light of the Constitution's guarantee of the right to collective bargaining in principle for the workers with the exception of public officials, it is desirable to resolve the dispute rising between the labor and the management of the Corporation by way of the system established by the current labor relations law as a matter of principle. In addition, the control over the matters of personnel decision and compensation of the Corporation may in fact be exercised through the authority to make personnel decisions over officers and directors of the Corporation and the authority to manage and supervise the Corporation.

Subjecting the validity of the provisions of the collective agreement concerning personnel and compensation concluded through autonomous collective bargaining between the labor and the management of the Corporation to the approval of the Minister of Health and Welfare who is a third party in the labor-management relationship, is in violation of the Constitution as an excessive restriction of the right to collective bargaining.

8. *No-smoking Zone and Right to Smoke Cigarette*

(16-2(A) KCCR 355, 2003Hun-Ma457, August 26, 2004)

Held, the National Health Promotion Act Enforcement Rule mandating the owner of the facilities used by the public to designate a no-smoking zone is constitutional.

Background of the Case

The National Health Promotion Act provides that the owner, the occupier or the manager of certain facilities as determined by the order issued by the Ministry of Health and Welfare should either designate the entire facility as a no-smoking zone or partition and designate a distinct no-smoking zone and smoking zone. Pursuant thereto, the provision at issue in this case determines in detail the facilities where the owners thereof or certain other individuals should designate no-smoking zone therein to include schools, medical institutions, and facilities for public performance. The complainant filed the constitutional complaint in this case, claiming that this provision violated the human dignity and value, the right to pursue happiness, and the right to privacy.

Summary of the Decision

The Constitutional Court, in the unanimous opinion of all justices, has dismissed the constitutional complaint on its merits, holding that the provision at issue in this case is not in violation of the Constitution. The summary of the grounds for the Court's decision is stated in the following paragraphs.

1. The right to freely smoke cigarettes is recognized based upon the human dignity and the right to pursue happiness under Article

10 of the Constitution and the right to privacy under Article 17 of the Constitution. The provision at issue in this case restricts the right to smoke cigarettes by designating the facilities used by the public where smoking is not permitted.

2. The right to avert cigarette smoking, which is the right of the non-smokers to not smoke and to be free from cigarette smoking, is also based upon Article 10 and Article 17 of the Constitution, as well as the right to smoke cigarettes. In addition, the right to avert cigarette smoking is also recognized based upon the constitutionally guaranteed right to health and right to life, in the sense that the health and life of the non-smokers who are exposed to indirect cigarette smoking is endangered.

There is no collision between the basic rights in the case where the smoker smokes cigarette in a way not affecting the non-smoker at all. However, the act of cigarette smoking in a space where the smoker and the non-smoker are together inevitably causes the collision of the basic rights of the smoker and the non-smoker.

In such a case, as the right to avert cigarette smoking is based not only upon the right to privacy but also upon the right to life which is the premise of all basic rights and lies at the highest position, the right to avert cigarette smoking is the basic right of the higher position compared with the right to smoke cigarettes. Where there is a collision between the basic rights one of which is superior to the other in hierarchy, the basic right in inferior position may be restricted pursuant to the principle of priority of the basic right in superior position. Therefore, in conclusion, the right to smoke cigarette may be recognized to the extent that it does not violate the right to avert cigarette smoking.

3. Furthermore, cigarette smoking concerns the public welfare common to the entire citizenry beyond the private interest of the individuals, in that cigarette smoking harms the health of the public including the smokers themselves and harms the environment by polluting the air. Therefore, pursuant to Section 2 of Article 37 of the Constitution that permits the restriction of the freedom and the right of the individuals for the sake of public welfare, cigarette smoking may be restricted by statute.

4. The provision at issue in this case has a legitimate purpose as it is for the protection of the health of the citizenry, and designating the no-smoking zone in places where the smokers and the non-smokers share their lives is an effective and appropriate means. The public interest of the health of the citizenry is greater than the private interest of the right to smoke cigarettes restricted thereby, and the provision at issue in this case specifically limits

the scope of and the prerequisites for the facilities used by the public to be designated as the no-smoking zone. Therefore, the provision at issue in this case is not in violation of the principle of prohibition against excessive restriction.

