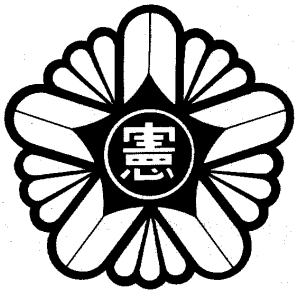
DECISIONS
OF
THE KOREAN CONSTITUTIONAL COURT
(2006)



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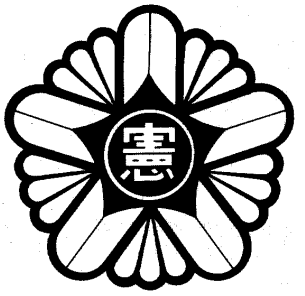

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2007

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http://www.ccourt.go.kr

Government Publication Registration Number
33-9750000-000032-10

Preface

The publication of this volume is aimed at introducing to foreign readers important cases decided from January 1, 2006 to December 31, 2006 by the Korean Constitutional Court.

This volume contains 18 cases, 4 full opinions and 14 summaries.

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

Professor Park Kyung Sin, Korea University(Assistant Professor), translated full opinions and Professor Park Yong Chul, Sogang University(Assistant Professor) translated summaries of opinions. Professor Lim Ji bong, Sogang University(Associate Professor) proofread the manuscript. The Research Officers of the Constitutional Court provided much support. I thank them all.

August 31, 2007

Ha Chul Yong
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. *Local Government Officers' Elected Term Limit Case*

[18-1(A) KCCR 320, 2005Hun-Ma403, February 23, 2006]

In this case, the Constitutional Court ruled that the three time elected term limit on local government officials set forth in Article 87 Paragraph 1 (hereinafter referred to as the "Instant Provisions") of the Local Autonomy Act(hereinafter referred to as the "the Act").

Background of the Case

Petitioners are local government officials who are serving their third elected term. They filed this constitutional complaint, arguing that the Instant Provisions, firstly, restrict their right to serve public offices without reasonable cause by limiting the number of elected terms regardless of their competence to hold the offices, and secondly, violate their right to equality by imposing the term limit only on local government officials while not imposing such limit on other elected officials such as the members of local councils.

Summary of the Decision

The Constitutional Court dismissed the Petitioners' claims in 6 : 3 decision for the following reasons:

1. Majority Opinion of Six Justices

A. The legislative purpose of the Instant Provisions is to protect regional growth from disruptive influences of prolonged incumbency and to broaden opportunities for talented persons to run for local government offices. The Instant Provisions also have incidental effects of encouraging the officers elected for the third time to conduct their local administrative functions fairly and reasonably without the distractions of reelection and partisan

politics. We acknowledge the legitimacy of the purpose of the Instant Provisions.
Once a person of influence is elected into a local government office, it is likely that the officer will attempt at prolonged incumbency by taking control of and organizing the civic servants in office and other local supporters. When the officer abuses its power in personnel, financial, and other areas, it is practically difficult to detect such instances of abuse. Even when it is detected, the Act has not adopted the retirement age for or the citizens' recall vote for local government officers, and therefore it is difficult to restrain such abusive officer during the officer's term. Therefore, the Instant Provisions constitute the means of last resort to correct the above-mentioned disruptions in local government administration and therefore have the appropriateness of means.

The Instant Provisions restrict election beyond the third term. They do not restrict the local government officials' right to hold public offices from the beginning. If they are not elected for consecutive terms, there is no term limit. Even if consecutively elected, they can serve three time terms (12 years). Then, by not seeking candidacy for one term, they can seek candidacy for additional three time consecutive terms. If so, the restriction on the right to hold public officers is relatively abated and the Instant Provisions satisfy the requirement of the minimal restriction.

The extent of restriction on the right to hold public offices by the Instant Provisions is relatively meager while the legislative purpose of the Instant Provisions is important public interest that should be attained to promote the nascent local governance system. Therefore, under the current Act lacking the means of potent restraint against the incumbent local government officials, the Instant Provisions are meaningful as an effective means to attain the public interest, and when weighed against the restriction on the local government officials' basic rights, do not depart from the principle of balance of competing interests.

B. The members of local councils have the right to be elected to be the chairperson or the vice chairperson of the local councils, and the rights to initiate a bill, make statements, vote, and participate in the local council to make resolutions. However, fundamentally, a councilperson is merely a member of the local council, a conferential body, and therefore cannot influence local government administration merely with the powers of one person. In contrast, the local government offices are unitarily operated administrative bodies. The local government heads are the chief executive officers of the local governments and have the powers to oversee their operation, promulgate rules, submit issues to residents' vote, and hire or

supervise the employees, and influence greatly the local self-governance. Therefore, the likelihood and magnitude of side-effects due to re-election are much greater for local government heads than for local councilpersons. Therefore, discriminatory treatment between local government heads and local councilpersons has a reasonable basis.

The members of the National Assembly are the representatives of people and represent the interests of the entire people of the country(Article 46 Paragraph 2 of the Constitution). Due to their unique role, they are granted the privilege against arrest and the immunity(Articles 44 and 45 of the Constitution). Therefore, it is inappropriate to place them on the same or similar status as those of the head of the local government in charge of local administration and take them into account as the comparison group for right to equality.

2. Dissenting Opinion of Three Justices

A decision on what is best for the interest and welfare of local residents lies with the local residents themselves. A decision on who is an appropriate person for local development also lies with the residents themselves, whose decision is therefore legitimate in itself and who take responsibility for the consequences of such decision. Not acknowledging their autonomy and responsibility and setting involuntary and external conditions and limits on the same is not consonant with the nature of local autonomy. The Instant Provisions contradict the basic principles of democracy and local autonomy and restrict the right to hold public offices through inappropriate and excessive means, and therefore are unconstitutional.

Party

Petitioners

Kwon ○ Yong and thirty four others
(The names of all Petitioners are listed in the attachment)
Counsel: Yi Seok Yeon and one other

Holding

The claims of this case are rejected.

Reasoning

1. Petitioners' Arguments and Subject Matters of Decision

A. Petitioners' Arguments

(1) Petitioners are the heads of the following districts, the mayors of the following cities or the heads of the following counties, who are serving or have served their third consecutive elected term: Kwon ○ Yong, Gangnam, Seoul(resigned on February 16, 2006); Cho ○ Ho, Seocho, Seoul; Chung ○ Sup, Gwangjin, Seoul; Ko ○ Deuk, Seongdong, Seoul; Park ○ Suk, Yeongdong, Busan; Park ○ Young, Saha, Busan; Park ○ Hae, Yeonje, Busan; Hwang ○ Hyun, Dalseo, Daegu; Kim ○ Taek, Suseong, Daegu; Cho ○ Ho, Jung(as in "Jung-gu"), Inchon; Yoo ○ Woo, Ichon, Gyunggi; Shim ○ Sup, Gangrung, Gangwon; Hong ○ Il, Taebaek, Gangwon; Kim ○ Dong, Samcheok, Gangwon; Cho ○ Jin, Hoengseong, Gangwon, Kim ○ Chang, Jungsun, Kwangwon; Yoo ○ Yeol, Okchun, Chungcheong; Kwak ○ Hee, Gimje, Jeonbuk; Im ○ Jin, Jinahn, Jeonbuk; Kim ○ Sik, Jangseong, Jeonnam; Park ○ Yong, Gimchun, Gyeongbuk; Kim ○ Soo, Sangju, Gyeongbuk; Chung ○ Gul, Uisung, Gyeongbuk; Kim ○ Ro, Jinhae, Gyeongnam; Song ○ Bok, Gimhae, Gyeongnam; Yi ○ Cho, Milyang, Gyeongnam; and Shin ○ Joo, Bukjeju, Jeju (hereinafter referred to as the "Petitioner Officials")

The following Petitioners are voters residing in the following districts: Yi ○ Geun and Keum ○ Whan, Gangnam, Seoul; Chang ○ Hyun, Seongdong, Seoul; Shin ○ Gun and Yi ○ Bung, Gwangjin, Seoul; Oh ○ Soo, Bukjeju, Jeju; Kim ○ Sun, Milyang, Gyeongnam; and Cho ○ Mok, Gangrung, Gangwon(hereinafter referred to as the "Petitioner Residents")

(2) Petitioners argued that Article 87 Paragraph 1 of the Local Autonomy Act limiting the consecutive elected terms of local government heads to three time violates the Petitioners' constitutional right to hold public offices, right to vote in elections, right to equality, and etc., and filed this constitutional complaint.

B. Subject Matter of Decision

The subject matter of this case is Article 87 Paragraph 1 of the Local Autonomy Act(revised on December 20, 1994 by Act No. 4789) which states that the consecutive elected terms of the head of the local government shall be limited to three time(hereinafter referred to as the "the Instant Provisions"), which reads as follows:

Article 87 of the Local Autonomy Act(Tenure of the Local Government Heads)

(1) The term of service for the head of the local government shall be four years, and the consecutive terms of service shall be limited to three time.

2. Petitioners' and the Ministry of Government Administration and Home Affairs' Arguments

A. Petitioners' Arguments

Petitioner Officers argue that the Instant Provisions (1) infringe on the right to hold public offices by barring one from candidacy solely for reason of the number of prior incumbencies without reasonable cause and regardless of his or her competence to be elected; (2) violate the right to equality by imposing the three time term limit only on the local government heads while the members of the National Assembly and local councils, and the other elected officials are not subject to the term limit; and (3) infringe on the right to pursue happiness of the local government heads who would like to run to exceed the three time term limit.

Petitioner residents argue that the Instant Provisions infringe upon the local residents' right, which has been constitutionally guaranteed under the local governance system, to elect the most appropriate person to accomplish local welfare(the right to vote in elections), and general freedom of action.

B. Arguments of the Ministry of Government Administration and Home Affairs

The contents of the right to hold public offices, the right to vote in elections, and the local governance system are determined by statute, and therefore in absence of infringement on their essences, fall under legislative discretion. Local government heads are the heads of administrative bodies and therefore are not comparable to the members of the National Assembly or local councils. The essential content of local governance system consists of the guarantee of local self-governing bodies, self-governing

functions, self-governed administration, and local councils. The Instant Provisions guarantee representative local autonomy. The three time term limit prevents irregularities in local administration due to corruption of local government heads, facilitates life cycles of local political personnel, and enhances the welfare of local residents. The private interest infringed thereby does not outweigh the public interest achieved and therefore the term limit abides by the principle of proportionality in restricting basic rights.

3. Statutory Requirements

A. Legal Relevance

Petitioners are the head of the local government in their third consecutive terms who cannot run again for the local government head elections due to the Instant Provisions, or those who cannot vote for these local government heads in the next elections. Therefore, the Instant Provisions restrict directly, without intermediaries, the basic rights of the Petitioners and therefore abide by the requisite directness. It is their own basic rights being restricted. Therefore, the requisite self-relatedness is also satisfied. Also, the restriction on basic rights is clearly anticipated, and therefore the requisite presentness is deemed satisfied.

B. Timing of Petition

The Minister of Government Administration and Home Affairs argues that, since the Instant Provisions have been effective since December 20, 1994, and the petitions hereunder have exceeded the time limit for filing and are therefore illegitimate.

However, the Instant Provisions do not restrict on the basic rights of the Petitioners immediately upon becoming effective. The infringement on basic rights takes the concrete presence only when the Petitioner local government heads are about to serve in the offices in more than three time consecutive terms, and therefore cannot be said to exceed the time limit for filing.

4. Review on the Merits

A. Legislative Backgrounds of the Instant Provisions and the Present State of Consecutive Incumbency of Local Government Heads

(1) Article 87 Paragraph 1 of the former the Local Autonomy Act(prior to the revision through Act No. 4789, December 20, 1994) provides "The term of office of the head of the local government shall be four years" and did not have limitation on consecutive services. In 1995, when the local governance system was truly implemented, the Instant Provision limiting the consecutive terms of the head of the local government to three time was enacted.

The Instant Provisions were adopted for the purpose of enhancing competitiveness of local self-governing bodies. The concrete legislative purpose was to prevent local government heads from using their personnel decisions as means to prolong their incumbency through consecutive terms, protect local development from complicities with local luminaries, suppress corruptions, and broaden opportunities for competent people to participate in politics.

(2) As of March 2005, the greater-area local government heads in their third consecutive terms account for 12.5%(2) of all greater-area local government heads. Among basic local government heads, the percentage is 14.6%(29).

B. Whether the Right to Hold Public Offices has been Infringed

(1) Article 25 of the Constitution states "All citizens shall have the right to hold public office under the conditions as prescribed by the Act" and guarantees the right to hold public offices as a basic right. The right to hold public offices means the right to perform the work duties as the members of local self-governing entities and other state or public entities. To perform work duties here does not mean that all people can actually perform those duties but that people are guaranteed equal opportunities to do so in a rational manner. The protected scope of the right to hold public offices covers not only irrational exclusion from the opportunity to hold public offices but also the unjust deprivation of the status as a civic servant(9-1 KCCR 325, 332, 96Hun-Ba86, March 27, 1997 ; 14-2 KCCR 219, 223, 2001Hun-Ma788 et al., August 29, 2002). The right to hold public offices is a right to hold public offices in all state entities and therefore includes the right to be a candidate and be elected in various elections.

On the other hand, people are grated the right to hold public offices "as determined by statutes" and therefore the legislature is given wide legislative-formative discretion in determining the contents of that right. However, such discretion should not exceed the limit on restriction on basic rights set forth in Article 37

Paragraph 2 of the Constitution(14-2 KCCR 219, 225, 2001Hun-Ma788 et al., August 29, 2002)

(2) Legitimacy of the Purpose

The legislative purposes of the Instant Provisions are to protect local development from adverse effects of prolonged incumbency and to broaden the opportunities for competent prospects to serve as local government heads. The Instant Provisions have the incident effects of freeing local government heads elected the third time from the temptation to seek continued incumbency and thereby ensuring fair and reasonable administration of local government matters independent of partisan politics. Therefore, the Instant Provisions have the requisite legitimacy of purpose.

(3) Appropriateness of Means

Local government heads represent the relevant local self-governing bodies, and oversee, control and execute the affairs thereof(the Local Autonomy Act, Articles 92 and 94), direct and supervise personnel under the heads' control and administer matters concerning appointment, dismissal, training, service, disciplinary sanction, and etc.,(Article 96), have the power to appoint the heads of subordinate administrative entities(Article 109) and propose for residents' referendum the important matters of the local governing bodies(Article 13-2).

Therefore, once an influential person from the locality is elected into a position of a local government head, it is highly likely that the elected will attempt at prolonged incumbency by organizing the employees of the relevant government bodies and other supporters in that locality. Especially, the incumbents have a clear advantage over other candidates vis-a'-vis their authority over personnel decisions. The incumbents can also obtain support from influential local people more easily by collusion with powerful and wealthy local families. Because the voting rate in elections for local government heads and local legislatures is not very high, the support formed on the basis of private gains will increase the probability of prolonged incumbency during which privately driven factionalism arising thereof may paralyze the very functioning of local self-governance.

Given the reality of our local politics, we fear that the head positions of a substantial number of basic local self-governing bodies may be monopolized by people from certain families or schools. The monopoly will lead to spoils systems, bringing down the morale of civic servants or giving rise to corruption and irregularity and wasteful local administration. Under certain circumstances, it may even lower the creativity and will power of

long-entrenched local government heads themselves and set up an obstacle to local development.

A violation of law by a local government head is subject to regulation by criminal law. Residents can petition for an audit or file a residents' suit on the matters within the jurisdiction of the relevant local government bodies and their heads(the Local Autonomy Act, Articles 13-4 and 13-5). When local government heads exercise their overreaching powers illegitimately in the areas of personnel and finance, it is practically difficult to detect such exercise. Even if such overreaching is revealed, when there is no retirement age or residents' recall vote under the current Local Autonomy Act, a check on local government heads mid-term is practically difficult. Even at the end of the term, due to the special features of local elections described above, it is likely that an incumbent will be re-elected.

Therefore, the Instant Provisions have the requisite appropriateness as the last means to correct the aforesaid disturbances in local self-governed administration under the present the Local Autonomy Act.

(4) Minimality of Restriction

The Instant Provisions concern consecutive re-election beyond three time terms. Therefore, the Provisions do not restrict the Petitioner local government heads' right to hold public offices from the beginning. As long as not re-elected consecutively, they can be candidates without any limitation. If re-elected consecutively, they can hold the offices for twelve years(provided that, the first three time terms under the Instant Provisions are eleven years.) If they do not become candidates in any one election after that, they can again be in incumbency for another consecutive set of three time terms.

Then, the extent of restriction imposed by the Instant Provisions on the right to hold public offices is relatively abated, and the requirement of the Minimality of Restriction is satisfied.

(5) Balance of Interests

The Instant Provisions restrict the right to hold public offices but do not deprive one of the right from the beginning. When three time consecutive terms are allowed, the restriction on the basic right is relatively meager. On the other hand, the public interests aimed to be accomplished by the Instant Provisions such as protection of local development and broadening of opportunities for competent aspirants are important and necessary for the advancement of meaningful local governance system, which has barely taken roots. The Instant Provisions, though enacted

previously, have not actually taken effects until 2006. In comparison to when they were enacted, the level of participation by local residents and the maturity of political awareness, and the availability of access to the information on local administration have been improved. However, the possible evils that the legislature tried to provide against in enacting the Instant Provisions cannot be said to have completely disappeared.

Therefore, under the current Local Autonomy Act not equipped with strong checks on local government heads, the Instant Provisions constitute meaningful and effective means to accomplish public interest and, even in consideration of the basic rights of the Petitioner local government heads being restricted, do not violate the principle of balance between legal interests.

(6) Petitioners, in addition to arguing that their right to hold public offices are being infringed by the Instant Provisions, argue that their right to pursue happiness is infringed.

When one regulation restricts more than one basic rights, our analysis of the limit on the restriction should center the basic right which is deemed most closely related to the controversy and deemed most severely restricted in light of the Petitioners' intent and the objective motive of the legislature behind such restriction(10-1 KCCR 327, 337, 95Hun-Ka16, April 30, 1998). In consideration of the Petitioners' arguments and the legislature's intent, the regulation arising out of the Instant Provisions is mostly closely related to the right to hold public offices, and the basic right most severely restricted is also the right to hold public offices. A response to the Petitioners' arguments vis-a'-vis the right to pursuit of happiness suffices with our decision on infringement of the former.

C. Whether the Right to Equality is Infringed

(1) Whether an equality violation shall be reviewed under a strict standard of review or a relaxed one depends on the scope of legislative-formative power granted to the legislature. First of all, if the Constitution specifically requires equality, the strict standard may be applied. If the Constitution itself states the criteria upon which discrimination shall not be based or the areas within which discrimination shall be particularly banned, discrimination based upon such criterion or discrimination within such area shall be justly subject to strict review. Furthermore, if discrimination causes grave restrictions on relevant basic rights, the legislative-formative power shall be limited and be subjected to strict scrutiny (11-2 KCCR 770, 787, 98Hun-Ma363, December 23, 1997).

The Instant Provisions restrict the right to hold public offices but do not discriminate within an area constitutionally banned or cause grave restrictions on the relevant basic rights. The right to hold public offices is unique in that the work performed in such offices accomplishes public interest. Therefore, a restriction on the right to hold public offices shall be presumed to have relatively strong constitutionality as long as the restriction does not infringe on the essence of the work performed and does not cause infringement on other basic rights. Therefore, compliance with the principle of equality or a reasonable relationship between means and ends shall be the main subject matter of review, and a balance between legal interests shall be also reviewed under a relatively relaxed standard (14-2 KCCR 541, 550, 2001Hun-Ma557, October 31, 2002).

Therefore, the equality review of the Instant Provisions shall suffice with a rationality review.

(2) A possible group to be compared to in the equality review of the Instant Provisions are elected officials and more concretely the members of local councils.

The members of local councils are elected officials who have run and prevailed in elections in certain regions. They represented the interests of the relevant localities and constitute a local council, a branch of the relevant local self-governing body. Local councils represent local residents, make the decisions of the relevant local self-governing body within the scope set by the relevant laws and regulations and the decisions concerning local administration, promulgate ordinances, and monitor and supervise the work of the executive branch as the representatives of the local residents. Therefore, local councilpersons can be deemed elected officials in a situation similar to that of local government heads in light of the purposes of the Local Autonomy Act such as democracy and efficiency in local self-governing administration, balanced local development, and the promotion of national democracy.

