DECISIONS OF THE CONSTITUTIONAL COURT OF KOREA (2007)

Constitutional Court of Korea

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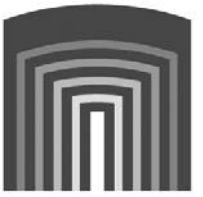

Constitutional Court of Korea

Pillars of the Constitution
Door to Protection of Basic Rights

Pillars

The shape of the pillars symbolizes the Constitutional Court' s role as the upholder of the constitution, which is the foundation of the nation.

Door

The image of an open door and diffusing light stands for the Constitutional Court's efforts to realize true democracy through the protection of basic rights of its citizens.

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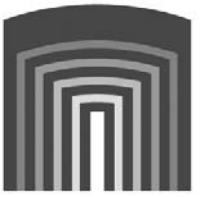

Constitutional Court of Korea

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Preface

The publication of this volume is aimed at introducing to foreign readers important cases decided from January 1, 2007 to December 31, 2007 by the Korean Constitutional Court.

This volume contains 17 cases, 5 full opinions and 12 summaries.

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

Professor Park Kyung Sin of Korea University, Professor Park Yong Chul of Sogang University and Professor Lim Ji Bong of Sogang University translated the original. Professor Lee In Ho of Chung-ang University proofread the manuscript. The Research Officers of the Constitutional Court provided much support. I thank them all.

August 31, 2008

Ha Chul Yong
Secretary General
Constitutional Court 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 Section 2 of the Constitutional Court Act
  - Hun-Ma : constitutional complaint case filed by individual complainant(s) according to Article 68 Section 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.)
  - Hun-A : various special cases (re-adjudication, etc.)

* For example, "96 Hun-Ka 2" means the constitutionality case referred by an ordinary court, the docket number of which is No. 2 in the year 1996.

Notes on Translation

※ P.K.S. : Professor Park Kyung Sin of Korea University
P.Y.C. : Professor Park Yong Chul of Sogang University
L.J.B. : Professor Lim Ji Bong of Sogang University

☐ Full Opinions

	Title	Translator	
		Full Text of Decisions	Summary Portion
1	Disclosure of Military Health Records of Public Officials Case(2005 Hun-Ma 1139)	P.K.S.	P.Y.C.
2	The Right to Vote of Nationals Residing Abroad Case(2004 Hun-Ma 644 et al.)	〃	〃
3	Accidental Fire Liability Case(2004 Hun-Ka 25)	〃	L.J.B.
4	Prohibition of Labor Campaigns by Public Officials Case(2003 Hun-Ba 51 et al.)	〃	〃
5	Request for Constitutional Review of Article 53 Section 1 of the Military Criminal Act(2006 Hun-Ka 13)	〃	〃

☐ Summaries of Opinions

	Title	Translator
1	Pension Payments Reduction for Public Employees due to Crimes They Committed(2005 Hun-Ba 33)	P.Y.C.
2	Electoral District Tables for Municipal and Provincial Assembly Election(2005 Hun-Ma 985 et al.)	
3	Requirements for Eligibility to Take Bar Examination and Substitution English Tests for Bar Examination English Test Case(2003 Hun-Ma 947 et al.)	

	Title	Translator
4	Competence Dispute on Rice Negotiation(2005 Hun-Ra 8)	L.J.B.
5	Punishment on the Concealment of Cultural Assets and the Possession and Keeping of Stolen Cultural Assets(2003 Hun-Ma 377)	
6	Labor Rights of Foreign Trainees of Industrial Technology(2004 Hun-Ma 670)	
7	Rating System of Video Materials(2004 Hun-Ba 36)	
8	Listing Order of Candidate's Name on Ballot Paper(2006 Hun-Ma 364 et al.)	
9	Statutory Provision Punishing Both Sides in Unlicensed Medical Practice(2005 Hun-Ka 10)	
10	Korean Broadcasting Commission's Warning against MBC(2004 Hun-Ma 290)	
11	Prohibition against the Establishment of Plural Medical Institutions by a Medical Personnel with Plural Licenses(2004 Hun-Ma 1021)	
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Ⅰ. Full Opinions

1. Disclosure of Military Health Records of Public Officials Case

[19-1 KCCR 711, 2005 Hun-Ma 1139, May 31, 2007]

Held, the Act providing that among the public service personnels of fourth rank or above, the ones who were exempt from obligation of military service are required to report the names of diseases as grounds of their exemption and such that information shall be open to the public, on the ground that such legislation violates the rights to privacy, is not in conformity with the Constitution.

Background of the Case

In July 1998, the nation was gravely shocked by the draft-dodging scandals of some society leaders, which were investigated and divulged by the military and the public prosecutors. Following the scandal, the Korean National Assembly legislated the Act on Reporting and Disclosure of Military Service Records of Public Service Personnels and Others, providing that the public service personnels need to report and open the information regarding their military service to the public. In 2004, the Act became more stringent to post the names of diseases on the Internet and the official gazette along with the names of such individuals in case they were exempt from obligation of military service due to a specified illness. The complainant, who was exempt from obligation of military service due to losing the sight of one eye, filed the constitutional complaint as he was ordered to report the name of his physical deficiency according to the amended provision at issue in this case (hereinafter referred to as 'the statutory provision at issue in this case').

Summary of the Opinions

The Constitutional Court has issued the decision holding the statutory provision at issue in this case is in violation of the Constitution.

All Justices has rendered unconstitutionality opinions: Five Justices

of Nonconformity Opinion with the Order of Continuing Application of the Provision at Issue, one Justice of Simple Unconstitutionality Opinion, two Justices of Nonconformity Opinion with the Order of Discontinuing Application of the Provision at Issue, one Justice of Partial Unconstitutionality Opinion. The summary of each Opinion is as follows.

1. Summary of the Majority Opinion

A. Personal health information containing an individual's physical/mental condition, health, and sex life is one of the crucial elements of human dignity and character. Therefore, the collection and public disclosure of such information upon the adjustment of interests from outer world should not be easily allowed in order to foster an individual's character and self-identity. The names of diseases which are compelled to be made public under the statutory provision at issue in this case are sensitive personal information closely related to the intimate privacy, which should not be known to the public without any special circumstances. Such information should be protected as an element of privacy. When the government notifies the public of such personal information, which infringes the right to privacy, carefully drawn standards and measures should be taken.

B. (1) In the reality where military service corruption scandal including the draft-dodging one is still away from eradiation and the demand for the anti-corruption campaign from the society is very strong, in order to achieve the legislative purposes such as 'prevention of unlawful avoidance of military service obligation', 'contribution for voluntary discharge of obligation of military service' it is necessary that obligors of such duty are to report their information on military service and such information should be a matter of public domain. Meanwhile, the matter whether someone has certain disease or not is one of the key factors in making the decision whether such person is qualified for the military service. Therefore, in order to have an opened military service system, such report and proper publication itself is necessary.

⑵ However, the provision at issue in this case, providing the publication of disease names along with the lists of individuals having such diseases, does not consider constitutional demand that personal privacy should be protected. Also, the provision at issue in this case requires any disease name to be opened to the public regardless such illness is related to the core of privacy, therefore resulting in disallowing the right to demand that some of diseases be kept in private. Thus, indiscriminately opening such information to the public without any regard to the invasion of character and privacy of holders of such information has led to grave violation of the right to privacy of the public service personnels, who were obliged to report it.

⑶ Considering our reality stated above, although the measure such as disclosing the names of diseases of the people exempt from obligation of military service is necessary, the measure should be restrictedly used only for the people who need to exercise *noblesse oblige.* The public service personnels of fourth rank or above are mostly in the ranks of a section chief or a chief clerk. Thus on the job they do not hold final say in any decision making process. Rather from the general perspective in the society, they are professionals just working for the government. Given that, although their military service information receives public attention, the degree of it is relatively weak and the demand for the protection of personal information of the public service personnels should neither be lowered nor be neglected. Furthermore, if the information is related with the core of privacy, such as the names of diseases, the need for protection is to be recognized with greater care.

(4) In conclusion, the statutory provision at issue in this case, providing that the public service personnels of fourth rank or above are to be the subject of releasing the names of their diseases without any specified exception, considerably neglects the constitutional demand for the protection of privacy in order to achieve the legislative purpose, therefore violates the fundamental rights of the complainant along with other public service personnels, guaranteed by Article 17 of the Constitution, which are the right to privacy.

C. In our reality where the necessity of having an opened system of military service information is acknowledged, as long as it is hard to tell that the reporting of the names of diseases of the people exempt from obligation of military service and publicizing in a proper way are unnecessary, it is not appropriate to bring the consequences of not being able to publicize any of disease names of any public service personnel of fourth rank or above by making simple unconstitutionality decision. Therefore, we hereby issue a decision of nonconformity to the Constitution, to the effect the legislators shall be able to take a measure to ease the restriction against privacy, and order that the statutory provision at issue in this case shall continue apply until such reform legislation is enacted.

2. Summaries of the Minority Opinions

A. Simple Unconstitutionality Opinion of Justice Lee Kong-hyun

The statutory provision at issue in this case violates human dignity and the core of human character. Therefore, it is necessary to declare simple unconstitutionality decision for that provision.

B. Partial Unconstitutionality Opinion of Justice Cho Dae-hyen.

The statutory provision at issue in this case includes a part providing that even in the case where the exemption from obligation of military service is awarded without any use of illegal means, the grounds for the exemption should be specifically noted to the public without any exception. Only such part of the statutory provision at issue in this case is in violation of the Constitution. Therefore, the unconstitutionality decision should be made partially only for the part stated above.

C. Nonconformity Opinion with the Order of Discontinuing Application of the Provision at issue of Justice Lee Dong-heub, Justice Song Doo-hwan.

In this case, there is no exceptional ground allowing continued

application of the statutory provision at issue in this case. Therefore the Court should have made a decision of nonconformity to the Constitution with the order of discontinuing the application of the statutory provision at issue in this case.

Aftermath of the Case

On this holding, the press expressed a view that the Court's decision that the constitutional protection for the privacy of the public service personnels should be respected is somewhat conflicting with the public perception that the public service personnels should hold higher moral standard.

Since the Court issues a decision of nonconformity to the Constitution with the Order of continuing application of the statutory provision at issue in this case, the provision shall continue to apply until the reform bill is enacted. However, if the reform bill without the unconstitutional elements is not enacted by December 31st, 2007, the statutory provision at issue in this case automatically loses its effect on January 1st, 2008.

Party

Complainant
Jung ○ Sang
Counsel : Jo Bong Kyu

Judgment

1. Out of the main text of Article 8 Section 1 of the Act on Reporting and Disclosure of Military Service Records of Public Service Personnels and Others(revised on December 31, 2004 through Act No. 7268), the part which refers to the publication of their own disease names of public officials of fourth rank or above, is non-conforming

to the Constitution. This part of the provision shall continue to apply until the legislator revises by December 31, 2007.

2. Remaining claims of the complainant are dismissed.

Reasoning

1. Introduction of the Case and Subject Matter of Review

A. Introduction of the Case

Complainant was exempted from duty of military service at the medical examination for conscription, having lost the sight of one eye. Pursuant to the Act on Reporting and Disclosure of Military Service Records of Public Service Personnels and Others(revised on December 31, 2004 through Act No. 7268, hereinafter referred to as 'the Act'), complainant, who is a public official working as policy research commissioner at the National Assembly since March 2005, reported in August of the same year the information concerning his duty of military service. Doing so, pursuant to Article 3 of the Act, complainant had to report the name of his disease that was considered at the time of disposition on his military service, and, pursuant to Article 8 of the Act, this information was printed in the official gazette and posted on the internet.

Hence, the complainant filed this constitutional complaint on November 22, 2005 arguing that the above provisions which mandate reporting and disclosing of even one's disease, Article 9 of the Act which mandates the candidates to public offices to report such information concerning their duty of military service, and Article 65 of the Public Official Election Act (revised on August 4, 2005 through Act No. 7681) which mandates disclosing of military service records of public official candidates, together infringe his constitutional rights such as the right to privacy and the right to freely choose his occupation.

B. Subject Matter of Review

Complainant filed this constitutional complaint against the whole

texts of Article 3, 8, 9, of the Act and Article 65 of the Public Official Election Act. However, the provisions relevant to this complaint can be confined to Article 3 Paragraph 4 Subparagraph b of the Act, which refers to those who are exempt from military service, the main text of Article 8 Section 1 of the Act, Section 1 and the first sentence of Section 3 of Article 9, which refer to the name of disease of government officials of fourth rank or above, and Article 65 Section 7 Paragraph 2 of the Public Official Election Act. Therefore, the subject matter for review is confined to above provisions. These provisions subject to review and related provisions are as follows:

Act on Reporting and Disclosure of Military Service Records of Public Service Personnels and Others(revised on December 31, 2004 through Act No. 7268)

Article 2 (Person Responsible for Reporting)

A government official who falls under any of the following Paragraphs (hereinafter referred to as Person Responsible for Reporting) shall report (including reports via the information and communication network defined by the Act on Promotion of Information & Communication Network Utilization and Information Protection, etc. This is the same for all reports hereinafter.) the military service information concerning the Persons Subject to Reporting as prescribed by Article 3.

4. National government officials or local officials of fourth rank or above in general services, and government officials in special services who receive remuneration equivalent thereto.

Article 3 (Person Subject to Reporting and the Information to be Reported)

Person Responsible for Reporting shall report the military service information prescribed by the following paragraphs concerning himself or his lineal descendants of 18 years or more (hereinafter referred to as Person Subject to Reporting).

1. As for a Person Subject to Reporting who is 18 years old, the information regarding his enlistment in eligible conscription status

1-2. As for Person Subject to Reporting who is subject to

conscription or draft physical, the year of draft physical and the decision on disposition of his duty of military service

2. As for Person Subject to Reporting who discharged or is deemed to have discharged his service duties, the field of service, the rank, the serial number(if he is given one), the date of enlistment, the date and cause of discharge or cancellation of conscription

3. As for Person Subject to Reporting who is enlisted in either active, recruit or alternative service, the field of service, the unit or facility he served in, the rank, and the date of enlistment

4. As for Person Subject to Reporting who falls under any of the following Items, military service records (including the name of disease or other grounds for military service disposition.) that cover the term between the date he received the draft physical and the date he discharged the military duty, each of which is defined by article 11 and 72 of the Military Service Act

a. Person enlisted in disqualified conscription status (including persons deemed to be enlisted in disqualified conscription status. Same for Article 8 Section 3)

b. Person exempted from military service or person removed from military register

c. Person discharged of his service without completing either active, recruit or alternative duty

Article 8(The Disclosure of and Objection to the Information to be Reported)

(1) The chief of the Office of Military Manpower Administration shall, within one month upon receiving the military service records (including information reported to the chief of District Office of Military Manpower Administration pursuant to Article 4 Section 3) from the chief of office handling the reports, disclose the information by printing on the official gazette and posting on the internet: Provided, that a person who has won the election defined by Article 2 of Act on the Election of Public Officials and the Prevention of Election Malpractices, and thus became a Person Responsible for Reporting, may request to alter the date of disclosure of information pursuant to the Presidential Decree.

(2) The chief of the Office of Military Manpower Administration

shall, when disclosing the military service records according to above Section 1, inform the Person Responsible for Reporting to inspect the information to be disclosed via internet or other means. The Person Responsible for Reporting may, if there is any error or omission in the provided information, object to the chief of the Office of Military Manpower Administration during the period of inspection.

(3) When applying for a certificate of military status or reporting the military service records, Person Responsible for Reporting may, in case where his lineal descendant is enlisted in disqualified conscription status or exempted from military duty owing to certain disease or mental · physical incompetence, request non-disclosure of the name of such disease or mental · physical incompetence prescribed by the Presidential Decree. In this case, the chief of the Office of Military Manpower Administration shall not disclose the said name of disease or the details of mental · physical incompetence.

(4) The period of inspection and other necessary particulars regarding the means and procedure of objection shall be prescribed by the Presidential Decree.

Article 9 (Reporting and Disclosure of Military Service Records of Public Official Candidates)

(1) Person (as for proportional representative members, the political party that nominates) who plans to be government official candidate pursuant to Article 2 of the Act on the Election of Public Officials and the Prevention of Election Malpractices shall report to the Election Administration Commission of his voting district, in writing, 1 month prior to registering as candidate, the military service records prescribed by Article 3.