9. *Competence Dispute over Jurisdictional Authority over Embankment in the Asan-man Coastal Area*

(16-2(A) KCCR 404, 2000Hun-Ra2, September 23, 2004)

Held, in a competence dispute over the jurisdictional authority between two local governments over the embankment built for the construction of the harbor in the ocean, i.e., the Asan-man coastal area, located between the above two local governments, that Dangjin-gun, the petitioner, has the jurisdictional authority.

Background of the Case

In 1992, the chief administrator of the Shipping and Harbors Administration approved the harbor development project over the ocean, specifically the Asan-man coastal area, located between the Dangjin-gun and Pyeongtaek-si. Pursuant thereto, the administrator of the Incheon district Shipping and Harbors Administration in the capacity of the entity in charge of the project reclaimed the foreshore and constructed the embankment to be used as harbor facility, by completing the first-stage construction at the end of 1997. In the following year, upon request of the chief administrator of the Incheon district Shipping and Harbors Administration who was the entity in charge of the project, Pyeongtaek-si newly recorded in the Pyeongtaek-si land register the above harbor facility-purpose embankment. Subsequently, Dangjin-gun, the petitioner, on the ground that part of the above harbor facility-purpose embankment(hereinafter referred to as the 'embankment at issue in this case') belonged to the petitioner's jurisdiction according to the maritime demarcation on the topographical map published by the National Geography Institute in 1978, requested many times to cancel the registration of the embankment at issue in this case from the land register, which Pyeongtaek-si declined to comply with. The petitioner thereupon filed the request for competence dispute adjudication in this case,

claiming that the authority to self-government over the embankment at issue in this case belonged to the petitioner.

Summary of the Decision

The Constitutional Court, in a five-to-four opinion, has issued the decision that the jurisdictional authority over the embankment at issue in this case belongs to Dangjin-gun, the petitioner. The summary of the majority opinion and the summary of the dissenting opinion are respectively stated in the following paragraphs.

1. Summary of the Majority Opinion

A. The right to local self-government of the autonomous local government guaranteed under Section 1 of Article 117 of the Constitution includes the authority to exercise its self-government right within its jurisdictional area. The jurisdictional area of a local government is a constituting element of the local government along with its residents and self-governing right, and refers to the geographical bounds where the self-governing right may be exercised. As such, it clearly demarcates the jurisdiction of each local government against other local governments.

B. Section 1 of Article 4 of the Local Autonomy Act concerning the jurisdictional area of the autonomous local government merely provides that "the names and jurisdictions of local governments shall be the same as prescribed by the previous provisions of the Act, and any alteration, abolition, establishment, division or consolidation thereof shall be carried out pursuant to the provisions of the Act. But alteration of the jurisdictions of Shi/Gun and autonomous Gu shall be prescribed by the Presidential Decree," while there is no provision under the current law directly providing the local government with self-governing right over the public waters. However, relevant provisions of the individual statutes contain various provisions on the premise of the existence of the public waters that is subject to the jurisdiction of each local government. Also, the established position in academia, the precedents of the Supreme Court and the opinion of the Ministry of Government Legislation, as considered in totality, recognize the existence of the self-governing authority of the local government over the public waters.

C. Unlike land, with respect to the ocean, there is no area specified to be subject to the jurisdiction of a particular local government by way of the lot number assigned to real estate, nor is

there a statute directly delimitating the demarcation between the administrative districts. However, first, there exists an administrative custom recognizing the maritime demarcation on the topographical map published by the National Geography Institute(hereinafter referred to as the 'maritime demarcation on the map') as the demarcation between different administrative districts in the exercise of the administrative authority over maritime affairs(e.g., fishing permit and license and act of fishing control under the Fisheries Act; occupation and use and permission to use over the public waters under the Public Waters Management Act) by the local government; second, such administrative custom has been in existence for a considerably long period of time; and, third, there exists a legal conviction with respect thereto on the part of the local governments and the general citizenry. Thus, the maritime demarcation on the map is acknowledged as the maritime demarcation, also under the precedents in the administrative law. Therefore, the 'previous jurisdictions' within the meaning of the above provision of the Local Autonomy Act may be confirmed by the maritime demarcation on the map, in the case of the public waters.

From the standard of the maritime demarcation on the map as applied to the maritime area at issue in this case, the maritime area at issue in this case belongs to Dangjin-gun, the petitioner. Therefore, the petitioner has the jurisdictional authority over the maritime area at issue in this case.