Local councilpersons have the rights to be elected to be chairpersons and vice chairpersons of the local councils, and the right to initiate proposals, make statements, and vote on the proposals, and can participate in local council meetings and resolutions thereof. However, they are merely the members of a local council, a conferential body. A local councilperson cannot exercise great influences on local administration with his or her individual power. In considering deliberate and equitable decision-making process unique to a conferential body, fair mediation among various interests, and democratic decision-making processes, the wills of individual local councilpersons materialize

after conference with other local councilpersons in form of the decisions of the local councils and thereby the resulting decisions are procedurally justified. Contrarily, the head of the local government are unitary administrative entities, who as chief executive officers of local self-governing bodies are empowered to oversee and execute the operation of the local self-governing bodies, promulgate rules, initiate proposals on residents' referendum, and hire and supervise the employees, and thereby exercise great influences on local administration. Therefore, the two are equally elected by residents but the probability and magnitude of adverse effects due to repeated incumbencies is much greater for local government heads. Therefore, differential treatment of local government heads and local councilpersons has a rational basis.

(3) Petitioners argue that the members of the National Assembly shall also be the comparison groups in conducting equality review.

The members of the National Assembly are similar to local government heads in that they are elected civic servants elected by residents of certain areas. However, the members of the National Assembly are functioning as the representatives of people who represent the interests of the people of the entire country(Article 46 Paragraph 2 of the Constitution). Due to their unique role, they are granted the privilege against arrest and the immunity(Articles 44 and 45 of the Constitution). It is inappropriate to place them on the same or similar status as those of the local government heads conducing local administration and take them into account as the comparison group for equality purposes. Even if deemed a comparison group, almost all justifications for differential treatment of local councilpersons will equally apply.

(4) Therefore, the Instant Provisions regulate only the prolonged incumbencies of local government heads because of the relatively high risk of interfering with democracy and efficiency in local autonomy and balanced local development, and thus has a rational basis.

D. Whether the Right to Vote in Election has been Infringed

(1) Petitioner residents argue that the Instant Provisions ban local government heads in their third terms from candidacy and thereby infringe on the residents' right to vote for the persons with the proven capabilities and integrity.

(2) Article 24 of the Constitution states "All citizens shall have

the right to vote under the conditions as prescribed by the Act." The right to vote here means the right of the people to elect civil servants. In our country where indirect democracy has been adopted, the right to elect civil servants is the most important of people's rights to participate in politics. Civil servants are most broadly defined here to include not just ordinary civil servants but also the President, the National Assemblypersons, local government heads, local councilpersons, judges, and all other persons constituting national and local government entities (14-1 KCCR 211, 223, 2000Hun-Ma83 et al., March 28, 2002). Therefore, the Petitioner residents have the right to elect local government heads as set forth by statute.

However, in exercising their right to elect local government heads, if a person to be voted for does not voluntarily, or cannot due to legal restrictions, obtain candidacy, the voters will suffer indirect and factual restrictions on their choices of candidates but cannot be said to suffer infringement on their election rights. At most, the person unable to obtain candidacy suffers a restriction on the right to hold public offices.

E. Infringement on Rights to the Local Governance System

(1) Petitioners argue that the Instant Provisions excessively infringe on residents' right to self-determination and thereby exceed the limit on legislative-formative power.

(2) The essential content of local autonomy is guarantee of local self-governing body, local self-governing functions, and local self-governed administration (6-2 KCCR 510, 522, 94Hun-Ma201, December 29, 1994). The constitutional guarantee of local self-governing bodies includes the autonomy of those bodies as well as the autonomy of the residents.

The local government system is one of the institutional guarantees of the Constitution (6-1 KCCR 317, 339, 91Hun-Ba15 et al., April 28, 1994 ; 10-1 KCCR 380, 384, 96Hun-Ba62, April 30, 1998). "An institutional guarantee arises out of placing provisions in the Constitution specifying a certain objective institution and thereby maintaining the integrity of such institution. When the framers of the Constitution find a certain national institution especially important and worthy of constitutional protection, the framers specify such institution in the Constitution and thereby regulate the future development, directions and scope of relevant laws. In other words, institutional guarantees are different from basic rights in that they are not subjective rights but objective norms. However, once such institution is guaranteed in the

Constitution, the legislator has a duty to form and maintain such institution, and due to the presence of a specific mandate, cannot abolish by legislation or infringe on its essential content in restricting on the content. However, while guarantee of basic rights …… omitted …… is subject to the requirement of 'maximum guarantee', institutional guarantees permit broadly the legislator's power to determine the substance and form of the institutions and are therefore subject only to the requirement of 'minimum guarantee(9-1 KCCR 435, 444-445, 95Hun-Ba48, April 24, 1997).'"

(3) Residents' right to self-government are institutional guarantees and therefore are not rights granted to individual residents. Even if we understand Petitioners' arguments as those concerning the residents' right to participate in the decision-making or vote on the local matters, these rights cannot be said to be basic rights to participate in governance guaranteed by the Constitution (13-1 KCCR 1431, 1439-1440, 2000Hun-Ma735, June 28, 2001). In other words, the constitutional scope of local self-government is determined by law and can be restricted by law outside its essential area.

The Instant Provisions' restricting of incumbent local government heads from repeating terms beyond the third does not gravely undermine residents' right to self-government. Furthermore, the newly elected heads will also have been elected with the hands of the residents themselves to oversee local self-government administration. Therefore, there is no infringement on the essential function of local self-government. The Instant Provisions do not excessively restrict local governance system and cannot be said to exceed the limit of legislative formation.

5. Conclusion

Therefore, this constitutional complaint is rejected as set forth above. This decision is a unanimous one except Justices Kwon Seong, Song In-jun, and Choo Sun-hoe who wrote a dissenting opinion set forth below.

6. Dissenting Opinion of Justices Kwon Seong, Song In-jun and Choo Sun-hoe

We dissent from the majority opinion for the following reasons:

A. The Republic of Korea is a democratic republic. The essence of democracy is that the basis of state power and its

exercise are based on the consent of the people. Where a modern state performing a variety of functions over a vast territory, representative democracy is not simply useful in but necessary for setting up a governance system, and has now become one of the fundamental principles of the Constitution (10-2 KCCR 600, 606, 96Hun-Ma186, October 29, 1998). The local governance system allows the local residents of a defined area to take responsibility for and carry out the work concerned their welfare, properties and other legally defined matters(Article 117 Paragraph 1 of the Constitution) through the entities elected by themselves, thereby enhance democracy and efficiency in local self-government and promote balanced local growth and the development of national democracy. The Local governance system is a local manifestation of representative democracy. Therefore, the directions of local development and the broadening of political opportunities to new prospects should be left up to the residents themselves as long as residents' opinions are democratically and rationally congregated and converged and the local self-governing entities are elected from the converged opinions to perform the work concerning the residents' welfare.

Article 25 of the Constitution states, "All citizens shall have the right to hold public office under the conditions as prescribed by the Act." and grants the legislature broad legislative-formative discretion in determining the contents of the right to hold public offices (14-2 KCCR 219, 225, 2001Hun-Ma788 et al., August 29, 2002). However, the public offices are the means through which local self-governing entities execute political decisions on behalf of local residents and thereby materialize representative democracy. Restriction on the right to hold public offices shall not interfere with the functioning of the local governance system under the principle of representative democracy and the legitimacy of the election through which local self-governing bodies are elected upon the residents' consent.

B. The majority opinion identifies as the legislative purposes of the Instant Provisions prevention of spoils systems, protection of local development, and broadening of political opportunities to new prospects. These may be the legislative purposes to be achieved at the expense of restricting the right to hold public offices. However, the Instant Provisions are not appropriate means to achieve those purposes and do not qualify as the minimum necessary restriction of basic rights.

Prolonged incumbency of local government heads itself cannot be an obstacle to local development. Local development does not depend on lengths of offices but the heads' capabilities and

integrity. If a local government head is in his or her third term, we should assume that it is because he or she has developed the relevant local governing entities and strengthened the competitiveness thereof during his or her terms, barring special circumstances.

Corruption and irregularities can take place regardless of prolonged incumbency. In recognition of this, the Local Autonomy Act has instituted residents' request for audit(Article 13-4), residents' suits(Article 13-5), local councils' authority to audit and investigate administrative affairs(Article 36), the Central Government's authority to supervise local government affairs(Article 156-2), correction of unlawful or unreasonable orders and disposition(Article 157), the Ministerial orders to local government heads to perform duties(Article 157-2), and the Ministry of Government Administration and Home Affairs' authority to audit(Article 158), and thereby provided the means for monitoring and supervising local government heads. Even if the aforesaid monitoring or supervisory devices cannot control incompetence, corruption, and irregularities of local government heads and the Instant Provisions are being considered as the last recourse, retirement age or the age limit on candidacy are the less restrictive means to achieve the aforesaid legislative purposes.

Also, intra-party competitions and evaluations conducted during party endorsements of candidates, and critical monitoring and checking by the media also appropriately limit prolonged incumbencies of corrupt or incompetent local government heads.

The number of local government heads in their third consecutive terms is only 12.4% among basic local self-governing bodies and 12.5% among greater-area local self-governing bodies. The number of newly elected local government heads is 63.2% among basic local self-governing bodies while 75% among greater-area local government heads. Contrary to the belief at the time of enacting the Instant Provisions, the rate of consecutive incumbencies through three time terms is low. The Instant Provisions are not contributing to broadening the political opportunities for new competent prospects, and the repeated incumbencies of local government heads are not interfering with the advancement of new competent prospects.

C. Most importantly, the Instant Provisions do not comport with the fundamental principles of democracy and local autonomy. Under the local governance system, local residents themselves determine what is the best for their interests and welfare. Local residents themselves decide who is the most appropriate for local development. Such decisions are immediately considered legitimate

while local residents themselves take responsibility for the consequences of such decisions. Not recognizing such autonomy and responsibility by imposing involuntary and external conditions and limits does not harmonize with the nature of 'autonomy.' How to evaluate local government heads in their third consecutive terms, whether such repeat of terms have interfered with or contributed to local development, or whether local development calls for continuation of experienced incumbents or challenges of new prospects shall be left up to the residents themselves. The Instant Provisions deprive local residents of the right of self-determination on the basis of untested and abstract legislative purposes, no matter how capable and morally competent the local government head is and no matter how much they want him or her to repeat his or her term. The fundamental reason that the Instant Provisions cannot be deemed legitimate is the non-democratic and non-autonomous nature of the initiatives and directions behind them.

D. The Instant Provisions infringe on local government heads' right to hold public offices through inappropriate and excessive means in contradiction to the fundamental principles of democracy and local autonomy, and thereby violate the Constitution, and therefore we hereby announce our opinion of unconstitutionality in contradiction to the majority opinion.

Justices Yun Young-chul(Presiding Justice), Kwon Seong, Kim Hyo-jong, Kim Kyung-il(Assigned Justice), Song In-jun, Choo Sun-hoe, Jeon Hyo-sook, Lee Kong-hyun, Cho Dae-hyen

[Attached] Petitioners' List : omitted

2. *Registration Requirement of Political Parties*
[18-1(A) KCCR 402, 2004Hun-Ma246, March 30, 2006]

In this case, the Constitutional Court rejected a constitutional complaint alleging that Articles 25 and 27 of the former Political Parties Act(revised on March 12, 2004 through Act No. 7190 but prior to amendment on August 4, 2005 through Act No. 7683) requiring for registration all political parties to have at least five city or provincial(do) parties, each having at least 1,000 party members, infringes upon the Petitioner Socialist Party's freedom of party formation.

Background of the Case

Article 25 of the Political Parties Act requires as a prerequisite for registration all political parties to have at least five city or provincial branches and Article 27 requires that each city or provincial branch shall have at least 1,000 party members. According to Articles 2 and 3 of Addenda of the aforementioned Act, the parties registered pursuant to the old provisions before the enactment of the Instant Provisions, if they do not meet the requirements on the number of city or provincial branches and the number of party members set forth in the newly enacted Articles 25 and 27, must cure the non-compliance within 180 days of the enactment of the Instant Provisions. If non-compliance is not cured, registration of the non-complying party is cancelled by the National Election Commission pursuant to Article 4 of the Addenda. Petitioner Socialist Party filed this constitutional complaint pursuant to Article 68 Paragraph 1 of the Constitutional Court Act arguing that the Socialist Party, a minor party, cannot meet the requirements under the present Political Parties Act and therefore that the Instant Provisions violate the freedom of party formation under Article 8 Paragraph 1 of the Constitution.

Summary of the Decision

The Constitutional Court announces a unanimous decision rejecting the Petitioners' claim of unconstitutionality for the following reasons:

A. Article 25 of the Instant Provisions aims to exclude 'regional parties' and Article 27 aims to exclude 'minor parties.' Exclusion

of minor parties is a legitimate legislative purpose because proper functioning of representative democracy under our Constitution requires a stable majority within the legislature. Also, exclusion of regional parties representing the political wills of only certain regions cannot be said to be an illegitimate purpose under the Constitution when party politics depending excessively on regional affiliation has become problematic in our political reality. Therefore, the Instant Provisions have a requisite legitimate purpose.

B. The Instant Provisions require for party registration two constants, namely, 5 or more city or provincial branches and each city or provincial branch having more than 1,000 party members, for the purpose of excluding regional parties and minor parties. These regulations prevent the parties from being organized only from certain areas, and require city and provincial organizations in at least five cities or provinces, in each of which at least a certain number of members are active. Therefore, these regulations are appropriate means to suppress election-related entities and minor regional political organizations from indiscriminately participating in party politics. The Instant Provisions also concretize the requirement in Article 8 Paragraph 2 of the Constitution concerning "the organization necessary for participating in people's political will-formation" in the form of the minimum 5 city or provincial branches and the minimum 1,000 members for each of the branches. The legislator's decision that at least 5 city or provincial branches are required for fulfilling faithfully the functions and position of a national party is not irrational. Also, the requirement of at least 1,000 members for each city or provincial branch is not excessive even for minor or newly formed parties such as Petitioners in light of the size of the populations of the cities and provinces of our country.

C. The Instant Provisions do restrict people's freedom of party formation with the requirements of 5 or more city or provincial branches and 1,000 or more party members for each of the branches. However, these restrictions are reasonable restrictions materializing the constitutional concept of a political party through which people shall participate in political will-formation 'for a substantial time' 'in substantial areas.' These restrictions are constitutionally justified.

Party

Petitioners

Socialist Party
Representative: Sin ○ Jun
Petitioner's Counsel: Gang ○ Dae

Holding

Petitioner's claims are denied.

Reasoning

1. Introduction of the Case and Subject Matters of Review

A. Introduction of the Case

On March 9, 2004, the Plenary Session of the National Assembly passed the Political Parties Act, the Act on the Election of Public Officials and the Prevention of Election Malpractices, and the Political Fund Act, the so-called political relations laws, and all these laws became effective on March 12, 2004. Article 25 of the Political Parties Act revised through the Act No. 7190 provides, "a political party shall have five or more city or provincial branches", and Article 27 provides, "each city or provincial branch party shall have one thousand or more party members." According to Articles 2 and 3 of Addenda of the aforementioned Act, the parties registered pursuant to the old provisions before the enactment of the Instant Provisions, if they do not meet the requirements on the number of city or provincial branches and the number of party members set forth in the newly enacted Articles 25 and 27, must cure the non-compliance within 180 days of the enactment of the Instant Provisions. If non-compliance is not cured, registration of the non-complying party is cancelled by the Election Management Committee pursuant to Article 4 of the Addenda.

Petitioner Socialist Party filed this constitutional complaint on March 26, 2004 pursuant to Article 68 Paragraph 1 of the Constitutional Court Act arguing that the Socialist Party, a minor party, cannot meet the requirements under the present Political

Parties Act and that Articles 25 and 27 of the Political Parties Act violate the freedom of party formation under Article 8 Paragraph 1 of the Constitution, the Article 11 right to equality, and the Article 21 Paragraph 1 freedom of association.

B. Subject Matter of Review

The subject matter of this case is constitutionality of Articles 25 and 27 of(hereinafter referred to as the "Instant Provisions")the former Political Parties Act(revised on March 12, 2004 through Act No. 7190 but prior to amendment on August 4, 2005 through Act No. 7683) and the relevant provisions are as follows:

(1) Subject Matter of Review

The Political Parties Act(revised on March 12, 2004 through Act No. 7190 but prior to amendment on August 4, 2005 through Act No. 7683)

Article 25 (Statutory Number of City or Provincial Parties)

A political party shall have five or more city or provincial branches.

Article 27 (Number of Party Members of City or Provincial Parties)

Each city or provincial branch party shall have one thousand or more party members.

(2) Related Provisions

The Political Parties Act(revised on March 12, 2004 through Act No. 7190 but prior to amendment on August 4, 2005 through Act No. 7683) Article 4(Establishment)

(1) Political party shall come into existence when its central party is registered with the National Election Commission.

(2) Registration under Paragraph 1 shall satisfy the requirements of Articles 25 and 27.

Article 38(Revocation of Registration)

(1) When a political party falls under any of the following subparagraphs, the relevant election commission shall revoke its registration.

(i) When it becomes incapable of satisfying the requirements under Articles 25 and 27: Provided, that such revocation shall be postponed until after the election day when a failure to satisfy such requirements has occurred three months before the general

election day, and in other cases until three months from the failure to satisfy such requirements

(ii) When failing to participate during the past four years in an election of National Assembly members due to an expiration of term of office or the election of the head of the local government due to the expiration of term of office or that of the members of City or Provincial council; and

(iii) When failing to obtain a seat in the National Assembly after participating in an election of National Assembly members, and failing to obtain more than 2/100 of total number of effective votes

Addenda

Article 1(Enforcement Date)

This Act shall become effective upon the date of enactment (the proviso omitted).

Article 2(Transitional Measures for Political Parties)

A political party registered pursuant to the previous provisions prior to the effective date of this Act, if it does not satisfy the statutory number of city or provincial branches pursuant to the newly revised Article 25, shall cure non-compliance within 180 days of the effective date of this Act.

Article 3(Transitional Measures for Party Branches)

A party branch registered in accordance with the provisions prior to the enforcement of this Act shall be deemed registered under the current provisions. Provided, such party shall cure non-compliance with the matters required by the current Article 13 and the statutory number of party members required by the current Article 27 within 180 days of the enforcement date.

Article 4(Cancellation of Registration)

In event that a party fails to cure non-compliance with respect to the statutory number of city or provincial branches, other matters claimed on registration application, and the statutory number of party members, the relevant Election Commission shall cancel registration of that party.

2. Petitioners' Arguments and Interested Parties' Opinions

A. Summary of Petitioners' Arguments

Article 4 of the Political Parties Act provides that a political party is established when its central office is registered with the

National Election Commission and the registration shall meet the requirements of the Instant Provisions. The registration requirement of the Instant Provisions is excessively strict. A political party will need a national organization in order to prevail in the process of political will-formation. However, whether to have such organization should be decided by the political party itself after considering financial resources, local conditions, and other matters. The legislature should not predetermine that by imposing the requirement of a national scale or distribution of regional parties, suppressing or restricting the constitutionally guaranteed freedom of political formation.

The Instant Provisions impose excessively strict registration requirements on political parties and block minor parties and new parties from participating in party politics, thereby infringing upon the freedom of party formation under Article 8 Paragraph 1 of the Constitution, the Article 11 right to equality, and the Article 21 Paragraph 1 freedom of association.

B. Opinions of the Ministry of Justice

(1) Preliminary Defenses

After Petitioner filed for this constitutional complaint, the 17th National Assembly General Election took place on April 15, 2004. Petitioner did not obtain any seat in that election and failed to receive 2/100 of the total number of effective votes. For that reason, on 20th of the same month, its party registration was revoked pursuant to Article 38 Paragraph 1 Subparagraph 3 of the Political Parties Act. Due to the revocation, Petitioner is not a political party under the Constitution and does not have a standing as a Petitioner. Furthermore, even if the Instant Provisions are declared unconstitutional, the Petitioner's revocation of registration is under Article 38 Paragraph 1 Subparagraph 3 of the Political Parties Act and therefore is not affected. Since Petitioner's subjective right cannot be relieved for, there is no interest to be protected. Therefore, this constitutional complaint should be dismissed as a legally insufficient one.