(3) The Election Administration Commission of said voting district shall disclose the military service records of public official candidates when announcing the candidates' register. The provision of Article 8 Section 3 shall apply here.

Article 65 of the Public Official Election Act (Election Campaign Bulletins)

(7) In case where the book-type election campaign bulletins are submitted in the presidential election and the elections of the National

Assembly members of local constituency, the local council members of local constituency and the heads of local governments, the matters (hereinafter in this Article referred to as the "Open Data on Candidates") falling under each of the following paragraphs shall be entered in such book-type election campaign bulletins under the conditions as prescribed by the National Election Commission Regulations. In this case, with respect to matters that need to be clarified from among the Open Data on Candidates, data clarifying such matters may be also entered in the book-type election campaign bulletins

2. Military service records

The ranks, the service periods, the areas of service by the military branch, matters concerning the military service disposition and the grounds for the military service disposition of the candidate and his lineal descendant (excluding the case where the name of disease or the details of mental and physical incompetence are asked not to be disclosed pursuant to Article 8 Section 3 of the Act on Reporting and Disclosure of Military Service Records of Public Service Personnels and Others.)

2. Reason for the Petition and the Opinions of Related Agencies. (omitted)

3. Review on Justiciability Requirements

A. Petition on Section 1 and the first sentence of Section 3 of Article 9 of the Act, which refer to 'the name of disease of government officials of fourth rank or above', and Article 65 Section 7 Paragraph 2 of the Public Official Election Act

A constitutional complaint may be filed only by person who is infringed his fundamental rights guaranteed by the Constitution due to exercise or non-exercise of public power (Constitutional Court Act, Article 68 Section 1).

The above provisions shall be observed by a person registering as a candidate to government offices or the registered candidates when they submit an election campaign bulletin. However, the complainant

does not make it clear whether he plans to be a candidate, let alone register for a government official election, and does not make any assertion regarding a specific relationship between the above provisions and himself.

Therefore, the petition on the above provisions does not satisfy the requisite of self-relatedness and thus is dismissed.

B. Petition on the part of Article 3 Paragraph 4 Subparagraph b which refers to 'the name of disease of Public Officials of fourth rank or above' of those who are exempt from military service

A constitutional complaint shall be filed within 90 days after the existence of a cause of action is known, or within one year after the cause of action occurs (Constitutional Court Act, Article 69 Section 1).

The Act was revised on December 31, 2004 and entered into force after a lapse of six months (Addenda of the Act, Article 1). The complainant, who newly became a Person Responsible for Reporting pursuant to Article 2 of the Act, had to report his military service records within one month upon the date of enforcement (Addenda, Article 2). According to the case record, it is ascertained that the complainant reported aforementioned information on August 1, 2005 to the National Assembly Secretariat.

Therefore, the complainant must have recognized the cause of action related to the above provisions, at the latest on the day of reporting. However, he filed this constitutional complaint on November 22, 2005, a date which has passed 90 days since his recognition. The petition exceeded the time limit for filing and thus is dismissed.

C. Petition on the part of the main text of Article 8 Section 1 of the Act which refers to the publication of their own disease names of public officials of fourth rank or above'

The petition on this part satisfies the requisite of self-relatedness, time limit and other requirements for constitutional complaint, and thus is justiciable.

D. Sub-conclusion

Only the petition on the part of the main text of Article 8 Section 1 of the Act which refers to 'the publication of their own disease names of public officials of fourth rank or above' meets the justiciability requirements, and all the rest of the complaints are nonjusticiable and dismissed.

4. Review on Merits

A. Statutory History and the Contents of the Military Service Records Disclosure System

(1) Korean people were shocked to find out the corruption scandals related to the duty of military service, which were revealed by the investigation of the military and the public prosecutor. Most of the solicitors of the corruption scandals were so-called leaders of society. Thereupon, the National Assembly legislated the 'Act on Reporting and Disclosure of Military Service Records of Public Service Personnels and Others' on May 24, 1999 and enforced it on the same day, in order to prevent unlawful evasion of mandatory military service, enhance moral clarity of government officials, and create a social atmosphere of voluntarily serving the duty by systematically requiring the government officials, candidates, and their lineal descendants to report and disclose the military service records.

The Act was revised on December 31, 2004. The essentials of the revision are as follows: it extended the range of Person Responsible for Reporting from government officials of first rank or above to fourth rank or above who register his or her assets according to the Public Service Ethics Act, in order to enhance the efficiency of the military service records disclosure system; it included the name of disease and other grounds for disposition, on which the final decision on military service is based, as one of the information to be reported; and it required to disclose the information not only by printing on the official gazette but also by posting on the internet so that the public may gain easy access to the information.

(2) Under the Military Service Records Disclosure System, a government official of fourth rank or above, being the Person Responsible for Reporting (Article 2 of the Act), is required to report the military service records of his own and of his lineal descendant of 18 years and above (the main text of Article 3 of the Act). If the Person Subject to Reporting is exempted from military service or enlisted in disqualified conscription status, the Person Responsible for Reporting has to report the name of his illness or other grounds for that disposition (Article 3 Paragraph 4 of the Act). The chief of the Office of Military Manpower Administration shall disclose the information by printing on the official gazette and posting on the internet (Article 8 Section 1 of the Act). The Person Responsible for Reporting may request non-disclosure of his or her lineal descendant's name of disease or the details of mental · physical incompetence as prescribed by Presidential Decree. In this occasion, the disclosure of said information is not allowed (Article 8 Section 3 of the Act).

Military records of certain persons engaged in the fields of national security or national defense may not be disclosed (2 of Article 8 of the Act).

Person who breaches the duty of reporting shall be sentenced to 1 year or less of imprisonment or fined 10 million won or less. (Article 17 of the Act)

B. Whether the Rights to Privacy Have Been Infringed

(1) The Restriction on Privacy Rights and the Limits on the Restriction

Article 17 of the Constitution provides all citizens' right to private secrecy and freedom of privacy shall not be infringed, thereby guaranteeing the rights to privacy as a fundamental right. The right to private secrecy is a fundamental right that provides protection against monitoring one's private life by the government, whereas the freedom of privacy implies protection against the government that hinders or prohibits freely forming of one's private life. In concrete, the right to private secrecy and the freedom of privacy include the right to maintain one's inner secrets, the right to be guaranteed of one's inviolability of his or her privacy, the protection of one's

intimate area such as sexual or conscientious issues, the right to be respected of one's feelings and the right not to be infringed of one's private life. In short, Article 17 of the Constitution protects freely forming of private life and maintaining of private secrets as the basic right (15-2(B) KCCR 185, 206-207, 2002 Hun-Ma 518, Oct. 30, 2003).

The part of the main text of Article 8 Section 1 of the Act which refers to 'the publication of the disease names of public officials of fourth rank or above' (hereinafter referred to as 'the statutory provision at issue in this case') mandates the disclosure of the information concerning one's disease, the information which the government obtained by compelling the duty to report, via the official gazette and the internet. However, the name of one's disease is among one's private information, and hence unilaterally disclosing such information is a restriction on his right to private secrecy and freedom of privacy. The right to private secrecy and freedom of privacy may be restricted by statute in favor of public welfare etc, but only in accordance with the principle of proportionality, which is the general limiting principle to the restrictions on the constitutional rights (Article 37 Section 2 of the Constitution).

(2) Legislative Purposes of the Military Service Records Disclosure System

Article 1 of the Act provides: This Act intends to prevent unlawful evasion of mandatory military service and encourage practice of voluntarily serving the duty by systematically requiring the government officials, candidates, and their lineal descendants to report and disclose the military service records. In a democratic country, the duty of military service, along with liability to taxation, is bound to be burdened upon the members of that country, so that the nation as a political community can be preserved. That is, promoting national defense by burdening the people with the duty of military service is a constitutional value that is inevitably inherent in a nation as a community. Article 39 of the Constitution manifests such constitutional value that the duty of military service holds (16-2(A) KCCR 195, 202, 2002 Hun-Ba 13, Oct. 26, 2004). Nevertheless, as the frauds and corruptions related to administration of the military service

are not being rooted out, the society's need to eradicate such frauds and corruptions and restore equality in bearing the military duty is great. Especially, as it turned out that many influential members of society are implicated in significant amount of frauds or unjust preferential treatment of military duty, there is a growing national concern over the military duty of people in the leadership class such as high-level officials. Under such circumstances, it is the task of the legislator to seek to secure fair and substantial discharge of the military duty and prevent unlawful evasion of military duty, through adequate regulation and restriction. The Military Service Records Disclosure System that has been introduced, under said circumstances, institutionalized reporting and disclosing of military service records of public officials in attempt to accomplish such legislative tasks.

The accomplishment of said legislative tasks that can be summarized as 'to prevent evasion of military service' and 'to encourage practice of voluntarily serving the duty' depends on such legal, institutional, and cultural factors as the law-abiding spirit of the people, the legislation regulating the duty of military service, conditions of military bases where people actually serve the duty, situations of the national security. Among these many factors, perhaps the most important is raising rationality of the legal system and realizing fair and impartial administration of the duty of military service. However, other than pursuing these fundamental solutions to the legislative purposes, the legislator may seek additional, supplementary measures as well. When legislating the Military Service Records Disclosure System, the legislators deemed establishing fair administration of the military duty as a pressing national problem to be taken care of. And because of this urgency, providing supplementary measures that develop a social atmosphere of voluntarily serving the duty and thereby indirectly contribute to accomplishing such task, besides pursuing basic and direct measures that inherently consist of fundamental, long-term solution and investment, was deemed essential. This supplementary measure that the legislators came up with is the Military Service Records Disclosure System, and such decision of legislators cannot be held unreasonable.

In order to accomplish said purposes of the legislation, it may be necessary to mandate to report the military service records and

disclose such records by proper means. By imposing a duty to report, the government can not only collect such data, but also encourage the law-abiding spirit that leads to voluntarily serving the duty. Also, considering the purposes of the legislation, a report that is not followed by disclosure is not effective. Unless accompanied with the practice of transparently disclosing the reported military service records, the said purposes cannot be expected to be accomplished merely by imposing the duty to report or stating the military service records on an official book.

(3) The Extent and Means of Disclosing the Name of Disease

The the statutory provision at issue in this case does not seek to gather records of one's physical condition, such as the name of disease, regardless of military duty. Rather, disclosing the name of disease is requested as a part of the disclosure of military service records, and is necessary because one's disease is a crucial factor to be considered at the time of disposition of his duty of military service. Among the inspections conducted so as to decide whether the subject is fit for the military service, the draft physical serves as the most important and initial standard of such classification (Article 11, 12, and 14 of the Military Service Act). Deciding whether the subject should be exempted from duty rests solely upon the grade of the subject's physical fitness, whereas when deciding whether he should be enlisted in active or recruit service, the academic background, age, state of supply and demand of draftee resources for the military service etc. can be considered while maintaining the physical grade as the principal criterion (Article 14 of the Military Service Act). Those who are incapable of military service owing to any disease or mental · physical incompetence shall be judged in Grade 6, and thereby be exempted from duty. Thus, so long as treating the information of those who are exempt from military duty as one to be disclosed, the result of draft physical constitutes the essential part of such information. And stating such result by a mere entry of illness, mental · physical incompetence or received 6th grade will be insufficient to accomplish the purposes of the Military Service Records Disclosure System. Therefore, the practice itself, of requesting to report the

specific name of disease and properly disclosing such information, seems necessary.

However, even though such practice is deemed necessary, the meaning and function of the provision of the Constitution that protects private secrecy and freedom of privacy have to be taken into consideration when determining the extent and means of proper disclosure.

Information regarding an individual's mental · physical state, health, or sexual life is a factor that constitutes the essence of his dignity or personality. Therefore, one's innate personality and identity cannot be preserved if such information is easily allowed to be collected and publicized so as to meet certain external interest. The name of disease that is compelled to be disclosed by the statutory provision at issue in this case is a sensitive personal information that is closely related to the intimate privacy. However social being the human might be, that lives in a community along with others, the information regarding one's disease is neither natural nor necessary to be subjected to the formation, transmission, disclosure, and utilization through contact with the external world. Rather, such information normally has to be preserved as an individual's inner privacy, and is not to be disclosed for others to know. This is the same for the government officials. The subject matter of this case is the name of disease which constitutes the cause of exemption from the military duty. And the name of disease is not a piece of information that is generated in relation to the government official's public activities. Such information rather is imposed on the individual beforehand, regardless of his work as a public servant, and reveals his most private identity once disclosed. There is no doubt that one's disease is an essential factor in disposing his duty of military service, especially in deciding whether he should be exempted from duty, but it was not something that the individual could have chosen otherwise or do something about. Thus, when enforcing a government measure that restricts the right to private secrecy and freedom of privacy by requiring disclosure of such information, a strict criterion and method has to be employed along with delicacy in application.

However, the statutory provision at issue in this case does not take the meaning and function of the basic right to private secrecy and

freedom of privacy into consideration when determining the extent and means of disclosing the name of disease. Event though one's disease is a factor that is indispensable in deciding his exemption from the duty, the legislator is responsible to seek ways to minimize the infringement on the subject's privacy that follows such disclosure. There are certain diseases that are close to the essence of one's privacy, and there are those that are not. Setting aside the latter, compelling to disclose the former diseases without distinguishing from the latter is a practice that leaves constitutional intent of protecting the privacy out of consideration.

As seen above, Person Responsible for Reporting is given the right to request nondisclosure of certain diseases, defined by the Presidential Decree, of his or her lineal descendants. And in this occasion, the disclosure of nature of those diseases is not allowed (Article 8 Section 3 of the Act, the attached table of Article 14 Section 1 of the Enforcement, Decree of the Act). The diseases and mental · physical incompetence defined by the Presidential Decree as not to be disclosed if requested, are mostly ones that can grossly infringe the dignity or privacy of the subject (for instance, acquired immune deficiency syndrome, schizophrenia, syphilis, artificial anus). Therefore it is a valid argument that the Person Responsible for Reporting himself, as well as his lineal descendants, should be entitled to protection against the severe infringement on privacy caused by relentless disclosure of such information.

Furthermore, the Military Service Records Disclosure System compels disclosure regardless of whether the decision of exemption from duty was made unjustly or not, thereby disclosing even the diseases of government officials who were exempted based on a fair judgment. It is unreasonable to impose the duty to disclose even upon those officials who received a fair judgment and to ask them to endure the infringement on privacy and dignity, however gross it may be, for the sole purpose of creating a social atmosphere of voluntarily serving the military duty. Considering the need of protection of such government officials' privacy, and, moreover, the efficiency in running the public office, the statutory provision at issue in this case which discloses private information without proper distinction might decline the morale and loyalty of such officials or deter the concord and unity

within the office, and in some cases even result in loss of competent public servants.

(4) The Range of the Subject of Disclosure

All public officials shall be servants of the entire people and shall be responsible to the people (Article 7 of the Constitution). Therefore, bigger responsibility can be imposed on a government official than on a private person, with respect to discharging the duty of military service, and in this sense, it might be necessary to provide the people with information regarding the public officials' military service. And also, in light of the reality where a special, social need of fairness in disposing military duty and a prevalent distrust in privileges that high-level officials often enjoy exist, such information naturally is subject to keen interest of the general people who hold sovereignty. Considering such public character of said information, the need to protect an individual public official may concede a bit in favor of the need to expose, in some extent, the said information to public as far as such exposure aim to realize the common interest of satisfying the public concerns and enhancing a fair discharge of the military duty.