D. The self-governing authority of the local government exists over the public waters as examined above. Also, the geographical jurisdiction over the maritime area and the geographical jurisdiction over land that is reclaimed over the same maritime area should coincide. Therefore, in the case of the reclamation of the public waters that was under the geographical jurisdiction of a particular local government in the past, such reclaimed land automatically lies under the geographical jurisdiction of that same local government, unless altered by a separate statute or presidential decree. As the petitioner has the jurisdictional authority over the maritime area at issue in this case, the petitioner likewise has the jurisdictional authority over the embankment at issue in this case constructed in the maritime area at issue in this case.

2. Summary of the Dissenting Opinion of Four Justices

A. Section 1 of Article 4 of the Local Autonomy Act regulates the delimitation of the land where the land register has actually or possibly been readjusted, and does not intend to regulate the ocean

that is the public waters, and there has been no affirmation by law so far of the geographical jurisdiction of the local government over the ocean. Therefore, the above statutory provision may not be directly interpreted to mean that the geographical jurisdiction of the local government includes the ocean. Pursuant to the official opinion of the National Geography Institute and the uncontested position of all departments and ministries of the government, the maritime demarcation on the map merely indicates the affiliation of the islands and does not have any binding legal force or weight as proof in the determination of the geographical jurisdiction of the local government. Therefore, the demarcation may not be determined by adopting this as the standard. In addition, there is no evidence sufficient to prove the existence of the time-long custom of deciding the maritime delimitation of the local government pursuant to the maritime demarcation on the map or the existence of the legal conviction with respect to such custom.

In conclusion, the jurisdictional authority of the local government over the public waters does not exist, as there is neither the legal ground to recognize the jurisdictional authority of the local government over the public waters nor the evidence to prove such fact. Such geographical jurisdiction can only be determined by law.

B. Even assuming the petitioner's jurisdictional authority over the maritime area at issue in this case, the petitioner's jurisdictional authority over the embankment at issue in this case is not recognized therefrom. The text of Section 1 of Article 4 of the Local Autonomy Act that states 'jurisdictions of local governments shall be the same as prescribed by the previous provisions of the Act' means that, if the administrative district has previously been determined, the district as determined as such will remain unchanged. Therefore, as the land formed by the reclamation of the ocean as in this case is newly created land that did not exist in the past, there is no room from the outset for the application of the standard decided by something that existed in the past. That is, the issue is not the question of how to determine the maritime administrative district on the public waters, but instead the question of how to determine the jurisdiction of newly created land. There is no statutory provision whatsoever with respect to how to determine the administrative district over the newly created land. If any changes in the geographical district between the cities and the provinces should be regulated by statute, inserting an area over which the geographical district has not been determined into a city or a province should also be regulated by statute, and it may not be deemed that the jurisdictional authority over the ocean automatically

extends to the land newly formed on the surface thereof. Therefore, as it is not possible to determine to which local government's geographical jurisdiction the embankment at issue in this case belongs until a statutory decision of the administrative district over the embankment at issue in this case, there is presently no statutory ground to deem that the petitioner has the authority of self-government over the embankment at issue in this case.

Aftermath of the Case

Following the issuance of the above decision of the Constitutional Court, the government revised the enforcement decree of the Harbor Act to change the name of the harbor the embankment at issue in this case, from "Pyeongtaek Harbor" to "Pyeongtaek-Dangjin Harbor."

10. *Aggravated Punishment for Crime of Intimidation*

(16-2(B) KCCR 446, 2003Hun-Ka12, December 16, 2004)

Held, the relevant provision of the Punishment of Violences, etc. Act punishing those who committed the crime of intimidation by an aggravated sentence under certain conditions is in violation of the Constitution.

Background of the Case

The Criminal Act provides that

A person who inflicts a bodily injury upon another shall be punished by imprisonment for not more than seven years or suspension of qualifications for not more than ten years or by a fine not exceeding ten million won,

A person who uses violence against another shall be punished by imprisonment for not more than two years, a fine not exceeding five million won, detention, or a minor fine,

A person who illegally arrests or confines another, shall be punished by imprisonment for not more than five years, or a fine not exceeding seven million won,

A person who intimidates another shall be punished by imprisonment for not more than three years, a fine of not more than

five million won, detention or a minor fine,

A person who intrudes upon ones residence, or who refuses to leave such a place upon demand, shall be punished by imprisonment for not more than three years or by a fine not exceeding five million won,

A person who obstructs another from exercising his right by violence, shall be punished by imprisonment for not more than five years,

A person who, by extortion, causes another to surrender his property or obtains pecuniary advantage from the latter, shall be punished by imprisonment for not more than ten years or by a fine not exceeding twenty million won,

A person who, by damaging another's property, reduces their utility, shall be punished by imprisonment for not more than three years or by a fine not exceeding seven million won.