(2) Opinions of Review of Merits

A political party must participate in the process of political will-formation for a substantial period in a substantial area. Such concretization of the concept of a political party is in principle within the discretion of the legislator. The Instant Provisions aim

at many election-bound organizations mushrooming around the election days and small regional political organizations built on parochial interests of certain regions, and prevent these organizations from indiscriminately obtaining the party statuses and the related privileges. This way, the Instant Provisions attempt to permit sound formation of political wills. Installing five city or provincial branches is not an excessive burden. A requirement of 1,000 members for each city or provincial branch can be satisfied by voluntary membership and therefore does not impose a financial burden on Petitioner. The Instant Provisions pursue important public interests in preventing an indiscriminate number of election-bound organizations from obtaining party statuses and thereby ensuring materialization of sound party politics. The Instant Provisions apply equally to small parties, new parties, and established parties, and therefore do not irrationally discriminate against small parties and new parties in favor of established parties.

3. Review of Statutory Requirements

Petitioner, since revocation of registration on April 20, 2004, has continued its political activities under the same name 'Socialist Party', and has sustained a organizational structure, including a party constitution built on the premise that it will build a sufficient internal and external organization and it will participate in elections; a Party Congress as the highest internal decision-making body; a council of representatives; the Central Committee; and city and provincial committees serving as the regional arms(See www.sp.or.kr). Representative of the Socialist Party Sin ○ Jun (re-elected at the 7th Party Congress in April 2005) reported to the authorities formation of the Party Founding Committees under such names as 'Socialist 2004' and 'Socialist 2005' and yet failed to register as a political party before the Committees' periods of activities expired. In other words, the Socialist Party, after revocation of registration, has maintained its substance as a 'private organization without privileges' in lieu of that as a 'registered party'. Therefore, its standing as a Petitioner for this constitutional complaint is recognized. The party's standing does not arise out of its having obtained registration but out of its status as a private organization without privileges.

Freedom of party formation is not guaranteed just for registered political parties but also for political parties existing as private organizations without privileges. Even if an unconstitutionality decision on the Instant Provisions does not recover for Petitioner a registered party status, the very reasons for Sin ○ Jun's repeated

failures to obtain the registered party status have been none other than the registration requirements set forth in the Instant Provisions or their successors, Articles 17 and 18 of the current Political Parties Act. The current Political Parties Act provisions of the same content as the Instant Provisions are likely to cause the same restrictions on the basic right in the future and therefore there is a justiciable interest.

4. Review on Merits

A. Infringement of Which Basic Rights is Contested

(1) Freedom of Party Formation and Freedom of Association

Freedom of party formation is set forth in the beginning part of Article 8 Paragraph 1 of the Constitution. Yet it is a 'basic right' of individual persons and parties on the basis of which a constitutional complaint can be surely filed. In this case, what is in controversy is infringement of freedom of party formation in the beginning part of Article 8 Paragraph 1, which is a special provision of freedom of association under Article 21 Paragraph 1 of the Constitution(11-2 KCCR 800, 810, 99Hun-Ma135, December 23, 1999).

(2) Right to Equality

The Instant Provisions set up the registration requirements for parties and apply equally to all people and parties without discrimination. Even if some people or parties find it hard to satisfy these requirements under the circumstances and fail to register as parties or maintain party statuses, such hardship or failure is merely the result of application of the Instant Provisions. Therefore, where infringement on freedom of party formation is separately discussed, there is no independent issue of infringement on the right to equality.

(3) Sub-conclusion

As reviewed above, the basic right possibly infringed by the Instant Provisions is freedom of party formation in the beginning part of Article 8 Paragraph 1

B. Freedom of Party Formation and its Significance and Contents

(1) A political party is an intermediary between the state and people, acting as political conduit, which actively induces formation and convergence of the diverse political wills of people and thereby forms a political will at a magnitude sufficient to affect the national policy decision-making. A political party in today's populistic democracy acts as the conductor and intermediary in the people's political will-formation and an indispensable element in democracy. Free formation and activities of political parties is a prerequisite for materialization of democracy(16-1 KCCR 422, 434, 2001Hun-Ma710, March 25, 2004).

Taking into account a party's significance and role in today's democracy, our Constitution has separated a political party from the purview of general freedom of association and regulated it separately in Article 8, thereby emphasizing the special status of a political party. Article 8 Paragraph 1 of the Constitution states "The establishment of political parties shall be free, and the plural party system shall be guaranteed.", thereby guaranteeing all people the right to form a political party in principle without the state's interference as a basic right, and institutionally guaranteeing a multi-party system, the obvious legal consequence of freedom of party formation(11-1 KCCR 800, 813, 99Hun-Ma135, December 23, 1999).

(2) Freedom of party formation in the beginning part of Article 8 Paragraph 1 guarantees not only freedom of party formation but also freedom of party activities. Article 8 Paragraph 1 of the Constitution not only specifically refers to freedom of party formation but also guarantees everyone's freedom of enrolling in and withdrawing from political parties without the state's interference. If only party formation is freely allowed while a party thus formed can be banned at any time and party activities can be restricted arbitrarily, freedom of party formation means nothing. Freedom of party formation shall guarantee maintenance of the parties and freedom of party activities.

Therefore, the agency enjoying freedom of parties shall be both individuals intending to form parties and the parties thus formed. Concretely, freedom of parties include individuals' freedom of party formation, freedom of joining parties, and freedom of the organizational or legal form. Freedom of party formation includes the corresponding freedom of dissolving parties and merging and dividing parties. Freedom of party formation includes individuals' negative freedom of not joining any party or any particular party and of withdrawing from the party that they have previously joined.

C. Constitutionality of the Instant Provisions

(1) Concept of a Political Party and Meaning of Party Registration

(A) The Constitution in its Article 8 Paragraph 2 states "Political parties …… shall have the necessary organizational arrangements for the people to participate in the formation of the political will." Article 2 of the Political Parties Act states "For the purposes of this Act, the term 'political party' means a national voluntary organization that aims to promote responsible political arguments or policies and to take part in the formation of the nation's political wills in order to promote the national interests by endorsing or supporting candidates for public offices."

As set forth above, our Constitution and the Political Parties Act define a political party in terms of the following features: (1) affirm the state and free democracy or constitutional order; (2) endeavor to promote public interest; (3) participate in elections; (4) have party platforms or policies; (5) participate in people's political will-formation; (6) have continuing and stable organization; (7) specify the qualifications to become party members, and etc. In other words, political parties, other than the defining features set forth above, shall meet the requirement of participating in people's political will-formation 'for a substantial period or continuously' 'in a substantial area' as set forth in Article 2 of the Political Parties Act of Germany.

(B) Article 4 Paragraph 1 of the Political Parties Act states "Political party shall come into existence when its central party is registered with the National Election Commission.", thereby requiring party registration as the prerequisite to party formation. Therefore, if any political association aims to participate, as a political party, in people's political will-formation, it is not recognized as a political party under the Political Parties Act unless it is registered as a party.

Under the party registration system, an association claiming to be a party applies for registration with a competent administrative agency in accordance with certain statutory conditions, and if the conditions are met, the association is placed on the party roster and thereby recognized as a party. The party registration system facilitates confirmation of whether a political association is a party, and therefore permits relatively clear definitions of whether an association is entitled to the rights and duties of a political party. The party registration system contributes to legal stability and certainty.

(2) Whether Freedom of Party Formation is Infringed

(A) Standard of Review

Expressing in the form of statutory provisions the definitional requirement of participating in people's political will-formation 'for a substantial period or continuously' 'in a substantial area' is in principle within the discretion of the legislature. In other words, the legislature must consider comprehensively our national history of party politics, the current conditions and regional uniqueness of party politics, people's value systems and senses of justice, the effects of the regulation, and etc., and thereby express in concrete terms the requirement of temporal continuity, organization, and regional breadth.

The standard of reviewing whether the Instant Provisions infringe on 'Petitioner's freedom of party formation shall deliberate on whether the legislative purpose is a legitimate purpose that can be constitutionally pursued by the legislature and whether the means adopted by the Instant Provisions abide by a reasonable relationship of proportionality in order to accomplish such legislative purpose.

(B) Legitimacy of Purpose

The legislative purpose of the Instant Provisions is to exclude regional parties and minor parties. In other words, Article 25 demanding five or more city or provincial parties is aimed at excluding 'regional parties' which are established in reliance upon and conduct activities around affiliation with certain regions. Article 27 demanding 1,000 or more members from each city or provincial branch party is aimed at excluding 'minor parties' which have not recruited a sufficient number of members to win a certain level of people's support or represent people's interests.

Representative democracy under our Constitution, in order to function properly, requires a stable majority in the parliament. Therefore, there is a legitimate interest in exclusion of minor parties. One may contest the legitimacy of exclusion of regional parties. However, exclusion of regional parties representing the political wills of only certain regions cannot be said to be an illegitimate purpose under the Constitution when party politics depending excessively on regional affiliation has become problematic in our political reality. Therefore, the Instant Provisions have a requisite legitimate purpose.

(C) Proportionality between Ends and Means

1) The Political Parties Act, first enacted on December 31, 1962 through Act No. 1246 under the 1962 Constitution and repeatedly revised since then, requires political parties to procure an organization sufficient to participate in people's political will-formation and guarantee the parties democratic organization and activities, thereby aiming to contribute to sound development of democratic politics.

Article 25 of the first Political Parties Act(Statutory Number of District Party Members) provides, "a political party shall have district parties equal to or more than one third of a total number of electoral districts under the National Assembly Election Act." Article 26(Distribution of Regional Parties) provides "district parties set forth in the preceding article shall be set up in at least five regions out of Seoul Metropolitan City, Busan City and other provinces. Article 27(Statutory Number of Party Members) provides a district party shall have fifty or more party members."

The law revised on January 23, 1969 through Act No. 2089 strengthened the requirement of the statutory number of district parties to one half of all electoral districts(Article 25), and required the district parties to have one hundred or more party members(Article 27). The law revised on November 25, 1980 through Act No. 3263 changed the required number of district parties to one fourth of all electoral districts(Article 25) and changed the required number of members for each district party to 30(Article 27). The law revised on March 25, 1989 through Act No. 4087 again changed the required number of district parties to one fifth of all electoral districts(Article 25) and the required number of party members for each district party to 30(Article 27). The law revised on December 27, 1993 through Act No. 4609 changed the required number of district parties to one tenth of all electoral districts(Article 25) and the required number of party members for each district party to 30(Article 27).

2) The Instant Provisions differ in form from the previous regulations which defined the statutorily required number of party members in terms of one variable and one constant - namely, a percentage of all electoral districts and the statutory minimum number of party members - in that the Instant Provisions define the same in terms of two constants - namely, five or more district parties and 1,000 or more party members for each district party - thereby requiring at least 5,000 party members for party registration.

However, as previously said, the above regulations aim to

exclude 'regional parties' and 'minor parties'. The regulations prevent the organization to be formed only in certain regions and require an organization in at least five cities or provinces and a certain number of party members in each organization, and therefore constitute appropriate means to prevent election-bound organizations and minor local political parties from indiscriminately obtaining party status.

On the other hand, the Instant Provisions, in concretizing Article 8 Paragraph 2 requirement of 'the organization necessary for participating in people's political will-formation', require five or more district parties and 1,000 or more party members for each district party. The legislator's decision that at least 5 city or provincial branches is required for fulfilling faithfully the functions and position of a national party is not irrational. Also, the requirement of at least 1,000 members for each city or provincial branch is not excessive even for minor or newly formed parties such as Petitioners in light of the size of the populations of the cities and provinces of our country.

Therefore, the Instant Provisions do restrict people's freedom of party formation with the requirements of 5 or more city or provincial branches and 1,000 or more party members for each of the branches. However, these restrictions are reasonable restrictions materializing the constitutional concept of a political party through which people shall participate in political will-formation 'for a substantial time' 'in substantial areas'. These restrictions are constitutionally justified.

5. Conclusion

As reviewed above, the claims in this case are without basis and therefore shall be rejected with a unanimous decision of all Justices as set forth in the Holding.

Justices Yun Young-chul(Presiding Justice), Kwon Seong, Kim Hyo-jong, Kim Kyung-il, Song In-jun, Choo Sun-home(Assigned Justice), Jeon Hyo-sook, Lee Kong-hyun, Cho Dae-hyen

3. *Drunk Driving Three Strikeout Case*
[18-1(B) KCCR 98, 2005Hun-Ba91, May 25, 2006]

In this case, the Constitutional Court declared constitutional Article 78 Paragraph 1 Subparagraph 14(hereinafter referred to as the "the Instatn Provision") of the Road Traffic Act which compulsorily revokes a driving license in event of three time violations of the ban on drunk driving.

Background of the Case

Petitioner was suspended the driving license after found drunk driving twice, and was revoked the license after found drunk driving one additional time. Petitioner filed a suit to cancel the revocation of the license and requested constitutional review of the Instant Provisions which formed the basis of the revocation. When the request was denied, Petitioner filed this constitutional complaint.

Summary of the Decision

The Constitutional Court upholds the Instant Provisions with a unanimous decision of all Justices for the following reasons:

The Instant Provisions have the legitimate legislative purpose of protecting people's life, limbs, and properties and securing road safety. A person in violation of the ban on drunk driving three time can be deemed deficient in the sense of responsibility toward road traffic regulations and in the awareness of safety required of a traffic participant. Revoking a driving license of such person is appropriate means to accomplish the legislative purpose. On the other hand, the Instant Provisions of the Road Traffic Act were newly enacted in an effort to broaden the scope of compulsory revocation and thereby strengthen traffic order in response to the increasing number of traffic accidents. Once a driving license is revoked by the Instant Provisions, the disqualification period after revocation is a relatively short period of two years compared to the disqualification periods set pursuant to other statutes. Given the space-temporal limits on detecting drunk driving, regardless of time intervals among the violations, three time violations of the drunk driving ban sufficiently indicate the driver's deficiency in the sense of duty toward traffic regulations and the awareness of safety. The compulsory nature of the revocation under the Instant Provisions

and the failure to apply revocation only to the violations falling within certain time intervals do not exceed the necessary minimum in restricting occupational freedom and general freedom of action. Also, we cannot emphasize too much the gravity of public interest in protecting individuals, the society, and the state from enormous damages arising out of drunk driving while the private interest infringed due to compulsory revocation and the indirect damages originating therefrom cannot be compared in gravity to the public interest. The Instant Provisions therefore do not violate the principle of balance among legal interests. Therefore, the Instant Provisions do not violate the ban against excessive restriction in restricting occupational freedom and general freedom of action.

In applying administrative discipline against a driver that has caused a traffic accident deliberately or negligently, it is rational to comprehensively take into account the course and contents of the accident, the extent and type of injuries suffered by the victim, the degree of negligence of the driver, the age and gender of the driver and the victim, the post-accident course of events, and etc., in deciding on whether to suspend or revoke the driver's license. In event of such accident, it is important to identify the responsible party, make the party pay compensation, and thereby provide substantive relief to the victim. Suspending or revoking the driving license of the driver who has caused the injuries on others and did not file a report or otherwise take necessary measures will encourage voluntary reporting by such driver and thereby facilitate the compensation for the victim. Taking this into account, the Instant Provisions permit discretion in deciding on administrative discipline. Therefore, suspending or revoking the driving license of a person who has caused a traffic accident negligently or deliberately or who has caused injuries on others and failed to file a report or take other necessary measures does not depart so far from equity to violate the principle of equality as to an extent that destroys the order governing various reasons for revocations and suspensions.

Party

Petitioner

Shin ○ Gi

Petitioner's Counsel: Go Suk-Sang

Co-Counsel: Halla Law Firm

Attorney in Charge: Go Suk-Sang and one other

Underlying Case

Jeju District Court 2005Gu-Hap443 Cancellation of revocation of a driving license

Holding

Article 78 Paragraph 1 Subparagraph 14 of the Road Safety Act(revised partially on December 23, 2004 through Act No. 7247 prior to be wholly amended on May 31, 2005 through Act No. 7545) which provides, 'in event that a person who has violated Article 41 Paragraph 1 twice or more times violates Article 41 Paragraph 1 once again and thereby satisfies the reason for suspending the license', does not violate the Constitution.

Reasoning

1. Introduction of Case and Subject Matter of Review

A. Introduction of the Case

Petitioner was suspended the license for drunk driving on March 27, 2002 and July 22, 2003. On March 8, 2005, Petitioner was again cited for drunk driving with the blood alcohol of 0.071% and revoked the license by Chief of Jeju District Police Agency on March 18.

Petitioner filed a suit in Jeju District Court to cancel revocation of the license(2005Gu-Hap443) and requested constitutional review of Article 78 Paragraph 1 Subparagraph 14 which provided the basis for the revocation(Jeju District Court 2005Ah22). When the request was denied on October 5, 2005, Petitioner filed this constitutional complaint on November 9 against Article 78 Paragraph 1 Subparagraph 14 in accordance with Article 68 Paragraph 2 of the Constitutional Court Act.

B. Subject Matter of Review

Petitioner filed this constitutional complaint against the entire Subparagraph 14 of Article 78 Paragraph 1 of the Road Safety Act,

but in this case Petitioner had violated Article 41 Paragraph 1 twice and by violating once again was suspended the driving license, and therefore the part of Subparagraph 14 of Article 78 Paragraph 1 concerning Article 41 Paragraph 2 is excluded from the subject matter of review. Therefore, the subject matter for review is constitutionality of Article 78 Paragraph 1 Subparagraph 14 of the Road Safety Act(revised partially by December 23, 2004 through Act No. 7247 prior to be wholly amended on May 31, 2005 through Act No. 7545) which provides, 'in event that a person who has violated Article 41 Paragraph 1 twice or more times violates Article 41 Paragraph 1 once again and thereby satisfies the reason for suspending the license' ("the Instant Provisions"), which are set forth as follows:

The Road Safety Act(revised partially by December 23, 2004 through Act No. 7247 prior to be wholly amended on May 31, 2005 through Act No. 7545)

Article 78(Revocation and Suspension of Driver's License)

(1) When a person who has obtained a driver's license(excluding the driver's practice license; hereafter in this Article, the same shall apply) falls under any of the following subparagraphs, the Commissioner of the Local Police Agency may revoke the driver's license or suspend its validity within the limit of one year, pursuant to the standards as determined by the Ordinance of the Ministry of Government Administration and Home Affairs: Provided, that he shall revoke such driver's license when the said person falls under Subparagraphs 1, 2, 3(excluding the time when a period of regular aptitude test has been expired), Subparagraphs 5 through 8, 10, 11, 13, and 14:

(i) through (xiii) omitted

(xiv) When the person, who violated the provisions of Article 41 Paragraph 1 or 2 over 2 or more occasions, has come to fall under the causes for suspending his driver's license due to another violation of the provisions of Article 41 Paragraph 1;

(xv) through (xvii) omitted

Article 41(Prohibition of Driving under Influence of Liquor)

(1) No person shall drive a motor vehicle, etc. under the influence of liquor(including the construction machinery other than those referred to in the proviso of Article 26 Paragraph 1 of the Construction Machinery Management Act; the same shall apply hereafter in this Article, and Articles 42, 43 and 107-2)

(2) When a police officer deems it necessary for the traffic safety and the prevention of dangers, or when there exists a

reasonable cause for deeming that a person has driven a motor vehicle, etc. under the influence of liquor in violation of the provisions of Paragraph 1, he may take a measurement of whether or not the driver is under the influence of liquor, and the driver shall comply with such measurement.

(3) omitted

(4) Standards for the drunken conditions for which any driving is prohibited under the provisions of Paragraph 1, shall be prescribed by the Presidential Decree.

Article 70(Disqualifications for Driver's License)

(1) omitted

(2) Any person falling under any of the following subparagraphs shall not be entitled to obtain a driver's license unless the period as referred to in each of the relevant subparagraphs has elapsed. In this case, it shall be limited to persons who have been sentenced to the penalty of a fine or heavier ones(including a suspension of execution) in the cases of Subparagraphs 1 through 4:

(i) through (iv) omitted

(v) In case where his driver's license has been cancelled due to his violations of the provisions of Article 41 Paragraph 1 or 2 three time or more, or it has been cancelled due to the causes under Article 78 Paragraph 1 Subparagraphs 2, 5 or 6, two years from the day of having cancelled his driver's license;

(vi) through (vii) omitted

Article 31(Standard of Intoxicated State)

The standard of an intoxicated state as referred to in Article 41 of the Act shall be not less than 0.05 percent of alcohol concentration in the blood.