However, the information that is unilaterally forced to be disclosed by the statutory provision at issue in this case is the name of disease of an individual public official. It is too broad to subject all public officials of fourth rank or above to mandatory disclosure of the name of disease, which is a sensitive, personal information that is close to one's inner privacy. Even though one can easily admit, considering the reality of ours, the social need of renovating the ill custom prevalent in serving the military duty, through exceptional measures such as disclosing the name of disease, the application of such practice has to be confined only to a few high-level officials who can be inquired of additional responsibility and sacrifice. Government officials of fourth rank are consisted of officials who are at the level of director or section chief, and even if these officials are in charge of on-the-job responsibilities, they do not have the power to make direct, final decision on major policies or projects. Rather, in a general sense of the society, many of said officials are no more than persons engaged in ordinary occupation. Therefore, even in an unusual occasion where

the public concern happened to head towards a fourth rank official's military records, such concern is likely to be a relatively low one. And if so, the need to protect the individual public official's information should not be neglected, especially when said information contains such data as the name of disease, which goes to the essence of one's dignity and privacy. Therefore, the legislator should have selected a small number of high-level officials who bear close relation to accomplishing the purpose of the legislation, with regard to the amount of public concern drawn, the degree of public service ethics required, and one's relevance to administration of military service, and mandated only said officials to disclose the name of disease to a proper extent. To say it is permissible to expose information regarding an individual public official's most private disease to the public, neglecting the need of protection such private information deserves, in the name of 'public matter' or 'public concern', is not different from announcing that the right to private secrecy and freedom of privacy will no longer be protected as fundamental right as long as it belongs to a public official.

(5) Sub-conclusion

As seen above, to subject even the public officials of fourth rank, who does not draw a significant amount of public concern, to the disclosure of name of disease without exception, is a policy that puts undue emphasis on realizing the purposes of the legislation and considerably neglects the constitutional need of protecting the privacy, thereby infringes the complainant's and said public officials' right to private secrecy and freedom of privacy guaranteed by Article 17 of the Constitution.

C. Decision of Nonconformity to the Constitution

However, as seen above, as it can be agreed that the Military Service Records Disclosure System is necessary in light of our reality, and so long as one can not conclude that the reporting of the name of disease and disclosing of such information through proper means is certainly unnecessary, it is inappropriate to render a decision of

simple unconstitutionality on the statutory provision at issue in this case. Because if the decision of simple unconstitutionality is rendered, the name of all diseases, in respect to all public officials of fourth rank or higher, will no longer be subjected to disclosure. The unconstitutionality of the statutory provision at issue in this case is in that the prescribed range of the subject public officials or the name of illness is too broad, and it is primarily for the legislator, who hold the legislative-formative power, to decide how to eliminate such unconstitutionality. The legislator may adjust the range of the subject public officials or the name of disease and thus mitigate the restriction on the privacy. One of such adjustment could be, to leave the range of the subject public officials as it is and instead grant the Person Responsible for Reporting himself the right to request nondisclosure of the name of certain diseases, so that he can be protected equally as his lineal descendants. Or the legislator could, while granting all Persons Responsible for Reporting the right to request nondisclosure, initiate a system where the actual nondisclosure is decided by a fair screening that reflects various criteria such as the characters of each official position, the class of each official, the kind of disease etc. If the legislator can come up with a way to better balance the competing interests of the Military Service Records Disclosure System and the protection of privacy, he might as well adopt such device. Therefore, We hereby issue a decision of nonconformity to the Constitution and order that the statutory provision at issue in this case shall continue to apply until the reform bill is enacted. Considering the severe infringement that the statutory provision at issue in this case causes on the right to private secrecy and freedom of privacy, the legislators are obliged to replace the law, and should do so at the latest of December 31, 2007, and if not, the statutory provision at issue in this case shall lose effect from January 1, 2008.

5. Conclusion

As presented below, there are dissenting opinions of four Justices with respect to the statutory provision at issue in this case(opinion of simple unconstitutionality by Justice Lee Kong-hyun, opinion of

partial unconstitutionality by Justice Cho Dae-hyen, and opinion of nonconformity with the Order of discontinuing application of the provision at issue by Justice Lee Dong-heub, Justice Song Doo-hwan). Thus, no opinion has got the required passing votes, prescribed by Article 23 Section 2 Paragraph 1 of the Constitutional Court Act, that is required to be met in order to render the decision of any unconstitutionality. However, when adding the number of Justices who hold the opinion of simple unconstitutionality and of nonconformity with the Order of discontinuing application to the number of Justices who rendered the opinion of nonconformity with the Order of continuing application, the sum meets the pass criterion (see Article 40 of the Constitutional Court Act, Article 66 Section 2 of the Court Organization Act), and thereby we issue a decision of nonconformity to the Constitution and order that the statutory provision at issue in this case shall continue to apply.

Therefore, with respect to the statutory provision at issue in this case, we issue a decision of nonconformity to the Constitution and order that the provision at issue shall continue to apply, with the time limit of December 31, 2007, and the remaining claims of the complainant are dismissed as set forth in the Judgment.

6. Opinion of Simple Unconstitutionality by Justice Lee Kong-hyun

I dissent from the majority opinion, and think that a decision of simple unconstitutionality should be issued with regard to the statutory provision at issue in this case.

But for the protection of privacy, the human dignity can hardly be respected and development of one's personality cannot be expected. Thereby, the Constitution, in Article 17, expressly provides the protection of the right to private secrecy and freedom of privacy. The fundamental right in issue in this case is such right to freely form a private sector and to preserve its secrecy. Specifically, the main issue of this case is the unilateral and coercive disclosure by the government of a sensitive information such as the name of one's disease, which is his private information, a most inner private information at that. Naturally, every person would not approve of others learning about his or her medical information such as data

concerning his disease. They would rather keep it confidential. It can be easily assumed that once the information of one's disease is disclosed in public, he or she might undergo an unrecoverable pain and frustration or face a great difficulty in leading his or her social life. Thus, to guarantee the people's right to private secrecy and freedom of privacy, it would be crucial to protect the information concerning one's disease, keep it confidential and prevent it from being disclosed.

The intervention and restriction that the government exercises with respect to such matter that constitutes the essence of human dignity and personality should be allowed only when deemed indispensable to achieve a crucial public interest, and in deciding whether or not such requisite of indispensability is satisfied or not, a strict criterion and measures should be employed, as rightly pointed out by the majority opinion.

The Military Service Records Disclosure System intends to prevent unlawful evasion of mandatory military service and encourage practice of voluntarily serving the duty (Article 1 of the Act). However, disclosing the name of one's disease does not greatly contribute to the accomplishment of the first legislative purpose, which is to prevent unlawful evasion of military service. Because, not only is there a big time gap between the draft physical and the disclosure of name of disease, but also disclosing the name of one's disease, which is normally the cause of exemption from military duty, does not necessarily mean that an unlawful evasion therefore becomes ascertainable.

This is the same with regard to the second purpose of legislation, which is to 'encourage practice of voluntarily serving the duty', in other words, to create a social atmosphere of voluntarily serving the duty. The argument is that the statutory provision at issue in this case, going so far as to employ means that can severely infringe the sensitive privacy of the Person Subject to Reporting, seeks to 'create a social atmosphere' of voluntarily serving the duty rather than pursuing an objective and definite purpose, for instance, to remove an imminent harm to the public health. However, the fact itself that the statutory provision at issue in this case places restriction on the matter essential to human dignity and personality under the pretense of

accomplishing a purpose which for the most part is indirect and indefinite, raises suspicion as to whether such restriction can be justified. Furthermore, the legislative purpose of creating a social atmosphere of voluntarily serving the duty shall be, as the majority opinion concedes as well, attained by raising rationality of the legal system and realizing fair and impartial administration of the duty of military service. Thus, it is only natural to raise a strong suspicion as to whether a policy, that seeks to create such atmosphere through mental coercion that is brought by disclosing personal information to the general public, contains necessary rationality and suitability.

While the significance or legitimacy of legislative purpose, and the link between the legislative purpose and the means used to accomplish such purpose is uncertain, the harm that is caused by the statutory provision at issue in this case which discloses one's most inner private information in public, via the official gazette and the internet, is manifest and severe.

This argument applies in a case where the Person Subject to Reporting is a government official as well. Even though information belonging to the government officials, as they are the focus of the public concern, is more likely to be disclosed than that of private person, such disclosure will be allowed only when the information is related to the government official's public activities or when there is a need to satisfy the people's right to know. However, as the majority opinion rightly points out, the name of disease, which constitutes the ground to be exempted from military duty, is not a piece of information that is generated in relation to the government official's public activities. It is rather information that reveals his most private identity which is irrelevant to his work as a public official. Also even if there is a growing concern regarding the discharge of the military duty of the influential members of society, it cannot be concluded that all people are entitled to know specifics of a public official's private information concerning his disease or that the Constitution guarantees the people's right to know to such extent.

To conclude, the Military Service Records Disclosure System prescribed by the statutory provision at issue in this case severely and relentlessly infringes the fundamentals of the private secrecy and freedom of privacy, while failing to establish that such measure is

indispensable to achieve a crucial public interest, and thereby is unconstitutional.

I think the Constitutional Court shall assume a firm attitude of issuing a decision of simple unconstitutionality with regard to a system that infringes fundamental rights by impairing the essentials of human dignity and personality, and hence eliminate such infringement and safeguard the constitutional order. I thereby submit the opinion of simple unconstitutionality.

7. Opinion of Partial Unconstitutionality by Justice Cho Dae-hyen

I think the Court should issue a decision of partial unconstitutionality, because among the range of application set forth in the main text of Article 8 Section 1 of the Act, the unconstitutionality resides only in the part where it requests that the grounds for relief of military duty, including the name of disease, should be disclosed even with respect to the Person Responsible for Reporting and his lineal descendant who are not accounted for receiving an unlawful relief.

A. The Legislative Purpose of Article 8 Section 1 of the Act

As frauds related to military service surfaced, many of which were solicited by so-called leaders of society, the Act on Reporting and Disclosure of Military Service Records of Public Service Personnel and Others was announced and enforced through Act No. 5989 on May 24, 1999 to prevent unlawful evasion of military service. The Act was revised on December 31, 2004 through Act No. 7268, and this revision extended the range of Person Responsible for Reporting as well as the items subject to reporting and disclosing.

Article 3 of the Act prescribes the military service information which the Person Responsible for Reporting defined by Article 2 shall report. This includes: the military status, the results of military service disposition, record of discharge of duty, relief of military duty (enlistment in disqualified conscription status, exemption from military duty, removal from military register, discharge of service without completion of duty) and the grounds for such mitigation (including the

name of his disease and other grounds for disposition, on which the final decision on military service disposition is based). The main text of Article 8 Section 1 of the Act provides that all of said military records shall be disclosed through the official gazette and the internet.

In a case where a high-level public official or his lineal descendant fully discharges the military duty, disclosing such record that shows a full discharge of duty may contribute to elevating people's trust in high-level officials while inducing other's voluntary discharge of the military service, by showing that the high-class official fulfilled his duty of military service pursuant to the Constitution and statutes.

Meanwhile, in a case where a high-level official or his lineal descendant is relieved of his duty, the purpose of disclosing the specifics of the grounds for such relief is limited to that of preventing unlawful evasion of military service. As it is possible that the disclosure of the grounds for relief might induce voluntary discharge of military duty, such effect is neither direct nor certain. Thus, considering the risk that can be occurred by disclosing the grounds for relief of military duty, it is inappropriate to put up a vague intention such as 'to induce voluntary discharge of duty' as a legislative purpose of such disclosure.

The task of properly deciding on the range of high-level officials, whose military service record is subject to reporting and disclosing in order to accomplish said legislative purpose, should be assigned to the legislative power of the National Assembly.

B. The Limits on the Disclosure of Military Service Records

First, in a case where the Person Responsible for Reporting or his lineal descendant fully discharges the military duty, disclosing the military records of such merely shows that he fulfilled his duty of military service pursuant to the Constitution and statutes. In this case, the disclosure will not infringe his right to personality or right to private secrecy.

However, in a case where the Person Responsible for Reporting or his lineal descendant is relieved of his duty, disclosing the grounds for such relief which includes the specific name of disease, does

infringe the subject's right to personality (Article 10 of the Constitution) and right to private secrecy (Article 17 of the Constitution). Therefore in this case, the disclosure shall be performed within the limit set forth by Article 37 Section 2 of the Constitution (Limits on Restriction of Fundamental Rights).

In a case where the Person Responsible for Reporting or his lineal descendant is accounted for receiving an unjust relief, disclosing the information concerning such relief can be deemed necessary and adequate in accomplishing the legislative purpose of preventing unlawful evasion of military duty. But primarily, the relief of military duty should be presumed to be granted by lawful and fair judgment. Thus, for a disclosure of the grounds for relief of military duty to be justified, it should be performed only when confirmed through due process that the relief was unlawfully granted. However, the main text of Article 8 Section 1 of the Act does not require such confirmation when mandating the Person Responsible for Reporting or his lineal descendant to disclose the grounds for relief of military duty, and thereby neglects the limit on the extent to which a disclosure is permissible in order to accomplish the legislative purpose.

In a case where the Person Responsible for Reporting or his lineal descendant received a legitimate relief (including the cases where it is presumed that the relief is legitimate), it cannot be assumed that disclosing the grounds for such relief which includes the specific name of disease is necessary in accomplishing the legislative purpose of preventing unlawful evasion of military duty. Disclosing the grounds for such relief which includes the specific name of disease even in this case infringes the subject's right to personality and right to private secrecy without the lawful excuse required by Article 37 Section 2. As the fact itself, that one has received a relief of military duty owing to a disease, is information concerning his dignity and private secrecy, it will not be necessary to determine whether said disease, that constitutes the grounds for relief, is particularly a disgraceful one.

Article 8 Section 3 of the Act provides that the Person Responsible for Reporting may, in case where his lineal descendant is relieved of military duty owing to disease or mental · physical incompetence prescribed by the Presidential Decree, request nondisclosure of such grounds for

relief. Thus, the infringement on fundamental right might seem to be mitigated to this extent. However, the fact itself that one has requested such nondisclosure is likely to raise suspicion to its sincerity and in result infringes his right to personality, and with respect to the name of diseases that are not prescribed as the subject of nondisclosure, the statutory provision at issue in this case does not ask whether the relief was unlawful or not when mandating the disclosure. Therefore, it cannot be assumed that the unconstitutionality of the main text of Article 8 Section 1 is completely removed with regard to the lineal descendant of the Person Responsible for Reporting.

C. The Extent of the Declaration of Unconstitutionality

In conclusion, out of the range of application provided in main text of Article 8 Section 1 of the Act, the part which mandates disclosing of the grounds for relief of military duty, including the name of disease, even with respect to the Person Responsible for Reporting and his lineal descendant who are not accounted for receiving an unlawful relief, exceeds the limit set forth in Article 37 Section 2 of the Constitution (Limits on restriction of Fundamental Rights) and violates the right to personality of the subject (Article 10 of the Constitution) and the private secrecy (Article 17 of the Constitution), and thereby is unconstitutional. Other parts are deemed neither unconstitutional nor unconformable to Constitution. Therefore, the Court should issue a decision of partial unconstitutionality, clarifying among the whole main text of Article 8 Section 1 of the Act the part where the unconstitutionality resides in.

8. Dissenting Opinion by Justices Lee Dong-heub, Song Doo-hwan

We agree with the majority opinion in that the statutory provision at issue in this case violates the right to private secrecy and freedom of privacy that the complainant and other related public officials are guaranteed of by Article 17 of the Constitution and is therefore unconstitutional, and that a decision of nonconformity to the Constitution should be issued so as to urge the legislator to adjust the

range of the subject public officials or the name of disease and thus eliminate such unconstitutionality. However, we cannot consent to the majority opinion's decision of ordering that the statutory provision at issue in this case shall continue to apply even after its unconstitutionality has been confirmed. Our dissenting opinion is as follows.

The fundamental right that is confirmed to be violated in this case is the right to private secrecy and freedom of privacy — a typical civil liberty. Moreover, the name of disease which is compelled to be disclosed by the statutory provision at issue in this case is a sensitive personal information that is close to one's inner privacy. The majority opinion too admits that disclosure of such name of disease does severely violate fundamental right of the complainant and related public officials. However, ordering the statutory provision at issue in this case to continue to apply implicates that the Court is temporarily allowing the unconstitutional state to last, where the statutory provision at issue in this case severely violates fundamental rights. This means that the Court is forcing the complainant and related public officials to accept such infringement on their fundamental rights.

In order to order the continuance of application while issuing a decision of nonconformity to Constitution, an important constitutional value or interest should be present, that overrides the need of protecting the complainant and related public officials' fundamental rights and necessitates, despite the aforementioned unconstitutional state, the continuance of application of the statutory provision at issue in this case. If not, at least a crucial legal gap should be present, a gap that cannot be tolerated in a law-governed country, along with the need to prevent disorder likely to be caused by that gap (11-2 KCCR 383, 417, 97 Hun-Ma 26, Oct. 21, 1999; 12-2 KCCR 167, 186, 97 Hun-Ka 12, Aug. 31, 2000).