The Punishment of Violences, etc. Act(hereinafter referred to as the "Violences Act") provides that If a person commits a crime listed in the above Criminal Act at night, carrying with himself any weapon or other dangerous articles, he or she shall be punished by aggravated sentence. The requesting petitioner was prosecuted for the violation of the Violences Act, for allegedly intimidating the victims at nighttime by holding in hand and brandishing a kitchen knife, which is a dangerous object, towards the victims and showing the attitude likely to harm their life or body. The underlying court reviewing the above case requested the constitutionality review on the ground that the provision of the Violences Act punishing the crime of intimidation by aggravated sentence was unconstitutional.

Summary of the Decision

The Constitutional Court, in the unanimous opinion of all justices, has issued the decision holding that the statutory provisions at issue in this case is in violation of the Constitution. The summary of the grounds for the Court's decision is stated in the following paragraphs.

1. In determining the type and the degree of the statutory sentence for a crime, the request for the respect and the protection for human dignity and values against the threat of criminal punishment under Article 10 of the Constitution should be observed, the statutory sentence should be determined within the range enabling the application of the principle of different punishment for different crimes pursuant to the spirit of prohibition of excessive

legislation of Section 2 of Article 37 of the Constitution for the substantive realization of the principle of the government by the rule of law, and the appropriate proportion should be maintained so that the criminal punishment corresponds to the nature of the crime and the responsibility therefor.

The balance between crime and punishment should be consistent with the value system of the time that is based upon the constitutional order. Therefore, a fresh review over the statutory sentence in the basic law of the Criminal Act is required as a matter of principle when the amount of sentence for a specific crime is no longer appropriate due to changes in social circumstances, while, however, the amount of criminal punishment should not exceed the degree of responsibility of the actor also when the sentence is aggravated for special reasons.

The provisions of the aggravated punishment in the Violences Act including the statutory provision at issue in this case provide for uniform sentencing of incarceration for the minimum of five(5) years for the respective acts of violating the pertinent provisions of the Criminal Act to which the respective provisions of the Violences Act apply. Here, the above respective crimes under the Criminal Act considerably vary in terms of the seriousness of the crime, the mode of the act, and the degree of danger. Accordingly, the original statutory sentences for such crimes greatly vary in terms of severity, from the lower end of possible penal detention or minor fine in the cases of violence and intimidation, to the higher end of the imprisonment for the maximum of ten(10) years in the cases of infliction of bodily injury and extortion. Uniformly imposing the sentence of imprisonment for the minimum of five(5) years solely for the reason of committing the act at nighttime and carrying a weapon or other dangerous articles is contrary not only to the principle of punishment by statute pursued by a the government by rule of law in its substantive and social meanings but also to the principle of prohibition against excessiveness or the principle of proportionality which is the constitutional limit that should be observed in enacting the legislation restrictive of the basic right.

2. It may be desirable to punish violence committed at nighttime while carrying a weapon and other dangerous articles more severely than the violence committed during daytime without carrying a weapon or other dangerous articles, for the former is worse in terms of the seriousness of the crime and the degree of danger. However, the aggravation of the statutory sentence is justifiable when it is an aggravation by a certain degree starting from the existing statutory sentence under the Criminal Act as the standard, and the appropriate degree of aggravation should remain in the

scope that is not clearly unjust compared with the similar crimes.

Even if the provisions of the aggravated punishment in the Violences Act are the choice made by the legislators for the achievement of the legislative purpose of eradication of the act of violence, the statutory provision at issue in this case judges the person who committed "intimidation" identically to the person who committed infliction of bodily injury, illegal confinement or extortion, for the reason of the time and method of crime, namely the "possession of the dangerous object at nighttime," while the content of the act and the consequential illegality of the actor completely differ. This is a clearly arbitrary identical treatment of those that should be treated differently, and a conspicuous lack of proportionality in the criminal punishment system as the result thereof, thus is also in violation of the principle of equality.

11. *Prohibition of Inmates from Exercising*
(16-2(B) KCCR 548, 2002Hun-Ma478, December 16, 2004)

Held, the relevant provision of the enforcement decree of the Criminal Administration Act prohibiting exercise of the inmates during the execution of sanction is in violation of the Constitution.