Addenda(Act No. 6392, Jan. 26, 2001)

Article 1(Enforcement Date)

This Act shall enter into force on June 30, 2001: proviso omitted

Article 2(Application Example to Prohibition of Driving in Drunken State)

The amendments to Articles 70 Paragraph 2 Subparagraph 5 and 78 Paragraph 1 Subparagraph 14 shall be applicable to the offenses occurred on and after the enforcement of this Act.

2. Petitioner's Arguments, Ordinary Court's Reason for Denying Request for Constitutional Review, and the Opinions of Interested Parties.

A. Petitioner's Arguments

In applying enhanced discipline against a three time offender of the drunk driving ban, the risk posed by the offender shall be measured differently according to the time interval within which the offenses have taken place(e.g., three time within 1 year or within 5 years) and differential disciplines shall be applied. The Instant Provisions, however, do not place any restriction on the time interval within which the three time offenses must take place. Also, a violation of the drunk driving ban differs in its degree of culpability depending on the conduct involved(e.g., whether the offender has refused the blood reading, whether the blood alcohol level is above or below 0.1%, or the drunk driving has caused personal or property damages, etc.). However, the Instant Provisions ignore whether the prior offenses constituted the reasons for suspension or those of revocation and apply indiscriminately compulsory revocation to all three time offender of the drunk driving ban. Therefore, the Instant Provisions violate the ban against excessive restriction.

Also, the Instant Provisions apply enhanced discipline on the basis of criminal punishment and administrative discipline already applied to the prior two drunk driving offenses. Therefore, the Instant Provisions interfere with the stability of law. Also, Subparagraphs 4 and 12 of Article 78 Paragraph 1 of the Road Safety Act concern the conduct more culpable than the Instant Provisions and yet provide for permissive revocation. Therefore, the Instant Provisions also violate the principle of equality.

B. Court's Reasons for Denying Request for Constitutional Review

The Instant Provisions aim to protect people's life, limbs and properties and secure road safety. In providing for administrative discipline against habitual offenders, there is generally a limitation on the period within which the repeated offenses must have taken place to be recognized as a habit. However, such limitation is not mandatory. In light of the Instant Provisions, the related legislative purpose of disciplining habitual drunk drivers, the space-temporal limitation on detection of drunk driving, the enormous social and

economic damages arising out of drunk driving, and the need for administrative discipline, three time violations of the drunk driving ban sufficiently indicate the offender's profound deficiency in the spirit of compliance and the awareness of safety. Drunk driving, whether it constitutes the reason for suspension or revocation of the license, poses not much different risks of danger to people's life, limbs, and properties. Furthermore, while re-applying for the license is prohibited only for two years, we cannot emphasize too much the gravity of the public interest in preventing the enormous damages to individuals, the society, and the state caused by drunk driving. Therefore, the Instant Provisions do not violate the principle against excessive restriction.

C. The Opinions of the Chief of the National Police Agency and the Chief of the Jeju District Police Agency

The opinions are similar to the reasons for denying request for constitutional review and what follows is the part not similar:

The Instant Provisions apply a new administrative discipline of license revocation on the basis of the repeat offender's new additional offense, and therefore do not undermine the stability of law.

3. Review of Merits

A. History and Legislative Purpose of the Instant Provisions

(1) History

The Road Traffic Act, first enacted on December 31, 1961 through Act No. 941, did not have the provisions providing for mandatory revocation but only the provisions providing for permissive suspensions and revocations. As the country developed into an industrial society and the number of cars increased, increasing also the number of traffic accidents, the establishment of traffic order became a fundamental issue of social norms. Through several revisions of the law, mandatory revocation was instituted and its scope broadened. The Instant Provisions mandating license revocation of a three time offender of the drunk driving ban were first included in the law revised on January 26, 2001 through Act No. 6392 and have been maintained since then. On the other hand,

the Addenda enacted on January 26, 2001 through Act No. 6392 enforce the revised law starting on June 30, 2001(Addenda Article 1), and apply the Instant Provisions to the violations, the first of which has taken place before the enforcement date of the revised law(Addenda Article 2).

(2) Legislative Purpose

In our country, rapid economic growth brought about a world-class rate of car ownership while sound automobile culture has not taken roots. The Government has made multi-faceted efforts, including all-out traffic rules enforcement and education, expansion of traffic facilities, various campaigns, and etc., to reduce traffic accidents, and as a result, the number of traffic accidents and deaths involved has gradually decreased each year. However, drunk driving, despite the police's focused enforcement and sustained publicity, has not decreased and its share in all traffic accidents has rather increased.

In light of the reality of our traffic conditions, there is a great need to identify the drivers of unsound driving habits causing traffic accidents or involving habitual traffic offenses, who are likely to cause obstacles in traffic safety and efficient traffic flow, and to prevent them from driving for certain periods, thereby eliminating the risks and dangers to people's life and properties and securing traffic safety. Therefore, the Instant Provisions aim at the legislative purpose of revoking the habitual offenders of the drunk driving ban, thereby protecting people's life, limbs and properties, and securing traffic safety.

B. Constitutionality of the Instant Provisions

(1) Occupational Freedom and General Freedom of Action

The purpose of the Road Traffic Act is to ensure the safe and smooth traffic by preventing or removing all traffic dangers and obstructions occurring on roads(Article 1). If anyone can freely use cars, traffic safety and efficient traffic flow can be threatened. Therefore, driving cars on roads should be generally banned and the administrative authorities lift the ban only for those qualified drivers deemed to cause no danger or obstruction to traffic safety. This is the driver license system(Article 68). Therefore, whenever a risk of interfering with traffic safety is identified on the part of a driver, such license can be revoked pursuant to certain procedure. Revocation of a driver license is applied against an unqualified

driver on the premise that he or she displays such deficient aptitude as to pose a risk of personal or property damages. Revocation of a license previously issued, even if done because of a deficiency in the driver's aptitude, should not constitute an excessive restriction on basic rights. Article 37 Paragraph 2 of the Constitution provides that people's freedom and rights can be restricted by statute if necessary for national security, maintenance of order, or public welfare, but the essence of these liberties and rights should not be infringed upon(17-2 KCCR 378, 387, 2004Hun-Ka28, November 24, 2005).

The Instant Provisions, when applied, compulsorily revoke the license, and may render it impossible for people of those occupations involving driving to maintain their occupations, and restrict them in their methods of performing occupational tasks. Therefore, the Instant Provisions restrict occupational freedom that includes both the narrowly defined freedom of choosing occupations and the freedom of performing occupational tasks. Also, as to people not driving cars for occupational reasons, the Instant Provisions restrict their general freedom of action. Occupational freedom and general freedom of action can be restricted for the reason of national security, maintenance of order, and public welfare in accordance with Article 37 Paragraph 2 of the Constitution, which limits the permitted scope of restriction on basic rights. We hereby review whether the Instant Provisions restrict occupational freedom and general freedom of action in violation of the ban against excessive restriction.

(A) Legitimacy of Legislative Purpose and Appropriateness of Means

As said before, the Instant Provisions revoking the driving license of the habitual violators of the drunk driving ban aim to protect people's life, limbs, and properties and secure traffic safety. Therefore, the legitimacy of the purpose is recognized. Three time violators of the drunk driving ban can be said to be deficient in a sense of responsibility toward compliance with traffic laws and rules and the awareness of safety as traffic participants. If these people are allowed to drive, it is likely that they will cause a grave risk to public traffic safety and people's life, limbs, and properties. The Instant Provisions revoking the license for those people are appropriate means to achieve the legitimate purpose.

(B) Minimum Restriction

Even when the legislative purpose of a statute is legitimate and

the means adopted to achieve the purpose are appropriate, if the legislator can achieve the purpose of the law through optional provisions and yet attempt to use mandatory provisions in disregard of the individuality and uniqueness of the case at hand, such mandatory provisions violate the principle of minimum restriction (17-2 KCCR 378, 388-399, 2004Hun-Ka28, November 24, 2005). We review whether the mandatory aspect of the Instant Provisions violates the principle of minimum restriction.

1) Revocation of license and the post-revocation disqualification period are the means of establishing traffic order. The methods of obtaining compliance to such order and the strength of these methods should vary from country to country in accordance with the volume of traffic, the rate of traffic accidents, the law-abiding readiness, the level of civic consciousness vis-a'-vis traffic order, the cultural background, and etc. Our legislator has considered our traffic conditions, people's awareness of traffic order, culture, and etc., and adopted mandatory revocation as the means of administrative discipline against the three time violator of the drunk driving ban. The Instant Provisions of the Road Traffic Act were newly enacted in an effort to broaden the scope of compulsory revocation and thereby strengthen traffic order in response to the increasing number of traffic accidents. The Instant Provisions aim to prevent and regulate drunk driving and thereby combat and eliminate dangers and obstructions to people's life and safety in relation to the road traffic and secure safe and efficient traffic. Also, once a driving license is revoked by the Instant Provisions, the disqualification period after revocation is a relatively short period of two years compared to the disqualification periods set pursuant to other statutes. Given the space-temporal limits on detecting drunk driving, regardless of time intervals among the violations, three time violations of the drunk driving ban sufficiently indicate the driver's deficiency in the sense of duty toward traffic regulations and the awareness of safety. Therefore, the compulsory nature of the revocation under the Instant Provisions and the failure to leave room for suspension or other ways of maintaining licenses do not exceed the necessary minimum in restricting occupational freedom for reason of traffic order and public welfare.

2) We do not have to mention the need to ban habitual drunk drivers from driving, preventing traffic accidents caused by drunk driving and protecting people's life and limbs. An issue remains as to which method of discipline will be used as the means, and such issue is that of a legislative policy to be decided by the legislature which shall consider the volume of traffic, the law-abiding readiness of citizens vis-a'-vis traffic order, the conduct of the drunk driver

at the time of reading blood alcohol level.

In today's Korea, the number of cars has grown consistently while the risk of accidents has remained hidden. Alcohol paralyzes a person's central nervous system and undermines his or her ability to operate vehicles or respond to unexpected events. Drunk driving, therefore, increases the risk of accidents and thereby poses a severe threat to the driver himself as well as others' life and limbs(17-2 KCCR, 152, 155-156, 2003Hun-Ba94, September 29, 2005). The Government has made multi-faceted efforts, including all-out traffic rules enforcement and education, expansion of traffic facilities, various campaigns, and etc., to reduce traffic accidents, and as a result, the number of traffic accidents and deaths involved has gradually decreased each year. However, drunk driving, despite the police's focused enforcement and sustained publicity, has not decreased and its share in all traffic accidents has rather increased and the instances of enforcement have increased. Especially, the number of three time offenders whose license has been revoked under the Instant Provisions has increased consistently since 2003.

In response, the legislator adopted a strict measure of discipline - the mandatory revocation of the driving license - against three time offenders of the drunk driving ban in order to secure the effectiveness of the drunk driving ban and ultimately extirpate drunk driving, thereby prevent damages to people's life and limbs arising out of traffic accidents involving drunk driving.

3) Petitioner argues that, in applying enhanced discipline against a three time offender of the drunk driving ban, the risk posed by the offender shall be measured differently according to the time interval within which the offenses have taken place(e.g., three time within 1 year or within 5 years) and differential disciplines shall be applied. The Instant Provisions, however, do not place any restriction on the time interval within which the three time offenses must take place.

In providing for administrative discipline against habitual offenders, there is sometimes a limitation on the period within which the repeated offenses must have taken place to be recognized as a habit. However, such limitation is not mandatory. If the violation is grave and calls for administrative discipline, we may not need to place such limitation. In light of the Instant Provisions, the related legislative purpose of disciplining habitual drunk drivers, the space-temporal limitation on detection of drunk driving, the enormous social and economic damages arising out of drunk driving and the need for administrative discipline, three time violations of the drunk driving ban sufficiently indicate the offender's profound deficiency in the spirit of compliance and the awareness of safety.

Therefore, the failure to place a limitation on the period within which three time violations must take place does not violate the principle of minimum restriction.

(C) Balance among Legal Interests

In legislating restrictions on basic rights, the public interest protected by the restriction shall outweigh the private interest infringed by the same.

Driving cars carry the risk of grave damages to people's life, limbs and properties. The state has important interest in formulating various advance or after-the-fact preventive measures to prevent materialization of the risks. The driver falling under the purview of the Instant Provisions, given the repeated violations of important traffic regulations and the dangers associated with such violations, can be said to have betrayed deficiencies in elementary awareness of safety and a sense of responsibility. Permitting such person to continue driving will cause adverse influences on such public interest as public safety and public confidence in traffic participants' compliance with traffic rules.

On the other hand, in event of revocation of a license pursuant to the Instant Provisions, the affected driver cannot apply for a license for two years(Article 70 Paragraph 2 Subparagraph 5 of the Road Traffic Act), thereby taking away occupations from people indispensably driving for occupations. Such result can have the meaning of depriving one of the means of livelihood. Effects on the affected private interest cannot be said to be small.

However, we cannot emphasize too much the gravity of the public interest in preventing enormous damages to individuals, the society, and the state originating from drunk driving. The private interest infringed due to compulsory revocation under the Instant Provisions and the indirect damages originating therefrom cannot be compared in gravity to the public interest. Also, given the gravity of the latent risk of accidents that can be caused by drunk driving, the danger associated with drunk driving is disproportionately greater than minor accidents that take place for other various reasons. If people indispensably driving for occupations are allowed to continue maintaining such occupations even after they fall under the purview of the Instant Provisions, their adverse effects on the public safety shall be greater than those of people of other occupations. Therefore, there is great necessity of and public interest in excluding them from the traffic.

Then, the Instant Provisions cannot be said to have disregarded a balance between the public interest in establishing traffic order

and providing against dangers to people's life and limbs originating from drunk driving and the basic right of the person driving cars. The Instant Provisions therefore do not violate the principle of balance among legal interests.

(D) Sub-conclusion

Therefore, the Instant Provisions abide by the ban against excessive restriction which sets the limit on legislative restriction on basic rights, and therefore do not infringe on occupational freedom or general freedom of action.

(2) Review of Petitioner's Other Arguments

(A) Petitioner argues that the conduct described in Article 78 Paragraph 1 Subparagraph 4(In Event of Traffic Accidents Caused by Driving Deliberately or Negligently) and Subparagraph 12(In Event of Failure to Take Necessary Measure or File a Report After Causing Injuries Through Traffic Accidents) is more culpable than the conduct regulated by the Instant Provisions and yet such conduct is regulated by optional revocation, and therefore the principle of equality is violated.

However, in applying administrative discipline against a driver that has caused a traffic accident deliberately or negligently, it is rational to comprehensively take into account the course and contents of the accident, the extent and type of injuries suffered by the victim, the degree of negligence of the driver, the age and gender of the driver and the victim, the post-accident course of events, and etc., in deciding on whether to suspend or revoke the driver's license. Article 78 Paragraph 1 Subparagraph 4 of the Road Traffic Act suspending or revoking the driving license of a person who has caused a traffic accident negligently or deliberately or who has caused injuries on others and failed to file a report or take other necessary measures does not depart so far from equity to violate the principle of equality as to an extent that destroys the order governing various reasons for revocations and suspensions.

On the other hand, Article 78 Paragraph 1 Subparagraph 12 of the Road Traffic Act prescribes suspension or revocation of license for those who have caused injuries to others and failed to take necessary measures or file a report pursuant to Article 50 Paragraphs 1 or 2. The culpability of not taking necessary measures or filing a report is no less than that of the conduct covered by the Instant Provisions. However, the Instant Provisions discipline only those who are have the risk of causing traffic

accidents while Article 78 Paragraph 1 Subparagraph 12 disciplines those who have already caused injuries to others. As important as it is to apply discipline in proportion to the culpability, the Instant Provisions must have reflected the importance of identifying the party at fault and thereby facilitating the compensation for the victim. Taking this into account, the Instant Provisions permit discretion in deciding on administrative discipline and thereby encourage voluntary reporting by the driver at fault, and again facilitate victims' compensation. In addition, as described above, the risks associated with drunk driving and the need to discipline accordingly those found deficient in the law-abiding readiness vis-a'-vis traffic rules and the safety awareness as evidenced by their violation of the Instant Provisions justify Article 78 Paragraph 1 Subparagraph 12 which apply optionally either suspension or revocation to those who fail to take necessary measures or file a report in accordance with Article 50 Paragraphs 1 or 2 of the Road Traffic Act. Therefore, the Instant Provisions do not depart so far from equity to violate the principle of equality as to an extent that destroys the order governing various reasons for revocations and suspensions.

(B) Petitioner argues that the Instant Provisions apply enhanced discipline on the basis of criminal punishment and administrative discipline already applied to the prior two drunk driving offenses, and therefore that the Instant Provisions interfere with the stability of law.

However, the Instant Provisions provide mandatory revocation for the driver sufficiently deemed deficient in the law-abiding readiness vis-a'-vis traffic rules and the safety awareness since the driver was found drunk driving three time despite the space-temporal limitation on detection of drunk driving and he or she has repeated drunk driving even after disciplined twice for that. Therefore, the Instant Provisions apply mandatory revocation to the unique culpable act of repeating the same violation after being cited twice. In other words, the Instant Provisions discipline both the two previous violations and the third violation at the same time. Their argument is without merit.

4. Conclusion

Article 78 Paragraph 1 Subparagraph 14 of the Road Safety Act(revised partially by December 23, 2004 through Act No. 7247 prior to be wholly amended on May 31, 2005 through Act No. 7545) which provides, "in event that a person who has violated Article 41 Paragraph 1 twice or more times violates Article 41 Paragraph 1

once again and thereby falls under the reason for suspending the license", does not violate the Constitution., and therefore the Justices decide unanimously as set forth in the Holding.

Justices Yun Young-chul(Presiding Justice), Kwon Seong, Kim Hyo-jong(Assigned Justice), Kim Kyung-il, Song In-jun, Choo Sun-hoe, Jeon Hyo-sook, Lee Kong-hyun, Cho Dae-hyen

4. *Urine Testing of Narcotic Offenders Case*
(18-2 KCCR 280, 2005Hun-Ma277, July 27, 2006)

In this case, the Constitutional Court found that requiring narcotic offenders in correctional facilities to collect and submit urine once a month for narcotics testing does constitute a state act, but that such act, aimed at maintaining safety and order in correctional facilities, is not subject to the warrant requirement and does not restrict the constitutional general freedom of action or the bodily freedom excessively, and therefore rejected the constitutional complaint.

Background of the Case

Petitioner received a sentence in prison for a violation of the Narcotics Control Act, and while serving the sentence, was required to collect urine in a paper cup and submit the same regularly once a month for a reagent-drop test. Petitioner filed this constitutional complaint, arguing that the prison's urine test violates the constitutional requirement of warrant and infringes the constitutional freedom of action and bodily freedom.

Summary of the Decision

The Constitutional Court rejected the claims of the Petitioner with a unanimous decision of all Justices for the following reasons:

Chief Warden's requiring inmates to submit a urine sample is done in a secluded place by a person of superior position giving the punishment to a person obliged to comply with instructions and orders related to execution of the punishment. Its purpose is to maintain safety and order in prison and it is imposed upon unilaterally. Even if there is no direct punishment for non-compliance, it is sufficiently expected that inmates are under psychological anxiety that they may be subject to inferior treatment in event of non-compliance. Therefore, such act constitutes de facto exercise of power and therefore constitutes a state act under Article 68 Paragraph 1 of the Constitution.

The Constitution Article 12 Paragraph 3 requirement of warrant bans involuntary investigative measures except on the basis of a warrant issued by a judge. Requiring submission of a urine sample is for maintenance of safety and order and not for an investigation.

Such submission requires inmates' cooperation and cannot be said to be involuntary. Therefore, the warrant requirement does not apply here.