However, it does not seem that there is any crucial constitutional value or interest that necessitates the continuance of application of the statutory provision at issue in this case, and neither does the majority opinion provide any. Also, the legal gap that might occur due to suspension of the statutory provision at issue in this case is merely that 'name of all diseases, in respect to all public officials of fourth

rank or higher, will no longer be subjected to disclosure'. A legal gap as minimal as such is a mere temporary and partial obstacle in accomplishing the legislative purpose, which inevitably follows a decision of unconstitutionality, and is hardly expected to cause a disorder that cannot be tolerated in any law-governed country. Furthermore, as such obstacle only lasts temporarily until the law is replaced, the legislator is constitutionally allowed to, at any time, enact a law that may once again disclose the name of disease with regard to all public officials whose name of disclosure can be justified.

If so, it is unreasonable for the majority opinion to order continuance of application of the statutory provision at issue in this case despite the fact that, even though suspended, only a temporary and partial obstacle is expected to be present and there is no clear risk of resulting in either a legal gap that cannot be tolerated in a law-governed country or a disorder likely to be caused by that gap. If one is to say that it is permissible to force someone to accept the state of unconstitutionality with the pretense of such minimal obstacle in accomplishing the legislative purpose, the order of continuance of application will be issued with respect to most provisions that actually infringe fundamental rights with severity as well. It is doubtful that this is a practice that the Constitutional Court should employ in order to fulfill its task and function as an institution that seeks to protect the constitutional order and fundamental rights of the people from unconstitutional provisions.

As our Court has repeatedly emphasized whenever issuing a decision of nonconformity, it is a natural constitutional request to remove a provision that is deemed unconstitutional and thereby retrieve the Constitution's position as the founding principle, and even in cases where a decision of nonconformity is issued due to an exceptional circumstance, the general rule is to render such decision on the premise that the application of the provision in issue will be suspended. The decision of nonconformity is one sort of the decision of unconstitutionality, in that it too is a decision that confirms a provision's unconstitutionality, and thus is accompanied by an effect of suspension of so declared provision. Such effect of suspension is a natural consequence of the request of a law-governed country, and is based on the manifest principle that all branches of government shall

not commit an unconstitutional conduct by applying the provision or executing pursuant to the provision once it is declared unconstitutional, regardless of the form of the decision of unconstitutionality. It follows that when a decision of nonconformity is issued, the subject unconstitutional provision shall be suspended, and the public offices and the courts shall suspend the pending proceedings until the law is replaced. Moreover, as the legal effect the suspension of an unconstitutional provision and pending proceedings – that accompanies the decision of nonconformity is an essential factor that is inherent in such decision, the courts need not to even manifest the order of suspension when issuing a decision of nonconformity. Even if such order is manifested, it is no more than confirming the effect of suspension that naturally follows. In the contrast, when ordering continuance of application, the courts must state the temporary application of an unconstitutional provision.

Of course, it cannot be disputed that in an exceptional case – where it is necessary to protect a constitutional value or interest, which is so crucial that it pales the severity of an unconstitutional state where the provision in issue is temporarily applied, and justifies not resorting to the legal gap even if such gap is lawful, or where continuance of application is inevitable to prevent a serious legal gap and the disorder likely to ensue, which cannot be tolerated in a law-governed country – the legislator shall order the provision to be applied temporarily until the law is replaced, even if unconstitutional. Still, such order of continuance of application that follows a decision of nonconformity is an exceptional one, and therefore should be allowed only after fully inquiring into whether or not an excuse exists, that clearly justifies not abiding by the general rule of suspension. With respect to the statutory provision at issue in this case, such exceptional excuse cannot be found.

For above reasons, we do agree that a decision of nonconformity shall be issued, but dissent in that the decision should be rendered with an order of suspension of application, rather than continuance of application.

Justices Lee Kang-kook(Presiding Justice), Lee Kong-hyun(Could not sign and seal due to absence), Cho Dae-hyen, Kim Hee-ok(Assigned

Justice), Kim Jong-dae, Min Hyeong-ki, Lee Dong-heub, Mok Young-joon, Song Doo-hwan

2. The Right to Vote of Nationals Residing Abroad Case

[19-1 KCCR 859, 2004 Hun-Ma 644 et al., June 28, 2007]

Held, the Act providing that (1) voters need to be registered as residents in order to be able to cast their votes for the presidential election, national assembly election, local election, and national referendum as well as to be eligible to be elected in such elections, (2) registering for absentee ballots is allowed only for registered residents, thereby excluding Korean nationals abroad who are not allowed to register as residents, is not in conformity with the Constitution.

Background of the Case

The Public Official Election and Prevention of Election Irregularities Act and the National Referendum Act provide that (1) in order to exercise voting rights for the presidential election, national assembly election, local election, and national referendum as well as to be eligible to be elected in such elections, s/he needs to be registered as residents and (2) absentee voting is allowed only for those who reside in Korea. The complainants, Korean nationals holding Japanese or United States or Canadian green card, claiming that the statutory provisions at issue in this case, preventing people including the complainants who are unable to register because they reside outside Korea in this case from voting, violate their voting rights, the principle of popular election and the equal protection clause, filed the constitutional complaint.

Summary of the Opinions

The Constitutional Court unanimously has announced the decision holding that the statutory provisions at issue in this case are in violation of the Constitution. However, for the purpose of avoiding any confusion due to the legal vacuum generated by this holding and providing ample time to legislate new provisions, the Court issued a decision of nonconformity to the Constitution with the order of continuing application of the provisions at issue, making December

31st, 2008 as the deadline for new legislation. The majority opinion is followed by separate opinions by two Justices.

1. Summary of the Majority Opinion

A. Concerning Voting Rights for the Presidential and National Assembly Election (in short, Voting Rights for State Elections)

(1) Exercising the right to vote, as the practical means to realize the principle of popular sovereignty, functions both as an important channel to reflect people's wishes upon state affairs and as the means to control over state power via periodical elections. That is why political rights including the right to vote are considered to hold a supreme status over other fundamental rights in order to realize the principle of popular sovereignty. Although the Constitution provides that "all citizens shall have the right to vote under the conditions as prescribed by statute" (Article 24), it means that the right to vote should be realized concretely through congressional legislation. Therefore, any legislation restrictive of the right to vote cannot be justified directly by Article 24 of the Constitution. Merely, under Article 37 Section 2 of the Constitution, any legislation restricting the right to vote can be justified "only when necessary for national security, maintenance of law and order, or public welfare." And even when such restriction is imposed, no essential aspect of the right to vote shall be violated.

(2) (A) Even if it is allowed for Korean nationals abroad to exercise the right to vote, under our special circumstances, putting restriction on the right to vote of North Korean nationals and Japanese Koreans with North Korean citizenship is allowed. Therefore, given the fact that Korean nationals abroad hold Korean passports, it is distinguishable to tell them from others. Also, in case we are able to utilize the registration system for Korean nationals abroad and the reporting system for Korean nationals abroad living in Korea, we can prevent the danger that North Korean nationals and Japanese Koreans with North Korean citizenship are eligible for the exercise of the right to vote.

(B) The government has prime responsibility for guaranteeing the fairness of election. Since raising an issue of fairness of election cannot be the reason of denying the right to vote of certain groups of people, any expected possibility of having unfair election can be eliminated by (1) putting a proper limitation on election campaign abroad, (2) introducing ways to identify voters (3) restricting on campaign fund spending beforehand and afterwards. Also, *ex post* facto control might be feasible by putting the matters on trial.

(C) Any technical problem in managing overseas election can be overcome by innovation of information and communications technology. Considering that Korean nationals abroad are able to access the information on candidates via Internet and other means, any technical problem in overseas election cannot be a reasonable excuse to strip the right to vote from Koran nationals abroad.

(D) The Constitution does not intend that the people are allowed to exercise their fundamental rights in exchange for undertaking their duties such as paying taxes and doing military service. Also, considering (1) any Korean national abroad can perform their duty of military service if he wants, (2) there are Korean nationals abroad existing including women who have nothing to do with military service, (3) the fact that some of the complainant completed their military service duty, non-fulfillment of payment of taxes and military service duty cannot be a reason to deny the right to vote of Korean nationals abroad.

(E) Putting any restrictions on the right to vote can be justified only when there exists an inevitably particular, certain reason to do so. Reasons such as obscure and intangible risk, technical difficulty or obstacle which can be overcome through the efforts by the government, cannot be the justifying factors to put such restrictions on the right to vote. The statutory provisions at issue in this case provide that whether anyone is registered as a resident can be a determinative factor to decide s/he would be eligible for voting list, thereby flatly denying the right to vote of the Korean nationals

abroad who are not eligible to register as residents under the Resident Registration Act. Such a denial of right is of no just legislative purpose, therefore violates the right to vote, right to equality of Korean nationals abroad, and the principle of popular election.

⑶ (A) Even if financial costs upon the candidates as well as the social cost upon the nation would be on the increase following the extension of election campaign, those burdens are not unbearable considering the economic power Korea has. Also, any concern for the future increase of campaign fund spending cannot be a factor limiting the exercise of voting rights. In this international era where more and more Korean nationals emigrate to foreign countries, the fact they have emigrated voluntarily cannot be a justifying reason to deny someone from exercising the right to vote which is one of the fundamental rights granted to every citizen.

(B) Therefore, restrictively allowing Korean nationals who live in Korea to be eligible for the voter registration list so they can vote using absentee ballot, thereby denying any possibility that Korean nationals abroad and Korean nationals staying overseas for short period of time are able to exercise their right to vote, is of no just legislative purpose, thus violates the right to vote and right to equality of Korean nationals abroad. Also it violates the principle of popular election.

B. Concerning Voting Rights and Eligibility for Local Election

⑴ Korean nationals abroad residing in Korea is the people who cannot register as residents according to the Resident Registration Act. However, they are 'Korean nationals living in Korea' and in reality they are no different from 'Korean nationals registered in Korea' in terms of living in the same environments and sharing the same responsibility in their local district. Therefore there is no reasonable cause to justify any discrimination when it comes to granting the right to vote for local election. Furthermore, the Public Official Election and Prevention of Election Irregularities Act provides certain foreigners with the right to vote. Thus the reality amounts to

the unjust result where the right to vote for local election reserved for Korean nationals abroad which is ‘constitutional right' is being trumped by the right to vote for local election reserved for foreigners which is 'statutory right.' For the reasons stated above, stripping the right to vote for local election reserved for Korean nationals abroad living in Korea, just because they are not being registered as residents regardless the length of their stay, violates the right to equality as well as the right to vote for local election.

⑵ Even if Korean nationals abroad are not allowed to register as residents in Korea, they can formulate a close tie with the community they live in as they live in the community for a long period of time. Also, considering that in general election anyone above age 25 can be elected as a member of Korean Assembly, the local election restriction where only registered residents are allowed to be elected is something of no persuasive power. Therefore, flatly denying the right to vote of Korean nationals abroad living in Korea for certain period of time who also have close ties with the community just because they cannot be registered as residents under the current law violates their right to hold public office.

C. Concerning Right to Vote in National Referendum

National Referendum is a process where citizens make decisions regarding the vital national-policy-making and the constitutional amendments as supreme rulers. Whether someone is registered as resident is a factor which cannot affect their status of citizens as supreme rulers. Therefore, denying the right to vote of the Korean nationals abroad depending upon whether they are eligible for registration as residents is in violation of the right to vote in national referendum with the same rationale as the above holding concerning the voting rights for national government.

2. summaries of the Minority Opinions

A. Concurring Opinion of Justice Lee Kong-hyun

In case someone residing outside Korea for a long period of time with the intention to stay on a permanent basis, compared with Korean nationals who simply live outside Korea on a temporary basis, their seriousness and attachment to the politics in Korea could be remote. For the reason, above the meaning of citizens as abstract and ideologically unifying body, the necessity that they should be acknowledged as actual and concrete elements in the nation is minimal. Therefore, puting some restriction on the voting rights for national government of Korean nationals abroad is not always found to be unconstitutional because it violates the principle of popular election. The same rationale applies to the right to vote in national referendum.

B. Concurring Opinion of Justice Cho Dae-hyen

The unconstitutionality of provisions at issue in this case lays upon the particular part where, in legislating the procedure for the exercise of right to vote, only registered residents are eligible to cast their votes, thereby automatically preventing Korean nationals abroad who registered at Korean consulates from voting. The part where the provisions at issue in this case allows the registered residents to vote is just and constitutional. Only the part where it does not include certain Korean nationals abroad is not in conformity to the Constitution. Therefore, the form of judgment should have been in accordance therewith.

Aftermath of the Case

This decision is a clear departure from the former constitutionality decision of the year 1999 for the provisions providing (1) green card holders living outside of Korea and (2) Koreans residing outside were not eligible to vote for election. After this decision was rendered, the Government party and the Opposite parties praised it as "right decision," "developed decision" and etc. (JoongAng Daily, July 29, 2007)

Related Decisions

The decisions of nonconformity to the Constitution were rendered for the two cases with similar issues. Firstly, in regard to the case where resident registration was required as a prerequisite for exercising the right to vote in local referendum, the provision of Local Referendum Act stripping the right to vote in local referendum from Korean nationals abroad living in Korea but unable to register as residents was found to be not in conformity to the Constitution with the deadline for new legislation until December 31st, 2008 because there is no just cause to discriminate them from 'registered residents' (2004 Hun-Ma 643). Also, in regards to the provision of Public Official Election Act which does not provide any way to vote for the sailors who stay on the ship for a long time, the decision of nonconformity to the Constitution was rendered without specific deadline for new legislation. This decision was made with the order that the challenged provision would be applied until there is new legislation (2005 Hun-Ma 772).

Parties

Complainants

1. (2004 Hun-Ma 644)
   Choi ○ Young and 9 others
   The list of the counsels for the complainants are provided in the annex.
2. (2005 Hun-Ma 360)
   Kim ○ Su and 4 others
   Counsel for complainant : Hong Jun-pyo
   Co-counsels : Hwang Woo-yeo and 2 others

Judgment

1. The part of Article 15 Section 2 Paragraph 1 of the Public Official Election Act (revised on August 4, 2005 through Act No. 7681) which states “one whose resident registrations are completed in the district under jurisdiction of the relevant local government", the part of Article 16 Section 3 of the same Act which states “one who has registered as a resident in the district under jurisdiction of the local government concerned", the part of Article 37 Section 1 of the same Act which states "voters who have registered as residents of their jurisdictional districts", the part of Article 38 Section 1 which states “domestic resident who is entitled to enter in the electoral register", as well as the part of Article 14 Section 1 of the National Referendum Act (revised on December 22, 1994 through Act No 4796), which states “eligible voters registered as residents in their jurisdictional districts" are not in conformity to the Constitution.

2. Each of the provisions of the Articles mentioned above shall continue to apply until the legislator revises by December 31, 2008.

Reasoning

1. Introduction of the Case and Subject Matter of Review

A. Introduction of the Case

(1) 2004 Hun-Ma 644

(A) The complainants are all permanent residents of Japan with Korean citizenship who currently reside in Japan (complainants 1 through 6) or are Korean nationals residing in Korea (complainants 7 through 10) who are under the age of 19. They contend that Article 15 Section 2, Article 16 Section 3, and Article 37 Section 1 of the old ‘Public Official Election and Prevention of Election Irregularities Act’(before being amended by Act No. 7681, August 4th, 2005) require resident registration as a prerequisite to exercising one's right to vote and thereby render the complainants, who cannot register as residents, unable to exercise their right to vote in Presidential·National Assembly elections, and their right to vote or be elected to public office in local elections, thereby infringing their constitutional

basic rights. They filed this constitutional complaint on August 14th, 2004.

(B) On October 11th, 2005, the complainants amended the remedies-sought-for part of the complaint, stating that Article 14 Section 1 of the National Referendum Act prevents the complainant, who cannot register as residents, from exercising their right to vote in national referendum by requiring resident registration as a prerequisite to exercising one's right to vote in national referendum on important policies of the nation and proposed amendments to the Constitution, thereby infringing their basic rights and added a filing for the constitutional complaint on said article of the National Referendum Act.