Background of the Case

The enforcement decree of the Criminal Administration Act limits the inmates' interviews to four(4) times per month, and also prohibits interviews, correspondence by mail and exercise during the execution of the forfeiture of rights which is a type of sanction. The complainant was subjected to the forfeiture of rights while imprisoned in the correction facility following final sentencing. The warden prohibited the complainant from interviews with a third party, from sending and receiving mail, and from doing exercise, during the duration of the execution of the forfeiture of rights, and, subsequent to the execution of the forfeiture of rights, despite the intention of the complainant to meet with the attorney, the warden did not permit the interview with the attorney on the ground that the monthly quota of four(4) interviews had already been exhausted. The complainant thereupon filed the constitutional complaint in this case, claiming that the complainant's basic rights of the right to personality, right to health, freedom of communication and right to trial had been violated by the relevant provision of the enforcement

decree of the Criminal Administration Act prohibiting the interview with third parties, correspondence by mail and exercise during the execution of the forfeiture of rights and by the disposition of the warden not permitting the interview with the attorney.

Summary of the Decision

The Constitutional Court, in the unanimous opinion of all justices, has issued the decision holding that, with respect to the relevant provision of the enforcement decree of the Criminal Administration Act, the part prohibiting the inmates from interviews and correspondence by mail during the execution of the forfeiture of rights is not unconstitutional, however, the part prohibiting exercise is in violation of the Constitution, and that the disposition of the warden that did not permit the interview with the attorney was not in violation of the Constitution. The summary of the grounds for the Court's decision is stated in the following paragraphs.

1. Even if the restriction of the basic right of the inmates is inevitable for the maintenance of safety and order within the prison facilities, the essence thereof may not be violated and the principle of prohibition against excessiveness should be observed. Specifically, the restriction of the basic right by way of rules and sanctions for the maintenance of order and safety within the prison facility is an affliction additionally imposed on the inmates aside from imprisonment. As such, it may be permitted only when the purpose cannot be achieved in any of the alternative methods.

2. As the purpose of the sanction of forfeiture of rights itself is to urge repentance by confinement in the punishment ward and strict isolation, the restriction of interviews and of sending and receiving mail is inevitable. The relevant provision of the enforcement decree of the Criminal Administration Act, while prohibiting interviews and correspondence by mail during the execution of the forfeiture of rights, provides for the exception thereto in the proviso so that the warden may permit interviews and correspondence by mail even during the execution of the forfeiture of rights "when it is determined to be especially necessary for the purpose of education or treatment," thereby preventing it from becoming an excessive restriction. Therefore, such restriction of interviews and correspondence by mail of the inmates who are subject to the forfeiture of rights is the necessary minimum restriction for the legitimate purpose of maintenance of safety and order within the prison facility.

3. Outdoor exercise is the minimum basic requirement for the

maintenance of physical and mental health of the inmates who are imprisoned. Considering that the inmate subjected to the forfeiture of rights, even compared with other inmates in solitary confinement, lies in the state where communication with the outside world is disconnected, as interviews, correspondence by mail, communication by telephone, writing, work, reading the newspaper or books, listening to the radio and watching the television are prohibited, and is imprisoned in the punishment ward which is the size of approximately three(3) square meters with insufficient ventilation for up to two(2) months, there is a clearly high risk that completely banning the inmate subjected to the forfeiture of rights from doing exercise will harm mental as well as physical health of such inmate. Therefore, the absolute ban of exercise of the inmate subjected to the forfeiture of rights, even considering the purpose of the sanction, is beyond the necessary minimum degree in terms of means and methods thereof, thus in our judgment reaching the extent violative of the human dignity and values under Article 10 of the Constitution and of the bodily freedom under Article 12 of the Constitution that includes the freedom not to have bodily safety injured.

4. The inmate incarcerated for the execution of the punishment of imprisonment upon final sentencing has the status that is distinguishable from the status of the detainee, thus it is inevitable to restrict the frequency of the interviews for the inmate to a considerable degree. Also, even if the frequency of the interviews is restricted by including the interviews with the attorney in the general interviews, the inmate may prepare or carry out litigation by mailing letters and authored documents and communicating by telephone. Therefore, the disposition of the warden not permitting the interviews may not be deemed to violate the complainant's constitutionally guaranteed right such as the right to trial of Article 27 of the Constitution.