Due to their addictive nature, narcotics, once smuggled into correctional facilities, have the ever-present risk of being consumed by inmates. Once consumed, the correctional aim is forfeited for that consuming inmate, and such consumption can lead to dangerous conduct towards other inmates and the resulting accidents. Therefore, testing narcotics offenders monthly through urine testing is needed to detect early smuggling and consumption of narcotics and to block drug smuggling and thereby to maintain safety and order in correctional facilities. Furthermore, narcotics consumption cannot be detected through external observation. The testing involves voluntary submission of urine samples, unaccompanied by punitive measures for compliance, and a 3-minute test during which a reagent is dropped into the urine sample. The subject must engage in the undesired act of collecting and submitting one's own urine and its right of self-determination with respect to its own excretion is restricted. However, in light of the ends and means thereof, the urine testing does not violate the ban against excessive restriction.

Parties

Petitioner

Eum ○ Yong

State-Appointed Counsel: Jang Seon Ho

Respondent

1. Minister of Justice
2. Chief Warden of Daegu Prison

Holding

Petitioner's claim against the Minister of Justice is dismissed, and Petitioner's claim against Chief Warden of Daegu Prison is rejected.

Reasoning

1. Introduction of the Case and Subject Matter of Review

A. Introduction of Case

(1) Petitioner is arrested and indicted for a violation of the Narcotics Control Act in June 2004 and received a sentence of 10 months from Daegu District Court on September 23, 2004, which was finalized on November 27, 2004, and which Petitioner completed on March 31, 2005.

(2) Petitioner was subjected to a narcotics test(T.B.P.E. test where the test subject collects and submits urine in a paper cup into which T.B.P.E. reagent is dropped to see if the color changes to red for a positive identification) on June 9, 2004, October 26, 2004, and November 23, 2004 at Daegu Jail, and December 24, 2004 at Daegu Prison, and tested positive each time.

(3) Petitioner requested appointment of state-appointed counsel on January 6, 2005, and through the state-appointed counsel, filed this constitutional complaint on March 16, 2005, and argued that the Respondents' act of requiring Petitioner to submit urine for a narcotics test on December 24, 2004(hereinafter referred to as the "the Instant Urine Sampling") infringes the constitutionally guaranteed dignity of a person and the right to pursuit of happiness and bodily freedom, violates the warrant requirement, and argues that the involuntary urine sampling for the monthly narcotics test will continue, seeking a decision of unconstitutionality.

B. Subject Matter of Review and Related Provisions

(1) Subject Matter of Review

The subject matter of review is constitutionality of Respondents' act of requiring Petitioner to submit urine sample for a narcotics test on December 24, 2004.

(2) Related Provisions

The Penal Administration Act

Article 17-2(Bodily Inspection)

(1) A correctional officer may inspect the inmate's body, clothes, personally carried items, living room, and work space when it is necessary for safety and order of the prison.

2. Petitioner's Arguments and Respondents' Response

A. Petitioner's Arguments

(1) The Instant Urine Sampling is based on internal rules, not on statutory delegation, and therefore deviates from the limitation on statutory delegation, and is conducted without a judge-issued warrant and therefore violates the constitutional warrant requirement.

(2) Even if Petitioner is a narcotics offender, Petitioner, unlike inmates serving for other crimes, is already banned from receiving goods from the outside and is therefore blocked from smuggling in narcotics. Petitioner is obligated to go through the urine test regularly, without any legal basis for such obligation. This constitutes excessive restriction of bodily freedom in violation of the constitutional rule against excessive restriction and infringes upon the essential content of personal dignity and the right to pursuit of happiness.

(3) The urine test does not constitute an appealable administration action, and the Instant Urine Sampling being contested has been completed. However, since the Instant Urine Sampling will repeatedly conducted regularly, there is an interest in seeking a decision of unconstitutionality.

B. Respondent's Response

(1) The Instant Urine Sampling does not constitute an exercise of public power because it is conducted pursuant to the test subject's voluntary cooperation and not subject to punishment or any other penalty for non-compliance.

(2) Article 6 Paragraph 1 of the Penal Administration Act, Articles 6, 7, and 9 Paragraph 1 of the Enforcement Decree of the Penal Administration Act grant inmates the right to petition in objection to their treatment and the right to meet the Chief Warden and its procedure. Petitioner has not exercised the petition right and the consultation right, and therefore has not met the requirement of exhaustion of other remedies.

(3) Petitioner was released on March 31, 2005, and therefore

Petitioner's legal interests have been extinguished.

(4) The Instant Urine Sampling is conducted as part of bodily inspection pursuant to Article 17-2 Paragraph 1 of the Penal Administration Act and is therefore statutorily based. It is also pursuant to voluntary cooperation and not conducted under application of a force, and therefore is not subject to the warrant requirement, which applies only to the involuntary procedure such as arrest, detention, seizure, and search.

(5) Narcotics offenders are by nature addicts or habitual offenders. The risk of their smuggling-in of narcotics from the outside is constantly present. Availability of narcotics to the inmates can lead to major correctional disasters, and therefore there is a need for blocking that possibility to maintain safety and order in correctional facilities. The periodic narcotics testing conducted once a month is appropriate means of general prevention, to block in advance the smuggling-in of narcotics and protect narcotics offenders from the narcotics. Thorough inspection of bodies, clothes, living rooms, and outside goods is impossible, and visual observation does not identify consumption of narcotics. The Instant Urine Sampling does not violate the rule against excessive restriction.

3. Review of Statutory Requirements

A. Respondent Minister of Justice

The party responsible for the Instant Urine Sampling is not the Minister of Justice but the Chief Warden of Daegue Prison. The constitutional complaint against the Minister does not meet the legal requirement.

B. Respondent Chief Warden of Daegu Prison

(1) Whether an administration action constitutes a de facto act of public power, the subject matter of a constitutional complaint, should be individually determined by comprehensively taking into account the relationship between the administrative agency and the subject, the extent and attitude of the subject's and opinion on and participation in that de facto act, the purpose and course of that de facto act, and existence of the legal basis for the relevant order or enforcement measure(6-1 KCCR 462, 485, 89Hun-Ma35, May 6, 1994)

The urine test on narcotics offenders is impossible without the test subject's cooperation, and there is no punishment or other

penalty for refusing to cooperate. However, Chief Warden is a person of superior position giving the punishment to a person obliged to comply with instructions and orders related to execution of the punishment in a secluded place. The purpose of the urine test is to maintain safety and order in prison by prevention and early detection of inmates' consumption of narcotics, and the test is imposed upon unilaterally. It is sufficiently expected that inmates are under psychological anxiety that they may be subject to inferior treatment in event of non-cooperation, and the actual instances of non-cooperation are rare. Therefore, the urine test constitutes de facto exercise of power and therefore constitutes a state act under Article 68 Paragraph 1 of the Constitution.

(2) It is not clear whether the Instant Urine Sampling constitute a de facto exercise of power and therefore can be the subject matter of an administrative suit. Even if it is, the infringing act has ended, and therefore existence of the justiciable interest in the infringing act will be denied. The right to petition and the right to consult with the Chief Warden, given the nature of the dispositional authority, procedure, and effectiveness, are insufficient and indirect methods of providing relief. Therefore, these proceedings cannot be deemed the procedures that must have been exhausted before the filing of this constitutional complaint. Petitioner does not have any other effective remedy than the constitutional complaint(7-2 KCCR 94, 102, 92Hun-Ma144, July 21, 1995; 10-2 KCCR 637, 644, 98Hun-Ma4, October 29, 1998; 117 KCCG 938, 2004Hun-Ma826, June 29, 2006 et al.).

(3) Petitioner was released on March 31, 2005, and thereby the infringing act against Petitioner has terminated. A decision of unconstitutionality on the urine sampling does not provide relief to Petitioner, and therefore, Petitioner does not have subjective interest in this case. However, even if a constitutional complaint is not helpful for relief to subjective interests, when the infringing act is likely to repeat and therefore its constitutional interpretation has an important meaning, we have recognized the existence of a justiciable interest(9-2 KCCR 675, 688, 94Hun-Ma60, November 27, 1997; 13-2 KCCR 103, 108, 2000Hun-Ma546, July 19, 2001; 13-2 KCCR 238, 244, 99Hun-Ma496, August 30, 2001; 14-2 KCCR 54, 60, 2000Hun-Ma327, July 18 2002; 117 KCCG 938, 2004Hun-Ma826, June 29, 2006 et al.).

According to the materials in this case, the urine sampling is conducted upon narcotics offenders in each jail or prison upon admission and once a month or a quarter thereafter periodically and repeatedly. Therefore, constitutional resolution on this practice has an important meaning

4. Review of Merits

A. Introduction of Narcotics Testing

(1) Statutory Basis

(A) Article 17-2 of the Penal Administration Act(Bodily Inspection) states in Paragraph 1, "a correctional officer may inspect the inmate's body, clothes, personally carried items, living room, and work space when it is necessary for safety and order of the prison.", and thereby permits bodily inspection of inmates. The urine sampling for narcotics testing can be considered part of the bodily inspection. Therefore, the above provision is the statutory basis for the Instant Urine Sampling.

(B) Narcotics testing through urine samples in correctional facilities is generally conducted pursuant to the August 26, 1989 Instruction of the Minister of Justice(Correctional 01250-11529), which authorized the T.B.P.E. reagent testing for maintaining and managing narcotics offenders, and the May 1, 1990 Instruction (Correctional 01250-5623) which mandated the T.B.P.E. reagent testing once or more each month and the reporting of the results.

(2) Contents

The test subjects of the narcotics testing through urine samples are narcotics offenders, those who have worked in entertainment establishments before admission, high seas seamen and others who frequented overseas, those with narcotic-related prior convictions, and other inmates likely to use narcotics and therefore requiring narcotics testing. They are generally tested upon admission into the jail or prison and once a month thereafter, and exceptionally when necessary. The test method is as follows: The test subject collects his or her urine sample in a paper cup at a place not visible from others and submits the same. Then, 0.3cc of boric acid sodium and 0.5ml of T.B.P.E. reagent are dropped into 3 to 5cc of the sample to see whether the compound turns red(positive). For each test, the time and results are recorded on the health records, reported to the Bureau of Corrections and the Ministry of Justice. In event of a positive result, the test subject is referred to the more precise testing on blood and hair at relevant authorities.

B. Constitutional Limit on Urine Sampling

(1) Instant Urine Sampling and Petitioner's Rights

If Petitioner is obligated to collect urine samples in the absence of any legal basis or obligation, it presents the issues of infringement on the general freedom of action(the right not to do an undesired thing, i.e., collecting and submitting urine; and the right not to open to others one's bodily conditions and information) guaranteed by the Constitution Article 10's personal dignity and worth and the right to pursuit of happiness, and infringement of the bodily freedom guaranteed by Article 12 of the Constitution.

(2) Relationship to Warrant Requirement

Article 12 Paragraph 3 of the Constitution requires arrest, detention, seizure and search to be conducted pursuant to the prosecutor's request and a judge-issued warrant in accordance with due process, and thereby guarantees the constitutional requirement of warrant. The warrant principle means that no involuntary investigative measure shall be taken unless it is pursuant to a judge-issued warrant(9-1 KCCR 245, 258, 96Hun-Ka11, March 27, 1997).

Therefore, the Instant Urine Sampling does not constitute an involuntary measure calling for a judge-issued warrant. The urine sampling conducted in jails and other correctional facilities as described above without a judge-issued warrant does not violate the warrant requirement of Article 12 Paragraph 3 of the Constitution.

(3) Infringement on the Rule Against Excessive Restriction

Even if the Instant Urine Sampling is pursuant to Article 17-2 of the Penal Administration Act and necessary for maintenance of safety and order in correctional facilities, the essence of the basic rights shall not be infringed, and the rule against excessive restriction which includes the requirements of legitimacy of purpose, appropriateness of means, minimum restriction, and balance among legal interests, shall not be violated.

The uniqueness of narcotics is in its addictive nature. A great majority of narcotics offenders are repeated offenders. There is an ever-present risk of narcotics being smuggled into correctional facilities and being consumed by inmates. Once consumed, the correctional purpose is forfeited for that consuming inmate, and such consumption can lead to the dangerous conduct towards other inmates and the resulting accidents. In the presence of such possibility and risk, the periodic testing of narcotics offenders and

others likely to obtain narcotics allows early detection of the smuggling or consumption of narcotics. Also, by making all inmates aware of the periodic testing, it can block narcotics smuggling in advance. Once inmates give up on the attempts to smuggle in narcotics, they are more likely to respond positively to rehabilitation and other correctional programs. The periodic narcotics testing through urine sampling contributes greatly to maintenance of safety and order in correctional facilities and accomplishment of correctional purposes. Therefore, the legitimacy of purpose is recognized.

Also, smuggling of narcotics can be detected through inspection of clothing, personal carry items, living rooms, and work space and visual observation of the body exteriors and cavities but cannot be done thoroughly(these inspections can also infringe on inmates' basic rights and the body cavity inspection is likely to infringe on basic rights more severely). Narcotics consumption cannot be detected through external observation. Therefore, the narcotics testing through urine sampling is appropriate means.

Also, the testing involves voluntary submission of urine samples, unaccompanied by punitive measures for compliance. The test is completed in a short time(1 to 3 minutes) through a simple method(a boric acid natirum and T.B.P.E. reagents are dropped into the paper cup in which the urine sample is collected) and shows the result instantaneously. Therefore, it constitutes the minimum restriction.

Finally, Petitioner and the test subjects suffer from the disadvantage of having to periodically collecting and submitting one's own excreted urine, in other words, a restriction on the private interest in terms of the right of self-determination with respect to one's own body and in terms of having to do an undesired thing. However, as described above, the public interest achieved by the testing, in enhancing the likelihood of successful correction of the test subjects(this has the aspect of promoting the private interest) and in maintaining order and safety in correctional officers, is much greater. Therefore, the balance between legal interests is satisfied.

Therefore, the Instant Urine Sampling done on the Petitioner narcotics offender does not violate the ban against excessive restriction.

5. Conclusion

Then, the constitutional complaint filed by Petitioner narcotics offender against the Instant Urine Sampling is dismissed against the Respondent Minister of Justice for the lack of its agency in the contested state act and the resulting legal deficiency, and rejected against the Respondent Chief Warden of Daegu Prison since the Instant Urine Sampling is conducted within the limits of restriction on basic rights. Justices hereby decide as set forth in the Holding with a unanimous decision.

Justices Yun Young-chul(Presiding Justice), Kwon Seong, Kim Hyo-jong, Kim Kyung-il, Song In-jun, Choo Sun-hoe, Jeon Hyo-sook, Lee Kong-hyun(Assigned Justice), Cho Dae-hyen

Ⅱ. Summaries of Opinions

1. *Denial of Appeal to the School Foundation Case*

[18-1(A) KCCR 58, 2005Hun-Ka7 and 2005 Hun-Ma1163 (consolidated), February 23, 2006]

Held, Article 10 Paragraph 3(hereinafter referred to as the "the Instant Provision") of the Special Act on the Improvement of Teachers' Status(hereinafter referred to as the "the Act"), which denies the school foundation the right to appeal to courts against the decision of the Examination Committee(hereinafter referred to as the "Committee") in the examination of disciplinary measures made by the school foundation, is unconstitutional.

Background of the Case

The Petitioner, a school foundation which founded and operates A University, found that B, a member of the faculty at the university, demeaned the honor and dignity of a professor, and decided not to renew his contract. Upon B's filing for an examination of appeal, according to Article 9 Paragraph 1 of the Act, asking the repeal of the refusal to renew his contract, the Committee repealed the decision of the university. The Petitioner filed for an administrative suit seeking to revoke the decision of the Committee, also arguing that the instant provision giving the right to appeal the decision of the Committee only to the teachers, is unconstitutional. The administrative court in turn referred the case to constitutional review of the statute.

Summary of the Decision

The Constitutional Court, with a unanimous decision of all Justices, ruled that the instant provision is unconstitutional. This decision overruled the previous decision on the same provision(10-2 KCCR 89, 95Hun-Ba19 et al., July 16, 1998), which held it constitutional. The summary of the decision is as follows:

The legislative purpose of the instant provision is to effectively secure the right of the state to superintend the school foundations, and to improve the treatment and guarantee the status of teachers, by allowing them to appeal to courts the decisions of the Committee in the examination of disciplinary measures, and such legislative purpose may be deemed legitimate. As the teachers are relieved of disadvantageous measures, finally and decidedly, when the committee accepts their appeal for examination, the provision has the appropriate means to achieve such legislative purpose. When a teacher chooses to file a civil action, arguing the validity of the disciplinary measures, the school foundation may contest the suit or participate in the suit as the defendant and seek remedy to any rights and interests that may have been violated. Also the school foundation may actively file for a civil suit, seeking to confirm the non-existence of the status of a teacher, upon the premise that the disciplinary measures are lawful.

But arguing the school foundations' rights by contesting the suit or participating in the suit as the defendant, may only be possible when the teacher involved waivers his or her right to an appeal for examination or the right to file for an administrative suit as stipulated in the Act, and chooses to seek civil action. So the school foundation cannot be said to have been afforded effective relief measures. And in a civil suit seeking to confirm the non-existence of the status of a teacher, the decision of the court may contradict or conflict with the decision of the examination of appeal or the administrative court, when the teachers separately seek such measures. Thus such method is an indirect means to seeking relief of violated rights. Also, there exits no particular obstacle in guaranteeing the status of a private school teacher or any void in the remedy of their rights, just by giving the school foundation the right to appeal to the court on the examination of the Committee. Thus, the instant provision infringes upon the right to trial of the school foundation, which is the party concerned and also the defendant in the examination process.

Additionally, the school foundation has a civil contract relationship with its employed teachers, and the decision of the examination of appeal binds the school foundation as well as the teacher. As such, the instant provision which denies the school foundation the right to appeal to courts on the decisions of the Committee, without any reasonable cause, is in violation of the principle of equality, in Article 11 of the Constitution. Also by making the decision of the Committee final, on the legality of the disciplinary measures directed to private school teachers, it violates Article 101 Paragraph 1 of the Constitution, which mandates that

judicial power on all legal disputes be vested in courts. Moreover, it also violates Article 107 Paragraph 2 of the Constitution, by depriving the power of final review of the Supreme Court on the legality of the decision of the Committee, which is an administrative action.

2. *Passing the Revised Bill of the National Government Organization Act Case*

[18-1(A) KCCR 82, 2006Hun-Ra6, February 23, 2006]

Held, in a competence dispute over whether the Respondent, the Speaker of National Assembly infringed the Petitioners' power to deliberate and vote on the bills by passing the revised bill of the National Government Organization Act, providing the establishment of Defense Acquisition Program Administration, along with the original bill introducing a dual-deputy-minister system, the elevation of Korea National Statistical Office and Korea Meteorological Administration to organizations in which deputy ministers sit as heads, the Constitutional Court dismissed the case.

Background of the Case

On March 24, 2005, the Korean government brought a bill of the National Government Organization Act before National Assembly of the Republic of Korea. The contents of such bill included the introduction of dual-deputy-minister system, the elevation of Korea National Statistical Office & Korea Meteorological Administration to organizations in which deputy ministers sit as heads and the establishment of Defense Acquisition Program as well as the name change for Ministry of Construction & Transportation to Ministry of National Geography & Transportation. Government Administration & Home Affairs Committee in National Assembly of Republic of Korea reviewed the bill along with other bills which were already submitted, passed the alternative version of bill which includes the introduction of dual-deputy-minister system, the elevation of Korea National Statistical Office & Korea Meteorological Administration to organizations in which deputy ministers sit as heads and referred the bill to a plenary session of the National Assembly. On June 30, 2007, in the 8th full-dress meeting of 254th Extraordinary Session, regarding a part of reform bill of the National Government Organization Act above, in the name of 33 lawmakers from Our

Open Party and Democratic Labor Party, a revised bill including the establishment of Defense Acquisition Program was submitted. The Speaker passed the revised bill by a majority vote and he announced the passage of the original version of the bill of the National Government Organization Act along with the revised one. The Petitioners from the Grand National Party claimed that the Speaker infringed their power to deliberate and vote on the bills by announcing the passage of the bill which deviated from the extent of revision allowed by the National Assembly Act. Furthermore, the Petitioners, arguing that the announcement of passage of such bill is invalid because of its unconstitutionality, requested to the Constitutional Court an adjudication on competence dispute.