(2) 2005 Hun-Ma 360

The complainants are Korean citizens of over 19 years of age who are permanent residents of the U.S.A. or Canada. They contend that Article 37 Section 1 of the old 'Public Official Election and Prevention of Election Irregularities Act'(before being amended by Act No. 7681, August 4th, 2005), which enables only those registered as residents domestically to be entered in the electoral register and exercise their right to vote, prevents those residing abroad whose resident registration does not exist or has been expunged from exercising their right to vote. They add that Article 38 Section 1 of the same Act only enables the domestic residents who are eligible for entry in the electoral register to file absentee reports, makes it impossible for Korean nationals residing abroad, who have no resident registration, to vote as absentees. They assert that the aforementioned articles infringe the complainants' constitutional rights and filed this Constitutional Complaint on April 6th, 2005.

B. Subject Matter of Review

Though the complainants filed this Constitutional Complaint on the Articles of the old 'Public Official Election and Prevention of Election Irregularities Act' (before being amended by Act No. 7681, August

4th, 2005), the name of said Act was changed to the "Public Official Election Act" by Act No. 7681 on August 4th, 2005, and the contents were also amended. However, in the case of Article 15 Section 2 prior to amendment, only the position of the article was changed to Article 15 Section 2 Paragraph 1, and though some contents were added to Article 37 Section 1, there was no change regarding the portions relevant to the complainants. Also, though an Article 38 Section 1 was amended so as to eliminate the limits placed on the scope of domestic residents who were allowed to vote as absentees, no amendment was made to change the fact that nationals residing overseas can not vote as absentees. Then, it is reasonable to view the relevant Articles of the current Public Official Election Act (as amended by Act No. 7681, August 4th, 2005, hereinafter referred to as 'the Act').

In conclusion, the subject of this decision is whether the part of Article 15 Section 2 Paragraph 1 of the Act which states "one whose resident registrations are completed in the district under jurisdiction of the relevant local government", the part of Article 16 Section 3 of the same Act which states "one who has registered as a resident in the district under jurisdiction of the local government concerned", the part of Article 37 Section 1 of the same Act which states "voters who have registered as residents of his jurisdictional district", the part of Article 38 Section 1 which states "domestic resident who is entitled to enter in the electoral register", as well as the part of Article 14 Section 1 of the National Referendum Act (as amended by Act No. 4796 on December 22, 1994), which states "eligible voters registered as residents in their jurisdictional districts" (hereinafter referred to as 'the Article of the National Referendum Act in Question) infringe the basic rights of the complainants. (All of the articles subject to review in this case will hereinafter be referred to as 'the Articles in Question').

The contents of the Articles in question and the related provisions are as follows.

Public Official Election Act (as amended by Act No. 7681 on August 4, 2005)

Article 15 (Eligibility to Vote)

(1) A national of nineteen years of age or above shall be eligible to

vote in the election of the President and the members of the National Assembly.

(2) Persons who fall under any of the following paragraphs shall be entitled to vote in the elections held to elect the local council members and the head of the local government in the district:

1. Korean nationals who are aged 19 or above and whose resident registrations are completed in the district under jurisdiction of the relevant local government as of the date on which the electoral register provided for in the provisions of Article 37 Section 1 is compiled; and

2. Foreigners who are aged 19 or above and for whom 3 years lapse from the date on which they obtain their permanent stay statuses pursuant to the provisions of Article 10 of the Immigration Control Act and who are entered in the foreigner registration records of the relevant local government pursuant to the provisions of Article 34 of the Immigration Control Act as of the date on which the electoral register provided for in the provisions of Article 37 Section 1 is compiled.

Article 16 (Electoral Eligibility)

(1) A national who is forty years of age or above and who has resided in the country for five years or longer as of the election day shall be eligible for election to the Presidency. In this case, if he has been sent to a foreign country in public service or stayed in a foreign country while having a domicile in the Korean territory for a certain period, he shall be deemed to have stayed in the Korean territory for that period.

(2) A national of twenty-five years of age or above shall be eligible for election as a member of the National Assembly.

(3) A national who is aged 25 years or above and who has registered as a resident in the district under jurisdiction of the local government concerned for sixty consecutive days or longer (from the record date of the electoral register up to the election day consecutively, in case of any person who had been sent to a foreign country in public services and has returned to the Republic of Korea after sixty days before the election day) as of the election day shall be eligible for election for the relevant local council member and the head of the

local government. In this case, a period of sixty days shall not be interrupted by establishment, abolition, division, or merger of the local government, or change in the boundary of a district (including a case as provided in Article 28).

(4) (omitted)

Article 37 (Preparation of Electoral Register)

(1) Whenever an election is held, the head of Gu (including the head of autonomous Gu, and it is limited to the Dong area, in the case of Si in the urban and rural complex form), the head of Si (referring to the head of Si in which no Gus are established, and it is limited to the Dong area, in the case of Si in the urban and rural complex form), the head of Eup/Myeon (hereinafter referred to as the "head of Gu/Si/Eup/Myeon") shall survey the electors (including foreigners provided for in the provisions of Article 15 Section 2 Paragraph 2 in the case of the election of any local government council members and the head of any local government) who have registered as residents of his jurisdictional district 28 days before the election day, in the case of the presidential election; 19 days before the election day, in the case of the election for the National Assembly member, the local council member and the head of a local government (hereinafter referred to as the "record date of the electoral register"), and prepare the electoral register within 5 days from the record date of the electoral register (hereinafter referred to as the "electoral register preparation period").

Article 38 (Absentee Report)

(1) Where a domestic resident (excluding any foreigner provided for in the provisions of Article 15 Section 2 Paragraph 2 who is entitled to enter in the electoral register is unable to go to the polling station to cast a vote on the election day, he may make an absentee report in writing to the head of Gu/Si/Eup/Myeon during the electoral register preparation period. In this case, every absentee report by means of mail shall be made by means of registered mail and expenses incurred by the registered mail shall be borne by the State or the relevant local government.

National Referendum Act (as amended by Act No. 4796 on December 22, 1994)

Article 14 (Preparation of Pollbook)

(1) Each time a national referendum is held, the head of a Gu (including the head of an autonomous Gu, and in the case of a Si which is of the urban and rural complex type, it is limited to the Dong area), the Mayor (refers to a Si where no Gu is established, and in the case of a Si which is of the urban and rural complex type, it is limited to the Dong area), the head of an Eup/Myeon (hereinafter referred to as "head of the Si/Gu/Eup/Myeon"), shall investigate the eligible voters registered as residents in his jurisdictional area as of the day on which the date of the national referendum is announced publicly by voting districts, and prepare a pollbook within five days after the date of the national referendum is announced publicly.

National Referendum Act (as amended by Act No. 8449 on May 17, 2007)

Article 7 (Voting Rights)

All citizens who are over 19 years of age have the right to vote

Local Government Autonomy Act (as wholly amended by Act No. 8423 on May 11, 2007)

Article 12 (Qualifications of Residents)

Persons who have domicile within the jurisdiction of a local government shall be residents of such local government.

Article 13 (Rights of Residents)

(2) Residents who are nationals of the nation shall have the right to participate in elections of the members of local councils and the heads of local governments to be held by such local governments (hereinafter referred to as the "local elections") under the conditions as prescribed by the Acts and subordinate statutes.

2. Opinions of the complainants and Summary of Opinions of the Relative Agencies (Omitted)

3. Review on Justiciability Requirements

A. Claim Regarding the Articles of the Public Official Election Act

(1) Though this Constitutional Complaint was filed regarding Articles of the old 'Public Official Election and Prevention of Election Irregularities Act' as before being amended on August 4th, 2005, we have made the relative Articles of the amended Public Official Election Act, which show no actual difference in content, as the subject of our decision, as mentioned above. However, the elections for the 17th National Assembly were held on April 15th, 2004, and the complaints in question were filed on August 4th, 2004 and April 6th, 2005, both dates over 90 days after the elections, and thus when using the Articles of the old 'Public Official Election and Prevention of Election Irregularities Act as our standard, we should inspect whether the complaints were filed within the mandated period.

(2) In the case of regularly repeating events such as elections, new candidates run each time and a new range of voters vote each time. What is more, the effects of an election are limited until the effects of the following elections come into force. Therefore, each election is a new one. Also, the objective of the complainants filing this constitutional complaint is to question the issue of the potential infringement of basic rights in future elections, rather than the basic right infringements that have already occurred in elections of the past.

(3) In conclusion, considering such characteristics of elections along with the objectives of the complainants, this complaint can be viewed as the complainants contesting, in advance, the basic rights infringements that the complainant will suffer by not being able to participate in various future elections, that is to say, infringements of basic rights that are certain to occur in the future. In this case, the issue of timely filing of complaints, which applies to cases regarding events that have already taken place, does not apply here (11-2 KCCR 770, 98 Hun-Ma 363, Dec. 23, 1999; 13-1 KCCR 386, 2000 Hun-Ma 25, Feb. 22, 2001).

B. Claim Regarding the Article of the National Referendum Act in Question

The National Referendum Act was amended through Act No. 4796 on December 22, 1994, but there has since been no national referendum on important policies per Article 72 of the Constitution, nor on proposed amendments of the Constitution per Article 130 of the Constitution, and thus there has been no case of basic rights infringement through Article 14 of the National Referendum Act. However, national referendums are, by definition, held at unpredictable times and if we only allow for the filing of Constitutional Complaints around the times when national referendums are actually held, it will be difficult to effectively protect our basic rights. So, the claim regarding this section should be regarded as contesting, in advance, the infringements on basic rights that are sure to occur when national referendums are held in the future. Therefore, as in the case of the Articles of the Public Official Election Act above, the issue of timely filing does not apply.

C. Sub-conclusion

As there exists no other flaw of statutory requirements either, this filing for constitutional complaint is legitimate.

4. Review on the Merits

A. The Right to Vote in Presidential · National Assembly Elections

(1) The Legal Significance of the Right to Vote and the Limits to Restraining the Right to Vote

The Constitution elucidates the principle of popular sovereignty by stipulating that "the Republic of Korea shall be a democratic republic" and that "the sovereignty of the Republic of Korea shall reside in the people, and all state authority shall emanate from the people" in Article 1. The significance this holds is that the state authority shall be formed according to the consensus of the people(1

KCCR 199, 205, 88 Hun-Ka 6, Sept. 8, 1989). For this to happen, the opportunity for the sovereign people to participate in the political process must be ensured to the greatest extent possible. In modern democracy, in which democracy through representation is the dominating principle, the participation of the people is achieved, first and foremost, through elections. Therefore, elections are the paths through which the sovereign people exercise their sovereignty (13-2 KCCR 77, 93, 2000 Hun-Ma 91, July 19, 2001).

To ensure the maintenance of this principle of popular sovereignty and the participation of the people through elections, Article 24 of the Constitution guarantees all citizens the right to vote according to the relevant laws. Also, Article 11 prescribes the right to equality in the domain of political life, and Article 41 Section 1 and Article 67 Section 1 ensures the principles of popular·equal·direct·secret voting in presidential and national assemble elections. The reason why the Constitution clearly guarantees the right to vote and the principles of voting is because under the system of popular sovereignty and democracy through representation, the people exercising their right to vote is the only way to enable the establishment and organization of the state and state authority and to provide democratic legitimacy (11-1 KCCR 675, 697, 98 Hun-Ma 214, May 27, 1999).

This exercising of the people's right to vote is, on the one hand, the actual method for exercising popular sovereignty, an important way to reflect the ideas of the people in state affairs. On the other hand, it acts as a method of controlling state authority through regular elections. This is why the people's right to vote, including their right to vote in presidential and national assembly elections (hereinafter referred to as 'State Elections') is regarded as the most basic and necessary right for realizing the principle of popular sovereignty, and to be superior to other basic rights (1 KCCR 199, 207, 88 Hun-Ka 6, Sept. 8, 1989).

Though Article 24 of the Constitution takes on the form of statutory reservation by stating that all people shall have the right to vote 'under conditions prescribed by statute', this does not signify a reservation to comprehensive legislation that acknowledges the right to vote 'only under the terms of the law'. This means that the basic rights of the people should be materialized through the law and to

specifically actualize the right to vote through the law.

Such statutory reservation is to realize and ensure the right to vote and not to restrict it. Therefore, even when stipulating the contents and process regarding the right to vote, such stipulation must conform with Article 1 of the Constitution that declares popular sovereignty, Article 11 that speaks of equality, and Articles 41 and 67 which guarantee popular·equal·direct·secret elections for presidential and national assemble elections. Also, pertaining to the importance the right to vote holds in a democratic nation as the apparatus for realizing popular sovereignty and democracy through representation, the legislative branch should enact laws that guarantee the right to vote to its fullest. Accordingly, in cases where the constitutionality of legislation that restricts the right to vote is examined, said examination must be strict.

Therefore, legislations that restrict the right to vote cannot be justified directly by Article 24 of the Constitution, but can only be justified according to Article 37 Section 2 of the Constitution in exceptional and unavoidable cases only when necessary for national security, the maintenance of law and order or for public welfare. Even then, the essential aspect of the right to vote cannot be violated.

Moreover, as the principle of popular election disregards all actual factors such as the competence, wealth, or social status of the voter and demands that anyone of age is given the right to vote, the requirements and limits laid out in Article 37 Section 2 of the Constitution should be abided by even more strictly when enacting legislation that restrict the right to vote in violation of the principle of popular election (11-1 KCCR 54, 60, 97 Hun-Ma 253 et al., Jan. 28, 1999).

(2) The Constitutionality of Article 37 Section 1 of the Act

(A) The Significance of Article 37 Section 1 of the Act

Article 37 Section 1 of the Act gives the person in charge of drafting the electoral register the obligation to survey the registered residents in his/her jurisdiction and draft an electoral register within a certain period of time from record date of the electoral register each

time an election is held. Since those who 'are not registered domestically as residents' cannot exercise the right to vote in state elections as ensured by Article 15 Section 1, this Article actually has the legal effect of making it impossible for those without resident registration to exercise their right to vote in state elections, though it simply looks like a provision regulating electoral procedure.

Of the complainants in this case, the Korean nationals residing abroad who are permanent resident of foreign countries and do not reside in Korea have no resident registration in Korea and thus, cannot exercise their right to vote in state elections according to Article 37 Section 1 of the Act. In the case of those complainants who are nationals residing abroad but currently living within the country Article 6 Section 3 of the Resident Registration Act prohibits them from registering as residents unless they give up emigration, and thus, they too are unable to exercise their right to vote in state elections. All in all, Article 37 Section 1 of the Act precludes all Korean nationals residing abroad, save those who reside in Korea and express their will to give up emigration(thus enabling resident registration), entirely and in uniformity, from exercising their right to vote in state elections.

Moreover, with regards to the long term overseas sojourners with intention to emigrate and the long and short term overseas sojourners (such as students studying abroad, resident office employees, diplomats etc.) with no intention of emigration who have had their resident registration expunged (Articles 17-2 and 10 of the Resident Registration Act), Article 37 Section 1 of the Act prohibits them from voting in state elections regardless of whether they are staying within the country.

(B) The Constitutionality of Article 37 Section 1 of the Act (Reevaluation of the previous Constitutional Court decision)

Many arguments have been stated as the basis of the constitutionality of Article 37 Section 1 of the Act. Based on such arguments, the Constitutional Court in its 97 Hun-Ma 253 decision of January 28, 1999, declared that Article 37 Section 1 of the old 'Public Official Election and Prevention of Election Irregularities Act' (as

amended by Act No. 4796, December 22, 1994 and before being amended by Act No. 6663, March 7, 2002), which was the same in context, as constitutional. However, considering the development of information technology, the increase in Korean nationals residing abroad due to economic growth and globalization, the growth of our people's awareness towards the fairness and freedom of public official elections, and changes in legal perspective which have taken place since then, reevaluation is required.

First, the danger of North Korean residents or nationals residing in Japan affecting the elections is not a basis for denying the Korean nationals residing overseas their right to vote.