12. *Agreement for Trade of Garlic between Republic of Korea and People's Republic of China*

(16-2(B) KCCR 568, 2002Hun-Ma579, December 16, 2004)

The Constitutional Court dismissed on the procedural ground the constitutional complaint challenging the clause for free importation of garlic by South Korean private enterprises included in the

agreement between South Korea and China concerning the trade of garlic, and also challenging the failure to act for notification thereof to the citizens.

Background of the Case

In order to settle the disputes including the South Korean measure restricting the import of garlic produced in China and the termination of import by China of the South Korean mobile telephones, the government trade representative, with the Chinese counterpart, signed on July 31, 2000 an agreement concerning the trade of garlic between the Republic of Korea and the People's Republic of China to the effect that the restriction upon the import of garlic produced in China that had already been imposed by South Korea for the previous three years would be maintained. The government thereupon disclosed through press release that the amount of garlic to be imported from China was practically frozen for the three years to come at the level of the amount imported in 1999 or less. However, in fact, the supplemental document to the above agreement with China contained the additional agreement stating that the "private enterprises of the Republic of Korea may freely import garlic from the date of January 1, 2003," which the government did not disclose. The complainants, who were cultivating garlic, filed the constitutional complaint in this case claiming that their right to know and property right had been infringed by the above additional agreement and the failure to notify such additional agreement.

Summary of the Decision

The Constitutional Court, in the opinion of all justices with the exception of the separate concurring opinion of one justice, dismissed the constitutional complaint on the procedural ground. The summary of the grounds therefor is stated in the following paragraphs.

1. Summary of the Majority Opinion of Eight Justices

A. The measure restricting the import of garlic produced in China is merely to provide a certain amount of extra time for countermeasure by temporarily protecting the agricultural households that have failed to adjust themselves to the concrete economic situation that face them, and not to secure a legal situation

beneficial to the agricultural households cultivating garlic by maintaining the import barrier against the garlic produced in China for a long term or without temporal limit. Therefore, no legally justifiable expectation interest whatsoever can be endowed to the agricultural households cultivating garlic with respect to the renewal of the above import restriction measure, neither may the property right of the agricultural households cultivating garlic be deemed to be restricted by the government's decision to not renew the import restriction measure. In addition, the opportunity to cultivate garlic in an economically manageable way with constant profit is not something guaranteed as the basic right. Thus, even if they should discontinue the cultivation of garlic due to the exacerbation of business situation, the freedom to choose occupation may not be deemed to have been affected thereby. Therefore, as there is no room for the infringement upon the basic right of the complainants such as their property right, the constitutional complaint challenging the above agreement is unjustified.

B. The government's obligation to disclose that is derived from the right to know, exists only upon the citizen's act of active collection of information and especially the request for disclosure of specific information unless there is an exceptional situation. Therefore, in this case where there was no request for disclosure of information, the government was under no obligation to disclose in advance the import liberalization measure part out of the agreement concerning the trade of garlic between the Republic of Korea and the People's Republic of China.

In addition, although an obligation to disclose corresponding to the right to know may be recognized as an exception in the case of a certain categories of treaties for which there exists the obligation to promulgate even without request for disclosure, the above agreement with China may not be deemed as the final decision over the renewal of the emergency import restriction measure even pursuant to the supplemental document at issue in this case because such a decision should go through the process of investigation and recommendation of the Trade Committee under the applicable law. Thus, it may not be deemed that the government as the matter of Constitution should necessarily give such agreement the effect identical to that of the domestic law by way of promulgation.

As such, there is no obligation on the part of the government to disclose the supplemental agreement with respect to the import of garlic. Therefore, the constitutional complaint challenging the failure to act that is based on the premise of the government's obligation to disclose is unjustified.

2. Summary of the Separate Concurring Opinion Of One Justice

The above agreement concerning the trade of garlic is equivalent to the so-called public notice-type treaty, which under the domestic law has the status equivalent to the public notice and does not have the status as statute. The authority of the executive branch of the government to enter into such public notice-type treaties accompanies in its own nature a very broad discretion. Such discretion of the executive branch is fundamentally strategic and tactical and, further, may not depart from mutualism. Therefore, the constitutional complaint in this case should be dismissed, as the exercise of the authority by the government and the content thereof with respect to the conclusion of the public notice-type treaty may not be the subject matter of review on constitutional complaint unless there is a clear digression from or abuse of the procedure determined by the Constitution and the statute.

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