Summary of the Decision

The Constitutional Court has held, in 6 : 3 decision, dismissed the request. The summary of the grounds for the Court's decision is stated in the following paragraphs.

1. Majority Opinion of Six Justices

Considering (1) there is no restriction in the National Assembly Act in terms of the extent of revising bills referred to a plenary session of the National Assembly, (2) the National Assembly Act provides that the revision means adding a different idea to the original, which includes an addition, a deletion and a modification of the original, as long as the original opinion of the original remains intact, the revision would be qualified as a revised bill allowed by the National Assembly Act.

Likewise, if we can broadly construe the meaning of revision provided in Article 95 of the National Assembly Act, the fact that the Respondent passed the revised version would not be a clear violation of the Law. Furthermore, according to a stenographic record of the National Assembly, the Respondent, upon the assumption that without a clear rule on the proceedings the Respondent is supposed to follow the precedents, and upon the report from the National Assembly Secretariat that from the outset of the 17th National Assembly to June 29, 2005, 10 out of 12 revised bills were passed with the contents the original version did not have. Also, reviewing all the bills mentioned on the report from the National Assembly Secretariat, it is quite certain that the bills with newly made provisions were passed as revised bills without any particular problem. Therefore, it cannot be said that the

Respondents passed the bill at issue in this case while making a determination on the extent of revised bill with ex parte interpretation of the National Assembly Act.

2. Dissenting Opinion of Three Justices

The bill at issue in this case, because it is a separate one departing from the original version, is not the revised bill pursuant to the National Assembly Act. The original bill included (1) the introduction of dual-deputy-minister system for Ministry of Finance and Economy, Ministry of Foreign Affairs and Trade, Ministry of Government Administration and Home Affairs and Ministry of Commerce, Industry and Energy (2) the elevation of Korea National Statistical Office and Korea Meteorological Administration to organizations in which deputy ministers sit as heads. Therefore, although in formality the bill at issue in this case was submitted as a revised bill, without any similarity to the original bill in terms of contents, the bill at issue in this case is a separate one. Even if the National Assembly passed the bill at issue, it only shows that the members of the National Assembly expressed their opinion either in the affirmative or in the negative. The members never expressed any view on the introduction of dual-deputy-minister system and the elevation of some governmental organizations to the vice-minister class which was provided in the original bill. Therefore, since the fact that the revised bill was passed cannot be translated into the passage of the original bill, additional proceeding is necessary to announce the passage of the original bill.

3. *Awarding Additional Points to the Family Members of Patriots and Veterans Who Take the Public Servant Examinations to Work at National and Local Level of Organizations.*

[18-1(A) KCCR 269, 2004Hun-Ma675 · 981 · 1022(consolidated), February 23, 2006]

Held, the relevant provisions of the Cordial Reception and Support Act for Patriots and Veterans(Paragraphs 1 and 2 of Article

31) as well as other corresponding clauses providing an award of extra 10% of the perfect score to the family members of patriots and veterans who take the examinations to work as pubic servants for the national or local organizations are unconstitutional for the reasons that the relevant provisions violate the right to equality as well as the right to hold public office.

Background of the Case

The relevant provisions of the Cordial Reception and Support Act for the Patriots and Veterans provide that when the family members of patriots and veterans take the public servant examination to work at local as well as national level organizations, they get additional points of 10% of perfect score at all times. The complainant, who have prepared for or taken such examinations selecting either Level 7 or Level 9 public servants, requested the Court to review the constitutionality of the relevant provisions of the Act above in that those provisions violate their right for equality, right to hold public office.

Summary of the Decision

The Constitutional Court has held, in 7 : 2 decision, that the relevant provisions of the Cordial Reception and Support Act for the Patriots and Veterans are not in conformity with the Constitution. The summary of the grounds for the Court's decision is stated in the following paragraphs.

1. Majority Opinion of Seven Justices

A. The Constitutional Court held that, as decided on February 22, 2001, in 2000Hun-Ma25(hereinafter referred to as the "the former decision"), the old version of the Cordial Reception and Support Act for the Patriots and Veterans with the provisions of same contents along with the contested clauses of the current case did not violate the right to equality and the right to hold public office. However, a certain need to make a different decision has arisen for the following reasons.

Since the year of 1984, the numbers of people who get the benefit as family members of patriots and veterans have been on the dramatic rise. Since the former decision was rendered, other Acts such as the Special Act on the May 18 Democratic Movement have extended the same privileges to the persons concerned as well

as to the surviving family members. Also, since the year 2000, the number of beneficiary from such Acts has increased, because the award extends to the family members and the number of such family members have increased.

Meanwhile, taking the Level 7 public servant examination as an example, the pass rate of beneficiaries from such Acts was 30.3%(189 passers) in 2002, 25.1%(159 passers) in 2003, and 34.2%(163 passers) in 2004, respectively. In addition, the pass rate of the beneficiaries amounted to 26.9%(784 passers) in 2002, 17.6%(331 passers) in 2003, and 15.7%(282 passers) in 2004 for those who got selected as the Level 9 public servants. On June 30th of 2005, among the numbers of people who have the preferential opportunities to work as public servants(the beneficiary of additional points), which are 86,862, only 7,013(8%) people are the patriots and the veterans themselves and 79,849(92%) people are their family members as well as their surviving family members. Those records above show that the preferential treatment system for patriots and veterans has degenerated into a system where their family members get unfair advantage when they take public servant examinations.

In the former decision, the Constitutional Court found that Paragraph 6 of Article 36 of the Constitution, which provides "the opportunity to work shall be accorded preferentially, under the conditions as prescribed by the Act, to those who have given distinguished service to the State, wounded veterans and policemen, and members of the bereaved families of military servicemen and policemen killed in action." should be construed broadly, so the Paragraph of the Article can be a ground for a system awarding additional points to the patriots and veterans themselves as well as their family members. However, pursuant to the facts that the numbers getting such preferential treatment have been increasing rapidly and the competition to be public servants through public servant examinations has become so fierce, the broad interpretation of the contested clause brings the inevitable result of restricting the opportunity of the general public to hold public office. Therefore, there is a need that the Paragraph of the Article should be construed narrowly. For that reason, the beneficiaries of such act should be limited to 'those who have given distinguished service to the State', 'wounded veterans and policemen' and 'the bereaved families of military servicemen and policemen killed in action.'

B. While the discriminatory effect of awarding additional points pursuant to the Act in this case is nothing to be overlooked, the need for giving extra 10% of points to the family members of the patriots and veterans is not material. Even if the purpose of such

legislation is being taken into consideration, the discriminatory effect against the general applicants in terms of restricting the opportunity to hold public office is excessive. Since, the discriminatory effect of the Act is so great and the legitimacy of the legislative purpose and the appropriateness of the means to achieve the purpose cannot be satisfied, the statutory provisions at issue in this case violate the right to equality as well as the right to hold public office.

Meanwhile, the unconstitutionality of the statutory provision at issue in this case is based upon the magnitude of discriminatory effect not upon the inherent ban of existence of any sort of preferential system of giving extra points as legislative policy matter. For the reason, as an alternative, the legislators could slash the extra points given, and make readjustment in terms of the scope of beneficiaries at the same time, curing the unconstitutionality of the statutory provision at issue. Therefore, We hereby issue a decision of nonconformity to the Constitution, to the effect that the legislators shall be obligated to affirmatively cure the unconstitutionality, and order that the statutory provisions at issue in this case shall continue to apply to avoid any legal confusion which might occur to the beneficiaries. The legislators, at the latest of June 30, 2007, should replace the law with a new one. Otherwise, the provisions at issue in this case become nullified as of July 1, 2007.

2. Dissenting Opinion of Two Justices

Fundamentally, the provisions at issue in this case, awarding the extra points to the patriots and veterans as well as to their family members, are in accordance with the meaning and contents of Article 32 Paragraph 6 of the Constitution. Considering (1) the purpose of contributing their livelihood, (2) the purpose of maintaining their social status, (3) the danger of any financial support being a temporary measure, (4) the possibility that the pass rate of the patriots and veterans might drop dramatically without such system of giving extra points to them, the preferential treatments at issue in this case seem to be appropriate. Presently, among the numbers of public servants the people who passed the public servant examination with the benefit of getting extra points only occupy 3% of total number of public servants and the revised version of the Cordial Reception and Support Act for the Patriots and Veterans limits the percentage of people who pass with the help of extra points to 30%. Therefore, the proportion of extra points are not far-fetching which could be construed as either restricting

the rights and opportunities of the general public or causing enormous amount of difficulty in the country management. In short, without any data that awarding additional points to the family members of patriots and veterans is either grossly unfair or unjustifiable to be deemed as deviating from the purpose of the system, the provisions at issue in this case are not in violation of the right to equality. In addtion, the provisions at issue in this case do not violate the right to hold office of the general public by violating the right to equality of them. Therefore, the former decision which held the provisions at issue are not unconstitutional and it should be sustained.

4. *Treaties on Relocation of the U.S. Military Base Case*

[18-1(A) KCCR 298, 2005Hun-Ma268, February 23, 2006]

Held, the relevant provisions of 'Treaty between the Republic of Korea and the United States of America for the Relocation of the U.S. Military Base from Seoul Area'(hereinafter referred to as the "relocation treaty"), 'Agreement on the Advisory Opinion for the Execution of the Treaty between the Republic of Korea and the United States of America for the Relocation of the U.S. Military Base from Seoul Area' (hereinafter referred to as the "agreement for the execution"), and 'Revised Agreement between the Republic of Korea and the United States of America for the Concerted Land Management & Planning signed on March 29, 2002' (hereinafter referred to as the "Land Management & Planning Agreement") (hereinafter referred the treaties and agreements above as, "the treaties at issue") are not in violation of the Constitution based on the procedural grounds.

Background of the Case

The treaties at issue were signed on October 26, 2004 and the relocation treaty and Land Management & Planning Agreement with exception of the agreement for the execution were voted by the National Assembly of the Republic of Korea for the ratification on December 9, 2004, at 250th Assembly(regular session) 14th plenary session. On December 17th, the relocation treaty as the treaty number 1701 and the agreement for the execution as the treaty number 1702 and on December 9, 2004, the revised treaty, as the

treaty number 1703, came into effect and were published on official gazette respectively. The Republic of Korea, along with the treaties at issue, pursuant to Article 2 of 'Agreement under Article 4 of the Mutual Defense Treaty between the Republic of Korea and the United States of America, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea (SOFA)' has begun the process of buying up and expropriation of 11,517,000㎡ including 9,405,000㎡ size of land in PengsungEup of City of Pyungtek which is nearby K-6 base and 2,112,000㎡ size of land in SeotanMyun of City of Pyungtek which is nearby K-55 base(Osan airfield) to give the site to the U.S. military for the use of new base. The complainants, the locals residing in DaechooRi, DodooRi, PengsungEup in City of Pyungtek, claiming that the treaties at issue infringe their right to equality, the right to conduct peaceful livelihood, filed the constitutional complaint in this case on March 15, 2005.

Summary of the Decision

The Constitutional Court, with a unanimous opinion of all Justices, has dismissed the constitutional complaint on the procedural ground. The summary of the grounds therefor is stated in the following paragraphs.

A. As Paragraph 1 of Article 68 of the Constitution provides that "Any person who claims that his basic right which is guaranteed by the Constitution has been violated by an exercise or non-exercise of governmental power …… may file a constitutional complaint," constitutional complaint can be brought by the person whose fundamental rights are being infringed directly and presently by an exercise or non-exercise of governmental power. The meaning of "Any person whose fundamental rights are being infringed" refers to the person that whose fundamental rights are infringed presently and directly by an exercise or non-exercise of governmental power.

B. The relocation of United States Military Base is either a matter of public policy or an execution of such policy, which inevitably affects the people who live nearby the Base. However, the Relocation neither has something to do with individuality or fate of certain people, nor puts on direct restriction on the freedom of choice pursuant to the difference of individual taste. Therefore, the Relocation decision is not upon the constitutional protection of freedom of choice. While a government would be better off if it listens to local people when such decision has adverse effect on

their livelihood, if such decision is not an exceptional one such as the merger and abolition of local community, it is not necessary to listen to local people's opinion beforehand.

Today, being free from war, terrorism and violence are prerequisites for the realization of human dignity and value as well as for the pursuit of happiness. Although there is no express provision in the Constitution that states such fundamental rights, it is necessary to protect such rights as the rights to live peacefully, as we can draw from Article 10 and Article 37 Paragraph 1 of the Constitution. The basic contents of such Rights is to ask the country for peaceful livelihood which would not be forced upon by committing aggression. The treaties at issue are for the relocation of the U.S. military base only, and the relocation itself would not justify the arguments that the country would be engaged in invading warfare. Therefore, there is no possibility that their right to conduct peaceful livelihood would be violated by having such treaty.

The treaty at issue only includes the agreements of relocation and the environmental rights, the right to make a statement during the proceedings of trial, the right for the pursuit of happiness, the right to equality, the right to own property would not be in direct violation because of such treaty. Furthermore, upon the relocation of the U.S. military base, although it is expected that their rights might be violated to some degree, that concern for infringement is only potential. Therefore, there is neither 'immediacy' nor 'directness' in terms of the violation of the rights described above.

C. Besides the infringements of their fundamental rights, the complainants also raise the argument that the treaty provisions at issue is in violation of the general constitutional articles(Article 5 and 60 of the Constitution). However, as noted before, without the possibility of any infringement of fundamental rights, the assertion that such treaty provisions at issue is in violation of general constitutional articles and the principles of the constitution does not meet the requirement of asking for the judgment on constitutional complaint, therefore could not be accepted.

5. *Imposition Time for Penalty Surcharge Case*

[18-1(B) KCCR 1, 2005Hun-Ka17 and 2006Hun-Ba17 (consolidated), May 25, 2006]

In this case, the Constitutional Court pronounced the decision of nonconformity to the constitution since the Act on the Registration of Real Estate under Actual Titleholder's Name(hereinafter referred to as the "the Act") Article 5, the text of provision 2(hereinafter referred to as the "the statutory provision of this case") imposing penalty surcharge, based on equivalent of real estate at the time of imposing point, upon the case the violation of law had been ended violates requesting party's property right.

Background of the Case

Requesting party, the real owner of the real estate, did act of title trust, registering the ownership under other person's name. The issue of the case is whether the statutory provision of this case imposing the penalty surcharge based on the equivalent of real estate 'at the present day of imposing the penalty surcharge', upon the violation of the provision resulting in varying the specific amount of penalty surcharge depending on administrative agency's choosing the imposing point of penalty surcharge, violates property right, therefore, it is constitutional.

Summary of the Decision

The Constitutional Court, in 8:1 opinion, pronounced decision of nonconformity to the constitution of the statutory provision of this case violating complaint's property right, and ordered that its application shall be suspended until the revision. The summary of rationale is same as the following.

1. Majority Opinion of Eight Justices

In case the act of title trust still existed when the administrative agency imposed the penalty surcharge, the imposition is for the continuously committed illegal act so even if they determined equivalent value of real estate at the imposing point of penalty surcharge as standard for computing the penalty surcharge, it does not violate principle of proportionality and property right.

However, in case the act of title trust ended when the administrative agency imposed the penalty surcharge, if they determined equivalent value of real estate at the imposing point of penalty surcharge as standard for computing the penalty surcharge, due to increase of the penalty surcharge based on the increase of equivalent value of real estate, the arbitrary choosing of imposing point and etc. disinterest of wrongdoer is great, but after the relationship of title trust is already ended, public interest gained by collecting the wrongdoer's illegal interest and enforcing mandatory registration with the actual name, is not so great, therefore, it violates principle of proportionality and property right.

However, if the court found unconstitutionality decision in its entirety on the statutory provision of this case, there would be no standard on the basis in computing the penalty surcharge, to evaluate equivalent value of real estate, so it creates the legal vacuum which is even for the constitutional case in which they cannot impose penalty surcharge for legal violation, therefore, the court found decision of nonconformity to the Constitution and ordered that its application shall be suspended until the revision of the law, by May 31, 2007. If legislator does not revise the statutory provision of this case till the date stated above, it would become invalid from the very next day of the deadline, June 1, 2007.

2. Dissenting Opinion of One Justice

Since the contents of the statutory provision of this case contains the part which conforms with Constitution and the part which does not conform with the Constitution together, and the part which does not conform with the Constitution can be specified, the part which confirms should be kept and the part which does not conform should be invalidated. Therefore, the court should pronounce partial constitutionality, 'the part of the statutory provision of this case, which applies to the case after the relationship of title trust is already ended, computing penalty surcharge based on the equivalent value of real estate at time of the imposition, violates the Constitution'. The opinion of the majority invalidating the part which conforms the Constitution violates the principle of separation of power.

6. *Visually disabled persons' monopoly as massagers*

[18-1(B) KCCR 112, 2003Hun-Ma715 and 2006Hun-Ma (consolidated), May 25, 2006]

In this case, the Constitutional Court has issued a decision that "Municipal Regulation on Massager" Article 3 Paragraph 1 Subparagraphs 1, 2(hereinafter referred to as the "the Regulation of this case"), providing that only the visually disabled persons' qualification as a massager shall be admitted, violates the principle of statutory reservation, prohibition of excessive restriction, and freedom of occupation of the people who are not visually disabled, therefore, it is unconstitutional.

Background of the Case

The Regulation of this case provides that only a certain range of the visually disabled persons' qualification as a massager shall be admitted. In this case, the complaints received the relevant education from the institution which teaches the method of giving the sports massage and they were willing to work at the sports massage business, but they could never receive the qualification as a massager due to the Regulation of this case. So they argued that it violates the fundamental rights of people, who are not visually disabled, such as the right to choose occupation, and they filed consitutional complaint.

Summary of the Decision

The Constitutional Court, in 7 : 1 decision, held the Regulation of this case unconstitutional. The summary of the reasoning is same as it follows:

1. Majority Opinion of Seven Justices

The Regulation of this case provides that ordinary persons who are not visually disabled cannot be qualified as a massager, by placing limit upon a qualified person as a massager to a person who cannot see and who meets a certain range of conditions, that is, establishing so-called 'standard of excluding the non-visually disabled persons'. This completely limits the freedom to choose the

occupation as a massager of ordinary persons who are not visually disabled and it violates the Constitution because of the following reason:

In spite of fact that the standard of excluding the non-visually disabled persons in admitting the qualification as a massager is the important and essential factor related to limiting the fundamental rights, since the Regulation of this case being unclear in its standard and scope of delegation or excessively comprehensive provision or out of the scope of delegation by enabling statue, the Medical Service Act Article 61 Paragraph 4, is clearly out of limit of delegated rule-making and it is established as a reason to limit the fundamental rights, therefore, it being obviously out of limit of delegated rule-making violates principle of statutory reservation.

The standard of excluding the non-visually disabled persons, in purpose of protecting the visually disabled persons and ensuring them to make livings, even has legitimate legislative purpose, but it completely prevents ordinary persons from entering into the specific area of occupation, so it possibly could not be the reasonable and proper means, concerning only the certain number of registered visually disabled persons among the whole group of the visually disabled persons but excessively violating the rest of the disabled persons' and further freedom of occupation of the ordinary persons, therefore, it violates the rule of the least restrictive means in infringement on fundamental rights and, comparing public interest, which it is meant to accomplish, such as ensuring the visually disabled persons to make livings, the degree of infringement on fundamental rights is excessively large, therefore, it fails to have balancing of interest and violates the rule against excessive restriction.

2. Dissenting Opinion of One Justice

As I had clarified in opinion for constitutionality of the Constitutional Court's Decision(15-1 KCCR 663, 669-674, 2002Hun-Ka16, June 26, 2003), the Medical Act Article 61 Paragraph 4 surely does not violate principle of statutory reservation or principle of the rule against blanket delegation and since the Regulation of this case provides the delegated provision with the above legal provision providing the specific range, it does not violate principle of statutory reservation.