That is because even if we were to allow our nationals living abroad to enjoy the right to vote, in our special situation of continuing confrontation with the North, it would seem that certain restrictions on the right to vote of North Korean residents or the Koreans residing in Japan aligned with the General Association of Korean Residents in Japan (*Chae Ilbon Chosŏnin Ch'ongryŏnhaphoe* or *Joch'ongryŏn*; hereinafter, "*pro-Joch'ongryŏn* Koreans residing in Japan") will be acceptable. There is also concern about North Korean residents or *pro-Joch'ongryŏn* Koreans residing in Japan exercising the right to vote under false identities, but it is not impossible to utilize the registration policy under the current 'Registration of Korean Nationals Residing Abroad Act' as well as the domestic domicile report system under the 'Act on the Immigration and Legal Status of Overseas Koreans' to prevent such an event. Also, as the Korean nationals residing abroad who are not North Korean residents or *pro-Joch'ongryŏn* Koreans residing in Japan possess passports, unlike the North Korean residents or *pro-Joch'ongryŏn* Koreans residing in Japan, it is possible to differentiate the two. Therefore, the vague and abstract danger of North Korean residents or *pro-Joch'ongryŏn* Koreans residing in Japan affecting the elections cannot justify depriving Korean nationals residing abroad of their right to vote completely.

Second, some contend that if we were to allow all Korean nationals residing abroad the right to vote, the Korean nationals residing abroad would have the casting vote in cases when the elections are decided by small margins and that is why we should restrict their right to

vote. However, this assertion goes against the principle of popular elections.

The principle of popular election disregards all actual factors such as competence, wealth, or social status of the voter and demands that anyone of age is given the right to vote. Therefore that any citizen who is of the legally designated age can and should be able to affect the outcome of the elections is the ideological premise and inevitable conclusion of the principle of popular elections. So, assertions that the right to vote should be restricted as it may affect the outcome of the elections is an unacceptable assertion that violates the principle of popular elections.

Third, some suggest that allowing all Korean nationals residing abroad, including the permanent residents of foreign nations, to vote in state elections makes it difficult to ensure the fairness of an election. They say, the election process in the countries those nationals reside in can be conducted unfairly in terms of the loss and replacement of ballots, unlawful campaign finances, the possibility of voting twice or by proxy, the contortion of the will of the voter, and bribery etc. Depriving Korean nationals residing abroad of their right to vote on the basis of this such view also cannot be justified.

Ensuring the fairness of elections is primarily the job of the state, and it is not just to hold the voters responsible for said task. Also, we cannot deny certain citizens the right to vote, the right that enables democracy to function, simply because there is concern over the fairness of the elections. It can be expected that managing elections in foreign countries will be more difficult than doing so domestically, but it is such an impossible task as to have to completely deny the voters the right to vote. The expected possibilities of unlawful elections can be prevented beforehand through adequate restrictions on the campaigning methods of elections that take place abroad, implementing methods to confirm the identity of the voter, and management of campaign finances prior to and after the elections. Post facto control through the trials of the courts is also feasible. What is more, the election practices of our people have become mature enough so that there may be some reduction in heteronomous regulation in terms of the fairness and openness of elections.

Fourth, various technical difficulties regarding the elections such as

promoting the holding of elections and the candidates to all Korean nationals residing abroad within the alloted campaigning period, campaigning, and sending ballots and collecting the marked ballots is also not a good enough reason to justify depriving any of our citizens completely of their right to vote.

Such difficulties can be mitigated by extending the alloted campaigning period. In terms of promoting candidates, it is not extremely difficult to adequately provide Korean nationals residing abroad with information on the candidates in this world of advanced information and communication technology and the Korean nationals residing abroad can also easily access information on the candidates via the internet. Also, in modern times votes tend to be cast according to party rather than the individual. The electoral campaigns not being held abroad as extensively as within the country is something the Korean nationals residing abroad must understand. There are measures such as printing ballots locally which can be implemented to solve the difficulties regarding sending and collecting ballots. The collection and counting of ballots can be done even after significant time has passed since the elections. All these factors demonstrate that technical difficulties regarding the elections cannot be a basis for completely depriving the Korean nationals residing abroad of their right to vote.

Fifth, there may be concern that if we are to acknowledge that Korean nationals residing abroad should exercise their right to vote, there may ensue another issue of equality between the Korean nationals residing abroad that live in nations with advanced postal systems and those who do not if we are to allow only the former nationals to vote.

However, even if certain Korean nationals residing abroad who live in countries with inadequate postal systems are temporarily unable to exercise their right to vote, this is only a factual result and not a result of intended discrimination. We cannot deprive all Korean nationals residing abroad of their right to vote because of this. The principle of equality in the Constitution does not prevent the state from choosing when, where, or which class to begin improving the system with. The state can, in accordance with reasonable standards, implement step by step modifications of policies to promote the

realization and improvement of legal values to the best of its ability (3 KCCR 11, 25, 90 Hun-Ka 27, Feb. 11, 1991), and therefore, there will be no violation of the principle of equality even if Korean nationals residing abroad are granted the right to vote starting in the regions where this is possible.

Sixth, the assertion that the right to vote is connected with the obligations to pay taxes or serve in the military, and the Korean nationals residing abroad who do not fulfill this obligation should not be allowed to vote also needs to be reevaluated.

Article 1 Section 2 of the Constitution only stipulates that "the sovereignty of the Republic of Korea shall reside in the people, and all state authority shall emanate from the people" and does not acknowledge the status of the people based on their obligations. Putting aside whether historically the duties of tax paying and military service were conditions of being granted the right to vote, the current provisions of the Constitution also do not define the exercise of people's basic rights to be a trade-off for the fulfillment of obligations such as tax payment or military service.

Especially in this case, the Korean nationals residing abroad are simply exempt from the duty to pay tax according to 'the agreement on the prevention of double taxation' and are not in violation of their duties. The same may be said regarding military service considering there are ways for Korean nationals residing abroad to fulfill their duty of military service, some of the complainants of this very case have already fulfilled their military service obligations, in today's world national defense (in a broad sense) relies significantly on the patriotism and cooperation of Korean nationals residing abroad, and the fact that the duty to military service is currently only imposed upon men. Therefore, a certain relationship between the right to vote and the duty to military service cannot be established.

Finally, as Korean nationals residing abroad are undeniably citizens of the Republic of Korea who have the Constitutional right to participate in the formation of government agencies, and as national unification in the increasingly global and international world demands that the will of Korean nationals residing abroad also be included in the will of the people of Korea, there is no Constitutional justification that can be found for Article 37 Section 1 of the Act to deprive

Korean nationals residing abroad of their right to vote.

(C) Conclusion

That all citizens, as sovereigns, should enjoy an equal right to vote no matter where they reside, and the state has an obligation to do all that is in its power to realize such an equal right to vote is a Constitutional demand stemming from the principles of popular sovereignty and democracy. The legislative branch, when restricting the people's right to vote, must respect the significance that right holds as best it can, and when examining whether a law restricting the right to vote is in accordance with the prohibition of excessive restriction stipulated in Article 37 Section 2 of the Constitution, the examination must follow a strict standard.

Therefore, the restriction of the right to vote may only be justified when individual and specific causes clearly exist that make the restriction unavoidable. Ambiguous and abstract dangers or technical difficulties or obstacles that can be overcome through efforts on the part of the state cannot justify any restriction on the right to vote.

However, Article 37 Section 1 of the Act determines eligibility of being enlisted in the electoral register based solely on whether a person is registered as a resident and this decides whether a person will be able to exercise their right to vote. This results in completely denying Korean nationals residing abroad, who cannot register as residents under the Resident Registration Act, their right to vote even though they are undeniably citizens of the Republic of Korea. As stated above, there is no objective that justifies such a complete denial of the right to vote.

Therefore, Article 37 Section 1 of the Act infringes the right to vote and right to equality of Korean nationals residing abroad in violation of Article 27 Section 2 of the Constitution, and is also in violation of the principle of popular election stipulated by Article 41 Section 1 and Article 67 Section 1 of the Constitution.

(3) The Constitutionality of Article 38 Section 1 of the Act

(A) The Relationship to Article 37 Section 1 of the Act

Article 38 Section 1 of the Act allows only the domestic residents who are eligible for enlistment in the electoral register to file an absentee report. Therefore, even if the complainants become eligible for enlistment in the electoral register following Article 37 Section 1 of the Act being declared unconstitutional, those complainants who reside abroad will not be able to file absentee reports due to Article 38 Section 1 of the Act and, therefore, still will not be able to exercise their right to vote in state elections. So, whereas Article 37 Section 1 of the Act deprives Korean nationals living abroad who can not register as residents of the right to be enlisted in the electoral register, Article 38 Section 1 of the Act adds the requirement of residing domestically to the requirements for exercising the right to vote, and thereby makes it impossible for those residing overseas to vote. Therefore, Article 38 Section 1 of the Act is a provision that combines with Article 37 Section 1 of the Act to deny the Korean nationals living abroad their right to vote.

Meanwhile, of the citizens that are not Korean nationals living abroad and have resident registrations according to current law, short term overseas sojourners such as visitors to foreign countries, members of embassies and legations abroad, resident office employees, and students studying abroad whose resident registration has not been expunged must return to the country by the day of the elections in order to exercise their right to vote, due to Article 38 Section 1 of the Act.

(B) The Constitutionality of Article 38 Section 1 of the Act (Reevaluation of the previous Constitutional Court Decision)

In the 97 Hun-Ma 99 decision of March 25, 1999, the Constitutional Court decided that Article 38 Section 1 of the old 'Public Office Election and Prevention of Election Irregularities Act' (before being amended by Act No. 7189 on March 12, 2004), which was the same in context as Article 38 Section 1 of the Act, was not in violation of the Constitution. However, similar to the decision made regarding Article 37 Section 1 of the Act above, there is reason to reevaluate the contents of that decision.

First, concerns regarding technical difficulties and the fairness of elections are the same issues that are raised when allowing nationals residing abroad but currently living within the country, and that those arguments do not hold have already been demonstrated supra.

Second, the argument that the right to vote may be restricted due to concerns of increased election expenses of candidates and an increased burden upon the state that would result from extended election periods is also inadequate.

The 'Study on Implementation Methods of Overseas Absentee Voting' published by the National Election Management Commission proposes a measure that will not include overseas campaign expenses in the total campaign expense limit. Some campaign expenses may result from some campaign methods(broadcast advertisements, broadcast coverage of speeches and mailing of preliminary candidate PR materials) being allowed regarding overseas absentees, but such expenses will be accrued domestically and therefore it will be possible to manage the expenses. Also, even if there is a certain increase in election related expenses, it will not be so great as for our country to be financially incapable of handling it. Simple concern over election expenses is not enough to restrict the right to vote, the most fundamental and important right of the people in a democracy.

What is more, looking over our history of legislations regarding elections, we find that we have already had experience allowing absentee voting of Korean nationals residing abroad in state elections in the 60's and early 70's. On top of this experience, if we were to refer to various examples of advanced nations that recognize the right to vote of their nationals residing abroad, it does not seem that implementing an absentee voting system for Korean nationals residing abroad would be an impossible task.

Third, there is an assertion that there is nothing unjust about denying the right to vote to someone who voluntarily leaves the country, but this does not hold true.

Requiring people who left the country voluntarily for academic or occupational reasons to return to the country in order to exercise their right to vote, and making it impossible for them to vote if they do not return is unjust in that it infringes the basic rights of the person residing abroad such as the freedom to reside·move abroad,

freedom of occupation, right to hold public office, and the freedom of learning. What is more, in the current global society in which the possibility of moving and residing abroad grows ever greater, denying one the right to vote, a most basic right that should be enjoyed by all citizens, simply because the move abroad was voluntary, is unreasonable.

Fourth, the view that perceives Article 38 Section 1 of the Act to be one of convenience and not directly related to the restriction of the right to vote in the case of short term overseas sojourners with resident registrations in Korea such as members of embassies and legations abroad and resident office employees is a mistaken one.

Requiring one to spend large sums in travel expenses to return to the country, vote, and leave the country again is demanding something that is, in actuality, impossible and has the same effect as denying those persons their right to vote.

(C) Conclusion

As seen above, Article 38 Section 1 of the Act, which denies all overseas residents including Korean nationals residing abroad and short term overseas sojourners the opportunity to exercise their right to vote by only allowing absentee reports to domestic residents eligible for enlistment in the electoral register, has no justified legislative purpose. It thus infringes the right of overseas residents to vote and to equality in violation of Article 37 Section 2 of the Constitution, and is also in violation of the principle of popular election.

B. The Right to Participate in Local Elections (the Right to Vote and the Right to be Elected)

(1) Whether Restricting the Right to Participate in Local Elections is a Restriction on Constitutional Basic Rights

(A) The Constitution stipulates in Article 118 Section 1 that "a local government shall have a council" and states in Section 2 that "the organization and powers of local councils, and the election of members …… shall be determined by statute" making it clear that the right to

vote for local council members is a Constitutional right. However, Article 118 Section 2 of the Constitution only stipulates that "election procedures for heads of local governments …… shall be determined by statute" thus raising the issue of whether a restriction on the right to vote for a head of local government is a restriction of Constitutional rights.

As the Constitution says 'election procedures' in the case of the heads of local government, thus differentiating from the term 'election' used in the case of local council members, it is difficult to say that the right to vote for heads of local governments is a Constitutional right. However, even if the right to vote for heads of local governments were perceived as simply a legal right and not a Constitutional one, examination of whether the right to equality was infringed will apply when there exists discrimination between comparable groups. Therefore, any restriction on the right to vote in local elections, whether it be for local council or heads of local governments, is a restriction of Constitutional basic rights.

(B) Meanwhile, Article 25 of the Constitution stipulates that 'all citizens shall have the right to hold public office under the conditions as prescribed by statute', guaranteeing the people's right to hold public office. Since the right to be elected, which refers to be elected as the member or head of a government agency or local government through elections, is included in the right to hold public office, it is clear that any restriction on the right to be elected to local council or the office of the head of local government is a restriction on Consitutional basic rights.

(2) Whether Article 15 Section 2 Paragraph 1, Article 16 Section 3, and Article 37 Section 1 Infringe the complainants' Right to Participate in Local Elections

Article 13 Section 2 of the Local Government Autonomy Act stipulates that "residents who are nationals of the nation shall have the right to participate in elections of the members of local councils and the heads of local governments to be held by such local governments (hereinafter referred to as the "local elections") under the

conditions as prescribed by the Acts and subordinate statutes" thereby giving all 'residents who are nationals of the nation' the right to vote in local elections.

However, Article 15 Section 2 Paragraph 1 of the Act requires, as a prerequisite for attaining the right to vote in local elections, voters to be persons "whose resident registrations are completed in the district under jurisdiction" as of the date on which the electoral register provided for in the provisions of Article 37 Section 1. Then Article 16 Section 3 requires that only persons "whose resident registrations are completed in the district under jurisdiction" be given the right to be elected in local elections. Therefore, 'nationals residing abroad but currently living within the country who are not registered as residents' are deprived of their right to vote or be elected in local elections. The issue is whether depriving nationals residing abroad but currently living within the country of their right to participate in local elections can be constitutionally justified.

(A) Decision on Restricting the Right to Vote

As the right to vote in local elections is given to 'residents who are nationals of the nation' per Article 13 Section 2 of the Local Government Autonomy Act, one's right to vote is acknowledged by principle if one fills both the requirements of being 'a national of the nation' and a 'resident'.

In the case of Korean nationals who reside abroad, they obviously do not have the right to vote as they do not satisfy the requirement of being a 'resident'. However, in the case of nationals residing abroad but currently living within the country, there may be many cases in which both of the aforementioned requirements are fulfilled. This is especially true in the case of Korean nationals living abroad who have domiciles in Korea for though they cannot technically register as residents according to the Resident Registration Act, they are, in actuality, the same as 'registered residents who are nationals' in that they are 'residents who are nationals'. That is to say that both these groups are eligible to enjoy the same rights and same duties in an equal environment within the same local government they belong to. The 'registered residents who are nationals' and 'residents who are

Korean nationals residing abroad, incapable of registering as residents' are only different in whether they are registered as residents, and are the same in the aspect that they are residents of local governments who are nationals. Therefore, there is no basis for discriminating the two in terms of the right to vote in local elections.

Meanwhile, Article 15 Section 2 Paragraph 2 of the Public Official Election Act as amended by Act No. 7681 on August 4, 2005, give 'foreigners who are aged 19 or above and for whom 3 years lapse from the date on which they obtain their permanent stay statuses' the right to vote in local elections under certain conditions. However, a foreigner's right to vote in local elections is not a Constitutional right but simply a 'legal right' endowed by the Public Official Election Act. Therefore, according to current law, the right to vote, a Constitutional right, of the nationals residing abroad but currently living within the country fall short of a foreigner's right to vote, a legal right. It is obvious that such a result is unreasonable.