In admitting the qualification as a massager, the standard of excluding the non-visually disabled persons based on the national protection and welfare policy, and etc. of physically disabled persons, cited in Article 34 Paragraph 5 of the Constitution is in

order to protect the visually disabled persons who are in disadvantageous circumstance for the matter of employment compared to the ordinary persons and, ensure them to make livings, therefore, legitimacy of its legislative purpose is admitted and considering the bodily condition of the visually disabled persons and their specialized skill, it is necessary and proper mean to admit their qualification as massager exclusively. Even the ordinary persons are excluded from the subject of admitting the qualification as a massager, they can not only choose the other occupation and make livings but also go through training and exams to become a physical therapist and work as a massager if they wish to work in the field, therefore, it does not violate the rule of least restrictive means. Above all things, public interest ensuring the visually disabled persons to have a humane life absolutely takes precedence over protecting freedom of occupation of the ordinary persons as much as those two even cannot be compared, therefore, for the purpose of public interest to ensure the visually disabled persons to make livings, restricting freedom of occupation of the non-visually disabled persons does not violate the balancing of interest.

7. *Limiting the Age of Candidates in Level 9 Public Servant Examinations*

[18-1(B) KCCR 134, 2005Hun-Ma11 and 2006Hun-Ma314 (consolidated), May 25, 2006]

Held, Annexed List 4 of Article 16 of the Presidential Decree on Public Servant Examination, which limits the age of candidates in Level 9 general administrative public servant examination to the age of 28, is not in violation of the Constitution.

Background of the Case

The complainants, who have been preparing for Level 9 general administrative public servant examination, filed the constitutional complaint in this case, claiming that the right to hold public office as well as the right to equality of the complainant was violated by the provision at issue limiting the age of candidates to the age of 28.

Summary of the Decision

The Constitutional Court, in 4 : 5 decision, dismissed the constitutional complaint on its merits. The summary of the grounds for the Court's decision is stated in the following paragraphs.

1. Denial Opinion of Four Justices

Article 36 of the Public Servant Act provides that 'the necessary minimum qualifications to be able to perform his/her duty including an academic background, past career, age and etc in various kinds of examinations' are to be made by the Presidential Decree, and based upon the Decree, the provision at issue in this case limits the age of candidates in Level 9 general administrative public servant examination to 'the age of 28'. The goal of limiting candidates' age in the public servant examination is for the purpose of realizing the professional public servant system to select the talented, and throughout providing them with proper promotion, pertinent assignment to a position, education and training opportunity, to nurture them to be young and capable professional administrators and finally to offer better administrative service to citizens, while to prevent candidates from preparing for the Exam for a very long time, therefore to keep off any social problem as well as to foster appropriate distribution of human capital with private sectors. Furthermore, grading the age limitation of candidates pursuant to the different levels of public servant examination is based upon the considerations such as the different standards required for executing his/her job, ability development and service period as a professional public servant and minimum period prior to promotion. The goals stated above are in accordance with the restriction for public welfare provided in Article 37 Paragraph 2 of the Constitution.

The limitation age in this case, 28 years old, is premised on the assumption that candidates are given opportunities to take the Examination for 10 years after they graduate from high-school and for 5-6 years upon their college graduation. Those who served in the military get extensions and in case a special appointment is necessary, the limitation age for candidates extends to 40 years old. Considering those above, the fact that the provision at issue in this case limits the age of candidates in Level 9 general administrative public servant examination to the age of 28, is neither unreasonable nor unfair. Also, it is hard to say that legislators deviated from their given discretion. Therefore, the statutory provision at issue in this case does not violate the complainant's right to hold public

office.

The limitation age for Level 7 public servant examination is 35 years old. However, there is difference in the work characteristics, the ability and knowledge required for the job between Level 7 and Level 9 public servants. In addition, pursuant to article 31 of the Presidential Decree on Public Servant Examination, minimum period of 4 years is required for Level 9 public servants to be promoted as Level 7. Considering the different work characters required for the job as well as the minimum period for promotion necessary, the discrimination of candidates' age for the application of the respective examinations is justifiable. Although, it is merely questionable whether the 7 year difference between candidates of two Examinations is reasonable, as long as it is justifiable to have different systems in terms of limitation age, it is hard to conclude that such disparity is either unreasonable or arbitrary. Thus, the statutory provision at issue in this case is not in violation of the right to equality.

2. Nonconformity Opinion of Three Justices

In case the candidates for the Level 9 public servant examination are between 29 years old and early 30-ish, as long as they are equipped with the basic disposition and ability to work as public servants, it is hard to say that the age would be hindrance to their productivity at work. Also, the effect from selecting candidates of such age pool to the promotion and retirement system would be minimal. After all, the provision at issue in this case does not have a legitimate purpose as it is neither designed for the professional public servant system nor made for the achievement of the legislative purpose of administrative efficiency. In addition, the limitation age of '28 years old' is not a reasonable discrimination compared with the limitation age of '35 years old', applied to Level 7 public servant examination. The seven year difference exceeds the minimum necessary period for someone who will be promoted from Level 9 to Level 7 and the reasonableness cannot be found in the differences of limitation ages. Therefore, the provision at issue in this case, providing the limitation age as '28 years old', violates the right to hold office as well as the right to equality. Excepting that it is allowed to have the limitation age for public servant examination because there is legislative policy reason, the legislators shall be obligated to rectify the unconstitutionality by choosing a concrete scope. We hereby issue a decision of nonconformity to the Constitution.

3. Unconstitutionality Opinion of Two Justices

It is questionable whether limiting the age of candidates in Level 9 general administrative public servant examination to the age of 28 is the minimum qualification requirement to perform his/her duty as public servants. It is hard to perceive that someone loses his/her ability to carry out the duty as public servants once his/her is over the age of 28. This point becomes obvious considering the limit of 40 years old is being applied when Level 9 public servants are selected throughout a special appointment. Since the Korean society emphasizes ethical order of respecting seniority, it is common knowledge that if subordinates are older than their superiors the work efficiency would deteriorate. However, the social ethics of respecting seniority and the command system can remain intact and exist respectfully to each other. Therefore, the reasons noted above cannot be the ground for putting any limitation on the age of candidates for public servant examination resulting the violation of the right to hold public office.

8. *The Newspapers Act Case*

[18-1(B) KCCR 337, 2005Hun-Ma165 · 314 · 555 · 807 and 2006Hun-Ka3(consolidated), June 29, 2006]

Held that the Article 15 Paragraph 3 of the Act on Freedom of Newspapers, etc. and Guarantee of their Functions (hereinafter referred to as the "The Newspapers Act") is unconformable to the Constitution, the Article 17 and 34 Paragraph 2 Subparagraph 2 of the Newspapers Act and the former part of the body clause in the Article 26 Paragraph 6 and supplementary provision 2 of the Act on Press Arbitration and Remedies, etc.(hereinafter referred to as the "the Press Arbitration Act") are unconstitutional, and the Article 15 Paragraph 2, Article 16 Paragraphs 1, 2, 3 of the Newspapers Act, and the Article 6 Paragraphs 1, 4, 5, Article 14 Paragraph 2, and the latter part of the Article 31 of the Press Arbitration Act are constitutional.

Background of the Case

The National Assembly, by Act No. 7369 on January 27, 2005, changing the name of the previous "Act on the Freedom of Newspapers, etc. and Guarantee of their Functions" into the

Newspapers Act, wholly amended it and by Act No. 7370 on the same day, enacted the Press Arbitration Act. The complainants filed constitutional complaints, alleging that the relevant provisions infringe on their constitutional rights(2005Hun-Ma165, 2005Hun-Ma314, 2005Hun-Ma555, 2005Hun-Ma807). The requesting Petitioner of 2006Hun-Ka3 case had reported an article on the wire-tapped tapes in Chosun-Ilbo which is issued by the requesting Petitioner. The National Intelligence Service(hereinafter referred to as the "NIS") made an application for conciliation to the Press Arbitration Commission(hereinafter referred to as the "PAC") that the Chosun-Ilbo(company) publish a corrective report in the same media. The PAC, sua sponte, issued an conciliation that the Chosun-Ilbo publishes a refutation report of NIS in the same media. NIS filed an objection to the conciliation and therefore, by other related provision of the Press Arbitration Act, the NIS's application for conciliation was deemed as if NIS had instituted a lawsuit claiming a corrective report against PAC before Seoul Central District Court. The requesting Petitioner, while the case was pending, made a motion to request to the Constitutional Court an adjudication on the constitutionality of the relevant provisions of the Press Arbitration Act. The Seoul Central District Court admitted the motion and requested it to the Constitutional Court.

Summary of the Decision

1. Judgment on the Article 15 Paragraph 2 of the Newspapers Act : Constitutional - 7 : 2 decision

Article 15 Paragraph 2 provides that any daily shall be prohibited from concurrent running any news agency provided for in the News Agency Development Act or any broadcasting business that performs the general programming or the professional programming on reports under the Broadcasting Act. By the way, how to regulate daily's concurrent running different kinds of media like news agency or broadcasting business is in the category of a field that requires high level of policy-making-oriented access and decision, and therefore whether to continue the regulation policy of the prohibition of concurrent running and, if it were decided to continue, how far to regulate is in charge of legislature's media-policy-making decision. Article 15 Paragraph 2 regulates restrictively in the way of selecting the objects and extent, within the necessary limit to guarantee the diversity of newspapers. Namely, it sets limit of regulation objects to daily newspapers, and permits actions that are not concurrent running. For example, a

daily corporation may issue plural dailies, and it may concurrently run program providing business, CATV broadcasting business, satellite broadcasting business, and etc. which do not deal with general programming or professional programming on reports and accordingly have no possibility of overlap with the function of newspapers. Therefore Article 15 Paragraph 2 is constitutional.

2. Judgment on Article 15 Paragraph 3 of the Newspapers Act : Unconformable to the Constitution - 7[1] : 2

Among the Article 15 Paragraph 3 the part that, by prohibiting the dominant stockholder of daily from acquiring or holding not less than 1/2 of shares or equities that are issued by any corporation that runs any news agency, regulates the combination among different types of media, does not infringe on the freedom of newspapers, for the regulation is within necessary extent of restriction to guarantee the diversity of press. By the way, the Article 15 Paragraph 3, going a step forward, also regulates the multiple possession of newspapers by the dominant stockholder of daily. The regulation of multiple possession of newspapers to guarantee the diversity of newspapers cannot be said unconstitutional, in itself. But even though the multiple possession of newspapers has the occasion that does not hinder the diversity of newspapers or, on the contrary, contributes to it, this provision wholly prohibits the multiple possession of newspapers and therefore restricts the freedom of newspapers beyond the necessity. But since how to draw the standard of regulation of multiple possession to guarantee the diversity of newspapers is in charge of the discretion of legislature, we need to rule this provision unconformable to the Constitution and order temporary application until the legislature revises it.

3. Judgment on Article 16 Paragraphs 1, 2, 3 of the Newspapers Act : Constitutional - 6 : 3 decision

The purpose that Article 16 Paragraphs 1, 2, 3 stipulates the report and publication of newspaper enterprises is to uplift the transparency of the newspaper market and, by securing the

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1) Among these seven Justices, three Justices express their opinion that this provision is "Simply Unconstitutional." But the Court ruled it "Unconformable to the Constitution" because the three Justices have the same opinion with the other four Justices in the scope of the "Unconformable to the Constitution" opinion.

effectiveness of Article 15 which provides prohibition of concurrent running businesses and restriction of possession of a dominant stockholder, to implement the constitutional demand, the diversity of newspapers. Since newspaper enterprises have larger public function and social responsibility than general enterprises, it is more necessary to uplift the transparency and normalize the competitive order of the newspaper market through the report and publication of not only the possession structure but also the materials about management. Even though a good part of matters stipulated to report and publish in Article 16 Paragraphs 1, 2, 3 are already supposed to publish or open to the public in other acts like the Commercial Act, and Article 16 Paragraphs 1, 2, 3 require additional report and publication of the items like the circulation of newspapers and revenues accruing from advertisements, it is within the necessary extent to guarantee the peculiar function of newspapers. Therefore Article 16 Paragraphs 1, 2, 3 are not unconstitutional provisions that infringe on the freedom of newspapers or discriminate against the newspaper enterprises compared to the general enterprises.

4. Judgment on Article 17 of the Newspapers Act : Unconstitutional - 7 : 2 decision

Article 17 of the Newspapers Act provides the newspaper business operator to be deemed the market-dominating business operator more easily compared to the general business operator. By the way, it is unreasonable from the viewpoint that, first, it evaluates the possession rate of the newspaper market only on the circulation basis, secondly, in evaluating the controlling power it adds the individual preference for the newspapers that have different tendency from each other and binds them into one market, thirdly, it admits the homogeneity of market among general daily and special daily that have obviously different dealing fields and class of readers, fourthly, Article 17 of the Newspapers Act provides the newspaper business operator to be deemed the market-dominating business operator more easily compared to the general business operator, although there is no reason to tell that it is the product of unfair trade practice or that the newspaper enterprise seems to bring about the danger of unfair trade practice because the market-dominating status of a newspaper is formed by the readers's individual and spiritual choices. Therefore the provision is unconstitutional because it infringes on the complainants's right to equality and freedom of newspapers.

5. Judgment on Article 34 Paragraph 2 Subparagraph 2 of the Newspapers Act : Unconstitutional - unanimous decision

It is unreasonable to discriminate against a certain newspaper enterprise only for high market possession rate, that is to say, for the reason that it occupies high preference of readers and therefore has a large circulation, and moreover not to grade in the scope or extent of issuing the Newspaper Development Fund by reflecting market possession rate, etc. but to totally exclude the newspaper enterprise from the benefit of the Fund. If they want to regulate, through the market-dominating business operator system, the newspaper enterprise that has a large circulation, it suits the aim of the market-dominating business operator system to investigate the presence of an abuse of controlling power in the first place and apply additional sanction of the exclusion of the Fund when there is an abuse of controlling power. The provision, thus, discriminates against the newspaper enterprise that has a large circulation, and therefore violates the principle of equality.

6. Judgment on Article 6 Paragraphs 1, 4, 5 of the Press Arbitration Act : Constitutional - 7 : 2 decision

Article 6 Paragraphs 1, 4, 5 of the Press Arbitration Act force newspaper company only to have a grievance settlement person and publish the matters of the person. The operation of the ombudsman system is throughly left up to the self-determination of the newspaper enterprise. In addition, the competence of the grievance settlement person is merely advisory and therefore has a little effect to bind the newspaper company. On the other hand, if the ombudsman system works well, the public interests expected to be achieved will be very big, since the ombudsman system can have the 'small cost - big effect' in the prevention of the damage by a press report, prompt remedy when damaged, and settlement of dispute. Therefore, the provisions do not violate the Constitution.

7. Judgment on Article 14 Paragraph 2 and the latter part of Article 31 of the Press Arbitration Act : Constitutional - unanimous decision

The right to request a corrective report stipulated in Article 14 Paragraph 2 of the Press Arbitration Act is a new type of claiming

right totally different from the right to rebutting report or the claiming right based on the tort of the Civil Act. Even though a victim, when damaged by a false report of a newspaper, can be remedied through the existing civil or criminal remedy system, there can be a case where the victim can't take the newspaper company to task for tort responsibility or criminal responsibility because there is no deliberation or negligence on the newspaper company side, or the justifying grounds are admitted, etc. In this occasion, the appropriate remedy for the victim is not calling the newspaper company or the individual reporter to account but having them report and propagate that the report in question is false in the same media and in the same weight. In addition, the newspaper company can refuse the corrective report under some circumstances, the time limit for filing is restricted with a short period, and the corrective report is also limited to being published in a same size in the same space. Therefore, the burden to publish a corrective report is not exceeding the original report. Article 14 Paragraph 2 of the Press Arbitration Act, thus, does not infringe on the freedom of newspapers. And the latter part of Article 31 of the Press Arbitration Act is also constitutional because it is, despite of its position in the Act, the provision that reaffirms the same content of Article 14 Paragraph 2 concerning a libel.

8. Judgment on the former part of the body clause in Article 26 Paragraph 6 : Unconstitutional - 6 : 3 decision

The former part of the body clause in Article 26 Paragraph 6 stipulates that the lawsuit claiming a corrective report shall be adjudicated in accordance with the provisions of the procedure for preliminary injunction in the Civil Execution Act. As a result, the finding of facts constituting the causes of action can be accomplished through the procedure of vindication instead of that of proof. By the way, the lawsuit claiming a corrective report in the Press Arbitration Act is in itself a lawsuit on the merits, contrary to the ordinary preliminary injunction. In this lawsuit claiming a corrective report, it restricts severely the defense right of the press company which faces this kind of lawsuit claiming a corrective report to exclude the procedure of proof necessarily required in the ordinary procedure on the merits and substitute the simple procedure of vindication for it, concerning the establishment of the fact that "the press report on the factual arguments is not true" which is the key to winning or losing the suit, and therefore it infringes on the right to fair trial of the press company. This

chilling effect on the press gives rise to the result that the press will restrain itself from quick reporting on the matters of grave social concern. The harm of it is that the public function of the free press shall deteriorate. It, thus, is unconstitutional to have the remedy of the victim taken precedence of the freedom of the press and restrict the latter without reasonable causes.

9. Judgment on the supplementary provision 2 of the Press Arbitration Act : Unconstitutional - 8 : 1 decision

The body clause in the supplementary provision 2 of the Press Arbitration Act stipulates that the Press Arbitration Act shall also apply to the press reports that were published prior to the entering into force of the Act. Accordingly, with the Act's applying retroactively to the forming requirements of the right to request a corrective report and to the review process of the lawsuit claiming a corrective report, the previous legal status of the press company has newly changed. It comes under the so-called 'real retroactive legislation' because it newly regulates the past juridical relations that have already been completed. It is a constitutional principle that the real retroactive legislation is not permitted and there is no special circumstances concerning the provision to exceptionally permit it. Therefore, among the supplementary provision 2 of the Press Arbitration Act, the parts of Article 14 Paragraph 2, the former part of the body clause in Article 26 Paragraph 6 concerning the request of a corrective report, and the latter part of Article 31 violate the Constitution.

9. *So-called Brothel Building Provider Case*
[18-1(B) KCCR 498, 2005Hun-Ma1167, June 29, 2006]

Held, Article 2 Paragraph 1 Subparagraph 2 Item 3(hereinafter referred to as the "the Instant Provision") of the Act on the Punishment of Arranging Sexual Traffic(hereinafter referred to as the "the Act"), which prohibits and punishes "providing buildings or land with the knowledge that it will be used for sexual traffic", on the basis that it belongs to acts of arranging sexual traffic, is not unconstitutional, thus the complainant's complaint is dismissed.

Background of the Case

The complainants either own or have the management rights to buildings located in the so-called brothel area. They filed a constitutional complaint arguing that as their buildings cannot be leased out for any purpose other than sexual traffic, regulating and punishing the leasing out as thus, excessively infringes upon their right to property.

Summary of the Decision

The Constitutional Court, in 8 : 1 decision, dismissed the complainant's complaint. The summary of the decision is as follows:

1. Majority Opinion of Eight Justices

The purpose of this Act, which is to root out sexual traffic, the acts of arranging sexual traffic, and to protect the human rights of the victims of sexual traffic, may be deemed legitimate. The legislative purpose of the instant provision which is to contribute to the purpose of this Act, may be deemed legitimate as well. Providing buildings or land with the knowledge that it will be used for sexual traffic, facilitates sexual traffic or the act of arranging sexual traffic, and reaps the profits of coercing or arranging sexual traffic. So in order to achieve the goal of eradicating sexual traffic and the acts of arranging sexual traffic, such indirect acts of arranging sexual traffic as in this provision needs to be restricted. Thus the restrictions imposed by the instant provision are the appropriate means to achieve the legislative purpose.

The so-called brothel area is in fact an unlicensed prostitution district, where most of the saloons run by the tenants have long provided sexual traffic, under the toleration of the authorities. It is realistically difficult to use such buildings for any other purposes, such as residence. But sexual traffic in these areas are so-called traditional sexual traffic and such full time sexual traffic starkly and intensively exposes all the problems sexual traffic can cause. It is necessary for the state to protect women driven to such sexual traffic, and to regulate middlemen of sexual traffic. In order to root out coercing and arranging of sexual traffic, restricting the act of providing buildings or land to middlemen with the knowledge that it will be used for sexual traffic, is an inevitable means to achieve such legislative purpose. In addition, the public good that may be

achieved by preventing the deep-seated abuse and infringement of human rights of sexual traffic in the brothel area, and ultimately closing down the brothel area itself, is deemed greater than the short term private losses suffered by the complainants.

In sum, the restriction the instant provision imposes upon the complainants in exercising their right to property does not, in violation of Article 37 Paragraph 2 of the Constitution, excessively infringe upon the basic rights of the complainants.

2. Dissenting Opinion of One Justice

Although it may be true that providing buildings or land with the knowledge that it will be used for sexual traffic, facilitates sexual traffic or the act of arranging sexual traffic, it is troublesome that the state uniformly regulate sexual traffic or the act of arranging sexual traffic, and the prosecution of such providing of buildings is much more so. It is an exhibition of the extreme ideal of realizing moral purity, and disregards the imperfect character of mankind and reality, also reckoning upon the omnipotence of law. Such restriction lacks the justification in restricting the right to property, and undermines the public trust in law. In conclusion, "providing buildings" in Article 2 Paragraph 1 Subparagraph 2 Item 3 of the Act, and Article 19 Paragraph 1 Subparagraph 1 pertaining to the above Article, is unconstitutional.

10. *Sharing/Allocating Proportion of Country Subsidy to Political Parties*
(18-2 KCCR 242, 2004Hun-Ma655, July 27, 2006)

Held, Paragraphs 1 through 3 of Article 18(hereinafter referred to as the "the Instant Provision") of the Act on Political Fundraising(the version which was revised as Law number 7191 on March 12, 2004 and before it was totally revised as Law number 7682 on August 4, 2005), which differs in the proportion of country subsidy to political parties depending upon whether such party is formed as a negotiating one is found to be constitutional because it does not amount to notably change the competitive dynamics among political parties therefore not leading up to the lack of reasonability.

Background of the Case

Pursuant to Article 33 Paragraph 1 of the National Assembly Act, the instant provisions at issue in this case provides that any party forming a negotiating party by having twenty or more members has the first claim to participate in sharing/allocating 50% of country subsidy. Minjoo Party, which was not successful in forming a negotiating party(hereinafter referred to as the "the complainant") thereupon filed the constitutional complaint in this case, claiming that the right to equality had been violated by discriminating a party which was not a negotiating one from a negotiating party without any reasonable ground.

Summary of the Decision

The Constitutional Court unanimously dismissed the constitutional complaint on its merits, 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. The provision at issue in this case is no longer effective because the Act on Political Fundraising was totally revised as Law number 7682 on August 4, 2005, therefore there is no possibility that the same sharing/allocating pursuant to the provision at issue would be done again. For the reason above, the violation of their fundamental right came to an end as the change of legal bearing, resulting the complainant's subjective interest in redressing its right is no longer acknowledged. However, about the provision at issue in this case which provides parties' allocation percentage, there has not been any explanation. In addition, in case the provision at issue in this case is found to be in violation of the complainant's fundamental right, Article 27 of the totally revised version of Act on Political Fundraising is surely found to be unconstitutional since the Article 27 has the same contents with the provision at issue in this case. Therefore, the resolution of this case is necessary for the maintenance of constitutional order, resulting the final say on this case very significant. The complainant has the interest in this suit.

2. The provision at issue gives the priority to a negotiating party in sharing/allocating of the first 50% of country subsidy, consequentially adopting "Membership party system preferring parties with many members." This System has merits considering (1) party system in this country is unstable, (2) people's interests

do not coincide with supporting party's interest, (3) it is necessary to have parties with many members for the purpose of making democratic order functional, the provision at issue, which provides the system where membership parties with many members in the Assembly gets preferential treatment, cannot be found unfair. Merely, since the provision at issue in this case provides a great deal of differentiations in sharing/allocating(50%, 5% or 2%), the question is whether such sharing/allocating is reasonable.

3. In executing a party's public functions, however, disparities are inevitable between a party who gets sits in the Assembly and a party which does not have one, and between a party with negotiating party status and a party without it. Also, even a minor party, not successful in achieving a negotiating party status is allowed to participate in sharing/allocating of country subsidy for protecting and nurturing such minor party. In executing such policy, the level of support for a certain party is reflected by considering the proportion of its membership as well as of its votes. In addition, there is no meaningful difference between a current subsidy sharing/allocating scheme reflected by the provision at issue and the proportion of votes, resulting whether a party forms a negotiating party makes no difference. Taking all these factors into consideration, even if a difference exists in sharing scale of country subsidy pursuant to whether a party holds a negotiating party status, the degree of difference does not amount to unreasonableness which might change the competitive status among political parties.

11. *Jurisdictional Dispute over Reclaimed Field Case*

(18-2 KCCR 319, 2003Hun-Ra1, August 31, 2006)

Held, the Constitutional Court decided that a local government's autonomy exists on the reclaimed land which was made by filling up public waters and the boundary decision can be made based not only upon ordinances but also upon administrative custom. The Court held that the Petitioner has the jurisdictional authority.

Background of the Case

Since December, 1982, pursuant to the Act on Industrial

Location and Development, Jeollanamdo has made and forwarded the plan for Regional Industrial Complex Project by reclaiming the sea faced the Petitioner, Gwangyang-Si(hereinafter referred to as "the Petitioner"), the Respondent, Suncheon-Si(hereinafter referred to as the "the Respondent") and Yeosu-Si, which is not a party in this case. Stock Company "A" got a parcel of the reclaimed land, 446,283㎡, from Jeollanamdo after the filling-up was completed. "A" built a plant as well as accompanying facilities and those are now in full operation. Meanwhile, according to the maritime demarcation on the topographical map published by National Geography Institute, the parceled land and the buildings including the plant are located between the above two local governments. Pursuant to the local tax law, the Petitioner has imposed taxes on A's land and its buildings, located within its jurisdictional authority. Meanwhile, on July 1, 2003, the Respondent put city plan tax on the Buildings as soon as construction of those buildings were in complete. A, raising the question about who has the authority to be recipient of the taxes, placed the payment into deposit in Seoul District Court. On August 28, 2003, the Petitioner thereupon filed the request for competence dispute adjudication in this case, claiming that the authority to self-government over the Industrial Complex, parceled out to A by Jeollanamdo belonged to the Petitioner.

Summary of the Decision

The Constitutional Court, in 5 : 3 decision, has issued the decision that the jurisdictional authority over the taxation at issue in this case belongs to Gwangyang-Si, the Petitioner. The summary of majority opinion and the summary of dissenting opinion are respectively stated in the following paragraphs.

1. Majority Opinion of Five Justices

Concerning the jurisdictional area of the autonomous local government, Article 4 Paragraph 1 of the Local Autonomy Act 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 the Si/Gun and autonomous Gu shall be prescribed by the Presidential Decree." About the issue of jurisdictional area, the Constitutional Court held that 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[16-2(A) KCCR 404, 2000Hun-Ra2, September 23, 2004]. Therefore, the self-governing authority of the local government exists over the public waters as well.

Pursuant to the record at issue in this case, based upon the General Map Measurement Effectuation Rule (1914), an official order from the Chosun government-general, the jurisdictional boundary over the reclaimed field is to be determined by the topographical map published in 1918. In addition, in 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. Since there exists no administrative custom over the public waters where the reclaimed field at issue in this case amounting to change the old boundary between the Petitioner and the Respondent, the maritime demarcation on the topographical map published by National Geography Institute in 1969 which is closest to the year of 1948 when Article 4 Paragraph 1 of the Local Autonomy Act was enacted should be the normative boundary dividing jurisdictional authority of two local governments. Meanwhile, according to the presidential decree, 'Official regulation on jurisdictional change of Si, Gun, Gu, Eup' which was made in 1973, 'JangDo' and 'SongDo' which had been under the jurisdiction of GwangyangGun GollakMyun, Jeollanamdo, became a part of jurisdictional authority of YeocheonGun YulchonMyun, Jeollanamdo in July 1st of 1973, the maritime demarcation on the topographical map, published in 1974 would be the final standard for the boundary decision at issue in this case since the map reflects the jurisdictional change happened in 1973.

In conclusion, considering the standard of the maritime demarcation on the map published by National Geographic Information Institute in 1974, the jurisdictional authority over the part of landfill at issue in this case, which is indicated as belonging to Gwangyang-Si's jurisdiction, belongs to the Petitioner, therefore the Respondent's taxation on the objects which the Petitioner has the jurisdiction over is not valid because such action was taken without any legal authority.

2. Dissenting Opinion of Three Justices

Article 4 Paragraph 1 of the Local Autonomy Act historically 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 in regards to 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. Futhermore, the determination of the geographical jurisdiction of the local government cannot be made based upon the map from National Geography Institute which has no legally binding force. Meanwhile, the decisions on who has the jurisdictional authority over the public waters, and who manages such place, are the policy matters the country has the authority over. If there is no legal ground to recognize the jurisdictional authority of the local government over the public waters, the authority can be said to belong to the country. In short, as there is no evidence to claim the local government has the jurisdictional authority over the reclaimed land at issue in this case, this case should be dismissed.

12. *Priority Repayment System for Depositors*

[18-2 KCCR 403, 2003Hun-Ka14 · 15(consolidated), November 30, 2006]

Held, the relevant provisions of the former version of the Act on Mutual Trust Depository(February 1, 1992 Law number 5738), which guarantee a person who deposit in a mutual trust depository(now called a Mutual Savings Bank) an opportunity to participate in the liquidation process "prior to any other creditors within the limit of his/her depository" are in violation of the Constitution.

Background of the Case

The bankrupt, Kisan Mutual Trust Depository Stock Company (hereinafter referred to as the "the Bankrupt") was declared bankrupt by Seoul District Court on March 29, 1999. Hanareum Mutual Trust Depository Stock Company(hereinafter referred to as the "A"), which was fully financed by Korea Deposit Insurance Corporation, began to buy bonds from depositors pursuant to the Depositor Protection Act, starting from November 30, 1998. Thereafter, A(a plaintiff) filed a suit against Korea Deposit Insurance Corporation(a defendant, hereinafter referred to as the "B"), which was a trustee in bankruptcy to confirm bankruptcy

bond(Seoul District Court docket number 99KaHap95994), and Korea Federation of Savings Banks(thereafter "C")[2], which was a general creditor, joined the suit for the sake of B. After Seoul District Court found that the bond with priority, which A should pay first, is amounted to 4,954,393,557 won, C brought an intermediate appeal. C, claiming that the provisions at issue are in violation with the Constitution, filed a motion to Seoul District Court for referral to the Constitutional Court for a judgment on the constitutionality of the Act at issue(2001KaKi1034) and the District Court, granting the motion, made the referral to the Constitutional Court on June 30, 2003.

Summary of the Decision

The Constitutional Court has held, in 6 : 2 decision, that provisions at issue are not in conformity with the Constitution. The summary of the grounds for the court's decision is stated in the following paragraphs.

1. Majority Opinion of Six Justices

When the statutory provision at issue was firstly enacted, it was necessary to give the priority repayment right to the depositors of Mutual Trust Depository for the sake of its public credibility. However, after the enactment, the financial environments have faced a great change. The systems, which is to implement preventive measures against insolvency as well as to promote sound development of such institutions have been supplemented, making a great move for the financial freedom/openness, resulting in the Mutual Trust Depository business prosper in quality as well as in quantity. This development made Mutual Trust Depository virtually the same financial institution compared with other general ones. Furthermore, pursuant to the Depositor Protection Act the depositors of Mutual Trust Depository have been awarded with the same protection as other depositors' of general banks starting from December 31, 1997. Therefore, it became hard to say the need for extra protection by giving the right to be repaid prior to general creditors, which was not allowed to depositors of general banks,

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2) Korea Federation of Savings Bank("KFSB") is a non-profit special corporation to promote sound development of savings banks so that the commonality and small business can use savings banks with confidence and convenience. KFSB, used to be called Korea Federation of Mutual Trust Depositories, renamed as it is on March 1, 2002.

still exists.

Considering the history and background of how Depositor Priority Repayment System came in place, the purpose of the System was to guarantee the public credibility of the institution where small business people are most customers and to protect the depositors who are the commonality. However, the fact that the provisions at issue in this case give the absolute guarantee of the priority repayment irrespective of the types and sizes of such depository leaves a room for doubt whether the purpose of enactment is being realized. Even if there is a need for special protection for the depository right in case the deposit is being made in Mutual Trust Depository, the legislator should not award a non-restrictive right for repayment irrespective of types and sizes of the depository. Rather, pursuant to the purpose of the enactment, legislators have a constitutional duty to limit the types and sizes of depository where such special protection is being awarded, therefore minimizing any possible property right invasion of general depositors.

After all, Depositor Priority Repayment System is to give a favorable treatment to the depositors of Mutual Trust Depository, therefore inevitably sacrificing the general creditors of such Depository, resulting the infringement of their right to equality and their property right. Therefore, the statutory provisions at issue in this case are in violation of Article 11 Paragraph 1 and Article 23 of the Constitution.

2. Dissenting Opinion of Two Justices

Legislators are authorized to introduce a necessary system in order to promote the financial convenience of the commonality, to nurture Mutual Trust Depository which is a small size financial institution, and to protect depositors of such institution. While the enactment purpose of Depositor Priority Repayment System in this case is to protect depositors of Mutual Trust Depository prior to the general creditors of such Depository, Deposit Insurance System is to give absolute protection for certain deposit amount. Therefore, the two Systems are different in the purpose and the subject. For the reason above, whether there should be any change in Depositor Priority Repayment System upon the introduction of Deposit Insurance System should be referred to legislators and the decision by them should be respected without any further consideration. In short, considering the characteristics of statutory provisions at issue, the public interest and necessity of the purpose of such enactment, it is hard to note that legislators departed from the

power of legislation. Therefore, the provisions at issue in this case are not in violation of the Constitution.

13. *Performance of the Duty of Military Service before the Renunciation of Nationality Case*

(18-2 KCCR 528, 2005Hun-Ma739, November 30, 2006)

In this case the Constitutional Court dismissed the constitutional complaint, holding that the relevant provisions of the Nationality Act, providing that a person with dual nationality should perform his duty of military service before he renounces the nationality of Republic of Korea, do not infringe on the complainant's freedom of residence.

Background of the Case

The relevant provisions provide that a person with dual nationality can renounce the nationality of Republic of Korea in 3 months since he has been enlisted into the first militia service at the age of 18, otherwise he should perform his duty of military service before he renounces the nationality. The complainant, who has acquired the nationality of Republic of Korea as well as the citizenship in the United States, was enlisted into the first militia service on January 1, 2004 according to the Military Service Act. On August 8, 2005, he filed a constitutional complaint against the relevant provisions, alleging that they infringed on his right to pursue happiness and the freedom of conscience because they forced him to perform the military service for the renunciation of the nationality.

Summary of the Decision

The Constitutional Court unanimously dismissed the constitutional complaint, and the summary of the grounds is as follows:

Based on the premise that even a person with dual nationality has to perform the duty of military service once he has acquired the

nationality of Republic of Korea, the relevant provisions are aimed at preventing him from evading his duty of military service in the way of selection of nationality, by requiring him to perform the military service for the renunciation of nationality unless he is released from the duty through the renunciation of nationality in certain terms(3 months) from the establishment of concrete duty of military service(i.e. the enlistment into the first militia service).

According to the current legal system, the disadvantages caused by the renunciation of nationality is not enough to prevent the avoidance of the military service duty through the renunciation, so that without the regulation such as the relevant provisions, it will be much easier to evade the duty of military service in the way of selection of nationality, with the result that, first, it will bring about some loss of military manpower resources, and secondly, it will seriously hurt the principle of equality in the burden of military service duty because it can allow a person with dual nationality to enjoy the benefits as Korean living in this country and then opportunistically to give up the nationality when he has to perform his duty as a citizen.

Furthermore, his freedom to select nationality is just partly restricted, not fully deprived by the relevant provisions. He can freely renounce the nationality in 3 months since he has been enlisted into the first militia service at the age of 18, the prohibition against the renunciation of nationality has the time limit because it lasts just until he is released from the duty of military service by law(when he becomes 36 years old), and he can still renounce the nationality at his own will if he has performed the military service or been exempted from it.

Although the relevant provisions do not make an exception of persons with dual nationality whose main residence is in foreign country, it does not follow to the violation of their freedom to renounce the nationality because they can be released from the military service duty in the positive way, that is, by the renunciation of nationality in an early stage, or in the passive way, that is, by the other related provisions of the Military Service Act.

14. *Private Schools' Collective Bargaining Case*
(18-2 KCCR 565, 2004Hun-Ba67, December 28, 2006)

Held, the relevant provision of the Act on the Teachers' Establishing, and Conducting Labor Union, etc.(hereinafter referred

to as the "the Teachers' Labor Union Act") providing that the establishers or the management persons cannot do collective bargaining individually with the teachers' labor union but should necessarily do that job under the association of the establishers or the management persons is in conformity with the Constitution.

Background of the Case

The complainants are school corporations which were established in order to establish and manage private schools that are located in Tae-Jeon under the Private School Act. The Tae-Jeon Provincial Office(hereinafter referred to as the "TJPO") of the Korean Teachers and Education Workers' Labor Union required the complainants several times to have a collective bargaining but they did not answer for the reason of the difficulty in comprising a bargaining body. Therefore, TJPO made an application for remedy to the Chung-Nam District Labor Relations Commission alleging the complainants' omission to be an unfair labor practice under the Trade Union and Labor Relations Adjustment Act(hereinafter referred to as the "the Labor Relations Act"). The Commission admitted it and issued an order of remedy that the complainants should comprise a bargaining body and respond to the request of the TJPO to have a collective bargaining. The complainants made an application for review of said order to the Central Labor Relations Commission but the Commission issued a decision dismissing the application for review. The complainants instituted an administrative suit against the Commission before Seoul Administrative Court and, while the case was pending, made a motion to request to the Constitutional Court an adjudication on the constitutionality of the relevant provision. Seoul Administrative Court issued a decision rejecting the motion. Therefore, the complainants filed a constitutional complaint in accordance with Article 68 Paragraph 2 of the Constitutional Court Act.

Summary of the Decision

The Constitutional Court has held, in 7 : 1 decision, that the relevant provision of the Teachers' Labor Union Act is in conformity with the Constitution. The summary of the grounds for the Court's decision is stated in the following paragraphs.

1. Majority Opinion of Seven Justices

A. As teachers' labor union is not permitted in the individual school, the purpose that the relevant provision prohibits the individual school corporation from being the other party in a collective bargaining with teachers' labor union and consequently does not allow teachers' labor union to engage in the management of the individual school is as follows. Namely, considering the facts that, first, teachers' working condition is not largely different in individual school corporations, secondly, there is a necessity to guarantee teachers' status uniformly, thirdly, teachers' labor-management relation has special characteristics compared to general workers' labor-management relation, the purpose of the relevant provision is to prevent the disorder that may be brought about due to the collective bargaining on the level of individual school corporation. Therefore, the legitimacy of the legislative purpose and the appropriateness of the means are admissible. If each individual school corporation were permitted to be the other party of the collective bargaining, the nationwide or provincial teachers' labor union has to do collective bargaining with each individual school corporation and it is unnecessary waste of human and material resources. Moreover, if the contents of the collective agreement as a result of the collective bargaining were different from each other, it may bring about not a small disorder among the schools. Therefore, the relevant provision satisfies the requirement of the least restrictive means because it is the minimal and necessary restriction on the complainants' freedom of association. And the public interest that the relevant provision pursues is bigger than the restriction on the complainants' freedom of association that could be brought about due to the fact that individual school corporation cannot be the other part of the collective bargaining. Therefore, the relevant provision also satisfies the requirement of the balance of interests.

B. Even though a teacher is a worker as defined in the acts and regulations on labor relations, the labor relation of teacher is inherently different from that of general worker who is employed by the employer in an individual enterprise and offers his/her services directly and receives benefits in return such as wages. It, thus, is reasonable discrimination that the individual school corporation cannot be the other party of collective bargaining with teachers' labor union contrary to the general employer or management person. Therefore, the relevant provision does not infringe on the complainants' right to equality.

2. Dissenting Opinion of One Justice

The relevant provision denies the autonomous collective bargaining right of private school corporations and their teachers. And it has no rationality because it ignores the fact that the establisher or management person is different from each other among the private schools and therefore working condition is also different among them. Thus, the relevant provision ignores the independency and autonomy of the school corporation of individual private schools and violates the essential aspect of the freedom and right of individual school corporations and teachers to negotiate the necessary matters according to their own working conditions.