In conclusion, denying the nationals residing abroad but currently living within the country the right to vote in local elections — a right given even to foreigners permanently residing in Korea — completely and uniformly regardless of the length of their stay abroad is in violation of the principle of equality stated in the Constitution and is a restriction on basic rights which exceeds the limits of Article 37 Section 2 of the Constitution.

Therefore, Article 15 Section 2 Paragraph 1 and Article 37 Section 1 of the Act infringe the right of the nationals residing abroad but currently living within the country to equality and their right to vote in elections for local council members.

(B) Decision on Restricting the Right to be Elected

Article 16 Section 3 of the Act limits the scope of those eligible for election to 'nationals of 25 years of age or higher who have registered as residents in the district under jurisdiction of the local government concerned for sixty consecutive days or longer as of the election day', thereby depriving the nationals residing abroad but currently living within the country, who are incapable of registering as residents, of the right to be elected.

With legislations regarding local elections, it is necessary to consider the characteristics of the local government autonomy system, and the legislative branch is given a comparatively wide range of legislative-formative powers when it comes to legislating the specifics of the local government autonomy system, including deciding the requirements for eligibility for election in local elections. However, as restricting the right to be elected in local elections is restricting the Constitutional right to hold public office, such restrictions are still subject to the limits of Article 37 Section 2 of the Constitution.

The purpose of Article 16 Section 3 of the Act requiring people to be 'registered as residents in the district under jurisdiction of the local government concerned for sixty consecutive days or longer' to be eligible for election in local elections is to limit the people capable of being elected as heads or councilmen of the local government to those who have lived as residents in the local government for at least a certain period of time and have formed significantly close relationships of interests with said local government. Accordingly, the period of 60 days was set as the minimum requirements as a resident and resident registration is demanded as the official record of such a period of residence in the municipality.

However, even those legally incapable of registering as residents, as in the case of 'Korean nationals residing abroad who are permanent resident of a foreign country' can reside as residents of a municipality for long periods of time and form close ties of interest with the affairs of the local government, and there are ways to officially confirm such periods of residence besides resident registration.

In spite of all this, Article 16 Section 3 only uses a certain period of 'resident registration' or longer to determine eligibility for election in local elections. Denying the nationals residing abroad who have resided for at least a certain period of time as residents and have made significant ties with the work of the local government the right to be elected in local elections completely simply because they have no resident registration cannot be reasonably justified.

What is more, considering the fact that Article 16 Section 2 of the Act gives the right to be elected to all nationals of 25 years of age or older, regardless of whether they are registered as residents, enabling

Korean nationals residing abroad to be eligible for election to the national assembly regardless of whether they reside in Korea or not, denying one's right to be elected on the basis of resident registration only in local elections is not very convincing.

Therefore, Article 16 Section 3 of the Act which uses only the resident registration as a standard for determining eligibility for election, and thereby denies the right to be elected to Korean nationals residing abroad who cannot register as residents, infringes on the right to hold public office in violation of Article 37 Section 2 of the Constitution of the nationals residing abroad but currently living within the country.

C. The Right to Vote in National Referendum

(1) The Significance and Forms of Right to Vote in National Referendum

The right to vote in national referendum refers to the right of the people to directly make decisions regarding certain national matters in the form of national referendums. It is a basic Constitutional right which, along with the right to vote and be elected in various selections, constitutes the political rights of the people. The Constitution acknowledges the right to vote in national referendum when deciding important policies relating to diplomacy, national defense, unification and other matters relating to the national destiny (Article 72) and when confirming proposed amendments to the Constitution (Article 130 Section 2).

The national referendum on important policies stipulated in Article 72 of the Constitution is the process of the sovereign people authorizing matters relating to the national destiny proposed by the president. The referendum on proposed amendments to the Constitution is the process of the sovereign people ultimately deciding whether to authorize proposed amendments to the Constitution proposed by the National Assembly or the President and affirmed through a resolution of the National Assembly.

(2) The Constitutionality of the Article of the National Referendum Act in Question

The National Referendum Act is established as the law concretizing the right to vote in national referendum, and Article 7 of the National Referendum Act gives the right to vote in national referendum, by principle, to nationals of a certain age or older. However, the Article of the National Assembly Act in question requires the person in charge of compiling the register only the voters that are registered within the jurisdiction in question as of the date the national referendum is announced publicly, thereby rendering the Korean nationals residing abroad, such as the complainants, unable to exercise their right to vote in national referendum.

As seen supra, the national referendum is the process of the people, as the sovereign, decide whether to authorize important national policies or proposed amendments to the Constitution. As such, the Article of the National Referendum Act in question, that uses resident registration, which cannot affect the people's position as the sovereign in any way, as the sole standard and depriving the Korean nationals residing abroad of any chance of exercising their right to vote in national referendum infringes the right of the complainants to national referendum for the same reasons discussed in the decision regarding restricting the right to vote in state elections.

5. Decision of Nonconformity to the Constitution with the Order of Continuing Application

A. The Articles in question in this case infringe the basic rights of Korean nationals residing abroad, who cannot register as residents, by preventing them from exercising their right to vote in presidential and national assemble elections as well as their right to vote in national referendum simply because they are not registered as residents, even though they are still citizens of the Republic of Korea. The also deny the Korean nationals living abroad the right to vote or be elected in local elections simply because they are not registered as residents, despite the fact that they are residents who are nationals. However, as explained below, it does not seem appropriate to render a decision stating that the Articles in question are simply unconstitutional.

B. When laws violate the Constitution, it is procedure to declare them unconstitutional in order to ensure the validity of the Constitution. However, when removing unconstitutional Articles of law from the system through a decision of unconstitutionality may cause confusion and leave a legal void, a declaration of non-conformity can be made with an order to continue enforcing the articles in question temporarily. If it is determined that the unconstitutional state of temporarily enforcing the unconstitutional articles of law is constitutionally more desirable than the constitutional state of no legal regulation arising from the declaration of unconstitutionality, the Constitutional Court may decide maintain the unconstitutional regulations for a certain period of time and enforce them temporarily until the legislative branch amends the articles to conform with the Constitution in order to prevent an unbearable legal void and the ensuing confusion (17-1 KCCR 796, 810, 2005 Hun-Ka 1, June 30, 2005).

If the articles in question are declared unconstitutional and are immediately rendered ineffective, it is clear that a state of confusion in which it will be impossible to properly hold the upcoming 17th presidential elections and 18th national assembly elections. Also, though it is a Constitutional requirement that all Korean nationals residing abroad be granted the right to vote as a matter of principal, there still remain may issues that must be solved in terms of ensuring fair elections and technicalities involved therein. For example, if we were to allow Korean nationals residing abroad including overseas sojourners the right to vote in state elections and the right to vote in national referendum, we would require time to conduct a sufficient review of and prepare for matters such as installing voting booths and an agency to manage the elections, establish a process for checking the ID of Korean Nationals residing abroad, the method of voting, method of campaigning, and other specific methods on conducting fair elections. In the case of giving the nationals residing abroad but currently living within the country the right to vote in local elections, we must review issues such as whether to impose residential requirements, and if so how long the term of residing should be. These such issues should ultimately be decided by the legislative branch through extensive discussion and social consensus.

⑶ Therefore the Articles in question are hereby declared not to be in conformity with the Constitution, but they are to be temporarily enforced until the legislature amends them. The legislative branch must make the proper amendments at the latest by December 31, 2008, and if no such amendments are made by then, the Articles in question will become null and void starting on January 1, 2009.

6. Conclusion

Therefore, the articles in question are do not conform to the Constitution but are to be enforced temporarily until the legislature makes the proper amendments, which are to be made at the latest by December 31, 2008.

Also, the Constitutional Court decision 96 Hun-Ma 200 of June 26, 1996, which decided, unlike this decision, that Article 16 Section 3 of the old 'Public Office Election and Prevention of Election Irregularities Act' (before being amended by Act No. 5537 on April 30, 1998) did not violate the Constitution, is altered inasmuch as it conflicts with this decision, as are the decision 97 Hun-Ma 253 of January 28, 1999, which decided that Article 37 Section 1 of the old 'Public Official Election and Prevention of Election Irregularities Act' (as amended by Act No. 4796 on December 22, 1994, and before being amended by Act No. 6663 on March 7, 2002) did not violate the Constitution, and the decision 97 Hun-Ma 99 of March 25, 1999, which decided that Article 38 Section 1 of the old 'Public Official Election and Prevention of Election Irregularities Act' (before being amended by Act No. 7189 on March 12, 2004) was not in violation of the Constitution.

All of the justices concurred this decision, save the justices Lee Kong-hyun who expressed a separate opinion as stated below under item 7. and Cho Dae-hyen who expressed a separate opinion as stated below under item 8.

7. Concurring Opinion of Justice Lee Kong-hyun

A. I agree with the majority opinion in that Article 37 Section 1 and Article 38 Section 1 of the Act infringes the rights of Korean

nationals residing abroad with regards to state elections, specifically the right to vote, the right to equality, and the principle of popular elections. I also agree that Article 14 Section 1 of the National Referendum Act infringes the right to vote in national referendum of Korean nationals residing abroad. Thus, said articles do not conform with the Constitution, but I do not believe that the same articles generally infringe, the right of the nationals residing abroad who are permanent residents of a foreign country.

B. Though the right to vote must be realized to the fullest extent possible according to the constitutional principles of popular sovereignty and democracy, the demand for equality regarding participation in elections does not prohibit all kinds of restrictions on the right to vote. Exceptions to the principle of popular election may be constitutionally acceptable when there is reason for justification (9-1 KCCR 674, 685-686, 96 Hun-Ma 89, June 26, 1997).

Permanent residents of foreign nations have built a lives for themselves over considerable periods of time in countries with different cultural · social · economic conditions from Korea and have the right and will to reside their permanently. In many cases these people differ greatly from normal the nationals residing abroad in terms of the intimacy and sincerity of attitude they show regarding participation in the elections and politics of Korea. Therefore, they do not necessarily have the right to form representative organizations as specific constituents of the nation, even though they may be a part of our people in an ideological and abstract sense.

Even in the case of other nations, the will to reside permanently and the term of residence aborad are important factors considered when deciding whether or not to recognize the right to vote. In the case of England the right to vote is granted to nationals residing abroad who have only resided abroad for a certain amount of time or less, and Canada and Australia only grant the right to vote when the term of residence abroad is within a certain period and said residents intend to return to the nation and reside their permanently.

In conclusion, not granting the right to vote to certain nationals residing abroad, such as permanent residents of foreign countries, is not always constitutionally unacceptable and in violation of the

principle of popular elections, and this is the same with the right to vote in national referendum as well.

C. However, the aforementioned Articles do not consider the intimacy or sincerity of the demand for political participation according to the intention of permanent residence or the term of residence abroad. They simply determine eligibility for entry in the voter or electoral register according to whether a person is registered as a resident, and only allow absentee reports to be filed by those domestic residents eligible for entry in the electoral register. Therefore, even when we consider the divided state of our nation, technical concerns or the fairness of elections, and the issues of election expenses, such restrictions cannot be justified and said articles are not in conformity with the Constitution, as stated by the majority opinion.

D. For these reasons, I hereby express a separate opinion to the majority opinion.

8. Concurring Opinion of Justice Cho Dae-hyen

A. Subject Matter of Decision

What the complainants are demanding is a decision on whether the Articles concerned in this case violate the Constitution in that they do not allow nationals residing abroad to exercise their right to vote, and so this issue must be the subject matter of decision, and the conclusion must be expressed in the holding.[1)]

B. Article 15 Section 2 and Article 16 Section 3 of the Act (partially unconstitutional with regards to pseudo legislative omission)

Article 15 Section 1 of the Act stipulates that "a national of

1) the fact that the articles in question grant nationals with resident registrations the right to vote is not the subject matter of review, nor is it unconstitutional, so we must not include it as a subject of the holding.

nineteen years of age or above shall have a voting franchise for the election of the President and the members of the National Assembly", therefore there is no discrimination against Korean nationals residing abroad regarding the right to vote in presidential or national assembly elections.[2)]

However, Article 15 Section 2 of the Act, with regards to elections for local council members and heads of local governments, grant nationals of 19 years of age or older who are registered in the jurisdiction of the local government as of the date of compilement of the electoral register the right to vote. It also grants the right to vote to foreigners who are aged 19 or above and for whom 3 years lapse from the date on which they obtain their permanent stay statuses and who are entered in the foreigner registration records of the relevant local government as of the date on which the electoral register is compiled. On the other hand, it does give the right to vote to nationals of 19 years of age or older who have a registered domestic domicile within the jurisdiction of the relevant local government. Pursuant to the principle of resident autonomy, it is not against the Constitution to deny nationals who do not reside within the jurisdiction of the relevant local government the right to vote. However, if the nationals residing abroad of age 19 or higher have registered a domestic domicile and are residing in said domicile, the principle of resident autonomy demands they be given the right to vote as well, and as long as they have registered domestic domiciles, there should be no problem in terms of election management either. Therefore, Article 15 Section 2 of the Act failing to stipulate that the nationals residing abroad of age 19 or older who reside in registered domestic domiciles within the jurisdiction of the relevant local government have right to vote is in violation of Article 11 Section 1 of the Constitution, and discriminates against the aforementioned group unreasonably.

For the same reasons, Article 16 Section 3 of the Act allowing only residents who have resided in the jurisdiction of the relevant local

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2) There remains the issue of whether nationals residing abroad should be given the right to vote not just in proportional representative National Assembly elections but also in local constituency elections. However this is not the subject of this review and should be decided by policy.

government for 60 days or more with resident registration, and not including the nationals residing abroad who reside in registered domestic domiciles is in violation of Article 11 Section 1 of the Constitution.

C. On Article 37 Section 1 of the Act (partially unconstitutional with regards to pseudo legislative omission)

Regardless of whether the election is a presidential·national assembly or local election, one cannot vote if they are not registered in the electoral register, (Article 156 Section 1 of the Act), and nobody can be entered in more than one electoral register (Article 37 Section 3). In case of filing an absentee report, one must record such a report in the electoral register and be entered in a separate absentee report register (Article 38 Section 4), and can only cast absentee ballots (Article 156 Section 3).

The purpose of the electoral register system is to confirm the identity of those who have the right to vote, enter them in the register, and manage so that they only exercise their right to vote once. It is a necessary and appropriate system for ensuring fair elections.

However, since one cannot exercise their right to vote without being entered in the electoral register, restricting eligibility for entry in the electoral register is, in fact, restricting the right to vote. Therefore, in order not to enlist someone with the right to vote in the electoral register, the conditions of restricting basic rights, as stipulated by Article 37 Section 2 of the Constitution, must be followed.

Article 37 Section 1 of the Act stipulates that the electoral register must be compiled by surveying voters registered as residents in the relevant jurisdiction as of the date of compilement. Therefore, in the case of Korean nationals residing abroad, though they have the right to vote in state elections, cannot be entered in the electoral register because they have no resident registration, even when they file domestic domicile registrations or register as nationals residing abroad with embassies, and therefore cannot vote. As explained above, the nationals residing abroad with registered domestic domiciles should have the right to vote in local elections, and yet, even if Article 15

Section 2 of the Act is amended to grant them that right, they would be ineligible for entry in the electoral register on the basis that they have no resident registration, and therefore will not be able to exercise their right to vote.

However, in terms of confirming the identity of voters and managing elections so that they only vote once, nationals residing abroad registering domestic domiciles or registering at embassies is no different from the resident registration system.

Therefore, Article 37 Section 1 failing to allow nationals residing abroad who have registered domestic domiciles or have registered at the embassies to be entered in the electoral register for state elections[3] is restricting their right to vote without reasonable cause, and is in violation of the Constitution. The same is true in the case of local elections with respect to the nationals residing abroad with registered domestic domiciles who reside in the jurisdiction of the relevant local government. Though there is concern about the difficulty of managing elections when nationals residing abroad are allowed to vote, this is not reason enough to justify restricting the people's right to exercise their sovereignty.

D. On Article 38 Section 1 (Partial unconstitutionality)

When exercising the right to vote, the general principle is to be present at voting booths with compiled electoral registers, but when absentee reports are filed, votes may be cast at one's current location in the form of absentee ballots. When registered as an absentee, votes may only be cast in the form of absentee ballots. Those unable to file absentee reports cannot utilize the absentee voting system.

Article 38 Section 1 of the Act only stipulates that "domestic residents" eligible for entry in the electoral register may file absentee reports. the nationals residing abroad with registered domestic domiciles may be recognized as domestic residents and file absentee

3) Nationals residing abroad must be entered in the electoral registers of embassies even if they are only given the right to vote in proportional representative National Assembly elections and not local constituency ones. It is just that the elections must be managed so that they only exercise the right to vote that they are granted.

reports if they acquire eligibility for entry in the electoral register[4]. However, nationals who reside in foreign nations cannot utilize the absentee voting system be they nationals with resident registration in Korea, nationals registered as nationals residing abroad at embassies, nationals residing abroad temporarily, or nationals with the intention to reside abroad permanently.

Though there will be many problems regarding election management if we were to allow nationals residing abroad to vote as absentees, the remarkable advances in communications technologies have made it easier to overcome such difficulties. Also, as exercising the right to vote is in fact exercising the people's sovereignty, restricting the method of exercising the right to vote is not constitutionally acceptable. The part of Article 38 Section 1 of the Act which allows only domestic residents to file absentee reports restricts the right to vote of nationals residing abroad with regards to the method of exercising said right and cannot be considered reasonable. The legitimacy of the legislative purpose cannot be recognized, and it also violates the rule of balancing interests.

The "residing domestically" part of Article 38 Section 1 of the Act is in violation of the Constitution.

E. On Article 14 Section 1 of the National Referendum Act (partially unconstitutional with regards to pseudo legislative omission)

As Article 7 of the National Referendum Act grants the right to vote in national referendum to nationals of age 19 or older, nationals residing abroad also possess the right to vote in national referendum. However, Article 14 Section 1 of the National Referendum Act stipulates voters registered as residents be entered in the voter register, and Article 58 Section 1 states that those not entered in the voter register cannot vote in national referendums. Therefore, nationals residing abroad do not have resident registration, and thus, cannot exercise their right to vote in national referendum.

In the case of nationals residing abroad who have registered

4) The issue of eligibility of nationals residing abroad with registered domestic domiciles to be entered in electoral registers is related to Article 37 Section 1.

domestic domiciles or are registered with at embassies, election management is possible in terms of confirming the voters' identity and allowing them to vote only once. Therefore there is no reason to restrict their right to vote in national referendum. Therefore, Article 14 Section 1 of the National Referendum Act failing to allow nationals residing abroad who have registered domestic domiciles or are registered with embassies to be entered in the voter register is an unreasonable restriction of the right to vote in national referendum, as stated in section C. supra.

F. On the Expression of the Judgment

The unconstitutionality of the articles in this case lie in the fact that they regulate the matter of exercising the right to vote for registered residents but not for nationals residing abroad who have registered domestic domiciles or are registered with their relevant embassies. The part of the articles in question which regulate the rights of registered residents is just and constitutional, and only the pseudo legislative omission of not including certain nationals residing abroad is unconstitutional.[5)]

When certain articles of law are unconstitutional because they fail to include certain contents, as is the case with the articles involved in this case, such pseudo legislative omission must be declared in violation of the Constitution or to be nonconforming to the Constitution. The relevant articles should not be declared unconstitutional or nonconforming to the Constitution in their entirety. This is because we cannot declare the constitutionally valid sections of said articles as nonconforming to the Constitution, nor can they cease to be enforced.

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5) If the majority opinion believes that the articles in question "limiting to registered residents" does not conform to the Constitution, they must clearly state that in the holding and not simply state that the "resident registration" part does not conform to the Constitution. Also, if the opinion that limiting to registered residents" does not conform to the Constitution means that not including nationals residing abroad in addition to registered residents does not conform to the Constitution, the “registered resident” part should continue to be enforced, and since determining whether the "limiting part" should be temporarily applied is meaningless, there is no need to make a decision on this matter.

Declaring pseudo legislative omission unconstitutional or nonconforming to the Constitution is simply urging additional legislation and not declaring any existing law unconstitutional. Therefore, the existing articles of law do not cease to be enforced and no decision need be made on the matter of their temporary enforcement. No decision can be made on the temporary enforcement of the constitutionally valid section of the laws in question, and even when the period of temporary enforcement is over, the constitutionally valid section cannot be rendered null.

Justices Lee Kang-kook(Presiding Justice), Lee Kong-hyun, Cho Dae-hyen, Kim Hee-ok(Unable to sign and seal due to overseas business trip), Kim Jong-dae (Assigned Justice), Min Hyeong-ki, Lee Dong-heub, Mok Young-joon, Song Doo-hwan

[Annex] List of Counsels for complainants(2004 Hun-Ma 644)
Law Firm Namkang, attorney in charge Jung Ji-seok and 13 others
Law Firm Duksu, attorney in charge Lee Seok-tae
Law Firm Sanha, attorney in charge Gil Gi-kwan
Law Firm Saegil, attorney in charge Park Jong-wook
Law Firm Jahayeon, attorney in charge Lee Jae-gyun and 1 other
Law Firm Changjo, attorney in charge Kim Hak-woong
Law Firm Dongseonambuk, attorney in charge Jang Yoo-sik

3. Accidental Fire Liability Case

[19-2 KCCR 203, 2004 Hun-Ka 25, Aug. 30, 2007]

The Court found nonconforming to the Constitution the Act on Civil Liability for Fire Caused by Negligence which denied the application of the principle of fault liability in case of accidental fire by minor negligence and did not acknowledge a claim for damages by the victim.

Background of the Case

'The Act on Civil Liability for Fire Caused by Negligence' (hereinafter, the Accidental Fire Liability Act) limited the right of the victim to initiate a claim for damages by denying the application of the principle of negligence liability provided in Article 750 of Korean Civil Code in case of accidental fire by minor negligence. The petitioners had initiated a claim for damages against the accidental firer. During the pending suit, the petitioners filed a motion to request constitutional review on the Accidental Fire Liability Act. Thereupon, the Pusan District Court accepted the motion and referred the case to the Constitutional Court.

Summary of the Opinions

The Constitutional Court declared the Accidental Fire Liability Act was nonconforming to the Constitution, and the reasons are as follows.

1. Summary of the Majority Opinion

A. The Accidental Fire Liability Act was enacted to relieve the accidental firer by minor negligence from severe liability for damages since the damages were in many cases widely expanded against expectation once a fire broke out. Until today, the necessity of the Act continue to exist. However, although the necessity of the Accidental Fire Liability Act still exists, the rationality and concrete propriety of the Act cannot be acknowledged since the Act

concentrated on the protection of a firer and was indifferent to the protection of a victim by accidental fire. The Accidental Fire Liability Act which denied the liability for damages from the fire by minor negligence to relieve the accidental firer from severe liability limited the claim right for damages, a property right of victim from accidental fire, so excessively that it went beyond the minimum limit which is needed. It also fails to have balancing of interests by neglecting various factors of fair account for the loss incurred including the scale and cause of fire and combustion, the compensation capacity of the accidental firer and the financial status of the victim.

B. For this reason, the Accidental Fire Liability Act is against the Constitution by going beyond the limit of legislative restriction on the constitutional rights. However, since the duty to choose a proper way eliminating the unconstitutionality belongs to the legislature, we make not the decision declaring the Accidental Fire Liability Act unconstitutional but the decision declaring it nonconforming to the Constitution which call upon the legislature to revise the provision. In addition, we change the decision of 92 Hun-Ka 4 of Mar. 23, 1995 which declared, contrary to this decision, the Accidental Fire Liability Act constitutional inasmuch as it conflicts with this decision.

2. Summary of Supplementary Opinion by Justice Lee Dong-hueb

The Accidental Fire Liability Act is against the Constitution since it excessively restricts the property right of the victim by overemphasizing the features of fire and the relief of the accidental firer. In particular, except for Japan, there is no other country where an accidental firer is protected by uniformly denying the claim right for damages of the victim in case of accidental fire by minor negligence. Today, different from the days when the Accidental Fire Liability Act was enacted, wooden buildings which were weak from fire have almost disappeared and large scale buildings with great resistance to fire substituted them. In addition, the legislations concerning the fire fighting have been improved for early suppression and prevention of fire. These changes of circumstances weakened the

necessity to maintain the Accidental Fire Liability Act and I add this one of the reasons declaring it unconstitutional.

3. Summary of Simple Unconstitutionality Opinion by Justice Lee Kong-hyun and Justice Song Doo-hwan

As long as the Accidental Fire Liability Act is decided to be unconstitutional by intruding upon the property right of the victim from accidental fire going beyond the limit of the legislations restricting basic rights, the Court should declare it unconstitutional, eliminate it from legal order and take a firm stand to protect the constitutional order rather than nominally maintain its existence and suspend its application until the National Assembly revise it. For this reason, we declare unconstitutional different from the majority opinion.

Aftermath of the Case

Before this decision, the Constitutional Court declared constitutional the Accidental Fire Liability Act in March of 1995. However, the Court changed its position in this decision. The mass media reported the Accidental Fire Liability Act caused the controversies of unconstitutionality because it had been enacted in 1960s when there had been many wooden buildings with no fire prevention measures. In addition, so far, when a person got damages from the fire begun in neighborhood, that person could not get compensation in case the neighborhood commit gross negligence. However, this decision got positive reputation from the media in that it enabled the person to get compensation in a certain extent considering the various factors such as the scale and the cause of fire and the compensation capacity of the accidental firer (*KyungHyang Daily*, August 31, 2007).

Parties

Requesting Court
Pusan District Court

Petitioner
As listed in Annex.
Counsel for Petitioners, Attorney Yeo Tae-Yang

Relevant Cases
Pusan District Court 2003 Ga-Hab 16033 Compensation
Pusan District Court 2003 Ka-Hab 2686 Objection to Preliminary Attachment

Judgment

The Act on Civil Liability for Fire Caused by Negligence is not in conformity with the Constitution.

The courts, government agencies, and municipalities must cease application of the forementioned Act until legislators amend the Act.

Reasoning

1. Introduction of the Case and Subject Matter of Review

A. Introduction of the Case

(1) Petitioners and ○○ Chemicals Co., Ltd. (hereinafter referred to as '○○ Chemicals') were operating their businesses in the ○○ group factory located in ○○-dong, Pusan Jin-gu, Pusan. Around 03:00 on June 15, 2003, the semi disconnected part of wires laid down in the floor of the 2nd story of the building located in the ○○-dong and registered to ○○ Chemicals was overheated, which caused the covering of the wire to carbonize, resulting in a fire. This fire spread to the building of the petitioner located nearby, and the building as well as office appliances, materials, and factory facilities received fire damage.

(2) The prosecutor announced an exemption from prosecution for the

CEO of ○○ Chemicals, who was charged with the aforementioned fire, on the grounds that professional negligence did indeed exist regarding the carelessness towards inspecting the wires, but that this violation of the duty of care was not that significant. Also, ○○ Chemicals has fire insurance with the ○○ Insurance Co., Ltd. (hereinafter referred to as '○○ Insurance') for the purpose of insuring their factory.

⑶ The petitioners, on July 11, 2003, sued ○○ Chemicals for reparation of damages (Pusan District Court 2003 Ga-Hap 16033) and simultaneously filed for preliminary attachment of ○○ Chemical's right to claim insurance money from ○○ Insurance (Pusan District Court 2003 Ka-Hap 1737) and received a decision for preliminary attachment from said court on July 29, 2003. ○○ Chemicals filed an objection to this decision for preliminary attachment on August 20, 2003 (Pusan District Court 2003 Ka-Hap 2086), and currently the two suits (hereinafter referred to as 'Suits in Question') are pending in the court mentioned above.

⑷ While the suits in question were pending, the petitioners filed a motion to request constitutional review regarding the 'Act on Civil Liability for Fire Caused by Negligence' as 2004 Ka-Gi 595 in the aforementioned court, and the court accepted the motion and filed this request for constitutional review on August 31, 2004.

B. Subject Matter of Review

The subject matter of this review is the constitutionality of the 'Act on Civil Liability for Fire Caused by Negligence' (enacted on April 28, 1961 through Act No. 607, hereinafter referred to as the 'Accidental Fire Liability Act'), and the contents and relative provisions thereof are as follows.

[Act Subject to Review]

Act on Civil Liability for Fire Caused by Negligence (enacted on April 28, 1961 through Act No. 607)

Article 750 of the Civil Code shall be applicable in the case of fire caused by negligence only when gross negligence has been involved.

[Relative Provisions]

Article 750 of the Civil Code (Definition of Torts)

Any person who causes losses to or inflicts injuries on another person by an unlawful act, wilfully or negligently, shall be bound to make compensation for damages arising therefrom.

2. Requesting Court's Reason for Request for Constitutional Review and Opinions of the Minister of Justice (Omitted)

3. Review on Merits

A. Special Restrictions on the Right of the Victim of Accidental Fire to Sue for Damages

Article 750 of the Civil Code states that "a person who does damage to another through illegal acts committed intentionally or through negligence shall be liable for making compensations for the damage occurred" affirming that the principle of fault liability is the basic principle for torts and compensation for damages. However, the Accidental Fire Liability Act excludes application of Article 750 of the Civil Code in cases of accidental fires caused through ordinary negligence, thus amending the principle of fault liability.

As a result, in the case of accidental fires, the person that caused the accidental fire is only held liable for compensation when guilty of gross negligence, whereas in cases of ordinary negligence, the person who caused the accidental fire is not held liable for compensation even when the damages caused by said accidental fire are great, making the victim of the accidental fire carry the burden for the entirety of the damages. It is the same whether the damages caused by accidental fire is to property, or to human life or wellbeing. Therefore, the victim of an accidental fire caused by ordinary negligence cannot claim compensation from the person that caused the fire.

So, since the Accidental Fire Liability Act denies the victim's right to claim compensation for damages in the case of fires caused by ordinary negligence, unlike the general principle laid out in Article 750 of the Civil Code, said Act stipulates an exception to the principle

of fault liability in cases of tort, and thus limits the accidental fire victim's right to claim compensation for damages. Even if the Accidental Fire Liability Act falls under the purview of Article 23 Section 1 of the Constitution as a law that forms the contents of property rights, the Act is an exception to the general principle on tort liability and a special limitation on the accidental fire victim's right to claim compensation for damages and is no different from placing special limitations on the accidental fire victim's right to claim compensation for damages, which arises from the principle of fault liability laid out in Article 750 of the Civil Code, in order to protect the person responsible for the accidental fire caused by ordinary negligence, and therefore must conform to the principle of proportionality as stated in Article 37 Section 2 of the Constitution.

B. The Necessity and Legislative Purposes of the Accidental Fire Liability Act

Fire possesses both usefulness and danger. Fire is a basic necessity in the civilized world and the industrial society, but it also has the properties of heating and transforming the substance it touches and creating winds that allow it to spread on its own.

As such, in cases of fire, the fire burns not only the objects located where the fire originated, but in many cases the fire often spreads to nearby buildings and objects expanding the damages caused beyond expectations. Extended damages caused by fire and the extent of the damages caused depend on not only the tendency of fire to spread, but also on many other conditions including the adjacency of flammable substances, the humidity of the air and strength of the winds, the efficiency and swiftness of fire extinguishing and containment efforts, and such factors that may extend the damages caused by fire are, in large part, not controllable by the person responsible for the accidental fire.

Therefore, in cases of accidental fires, if the person responsible for the accidental fire is held liable for the entirety of the damages caused by the fire and the spread thereof, the liability assigned to said person can easily become excessive. It is especially so in the case of damages caused by the spread of the fire, in which there are

various difficulties associated with assigning all of the liability to the person responsible for the accidental fire. What is more, in many cases that person will also have sustained damages by the fire he or she caused.

This is why the legislator enacted the Accidental Fire Liability Act, in an effort to save the causer of the accidental fire from excessively harsh compensation liabilities for damages. Also, as stated in the Constitutional Court Decision 92 Hun-Ka 4, Mar. 23, 1995, in light of the conditions such as the aforementioned usefulness and dangers of fire, its tendency to spread, the possibility of boundless spreading of damages caused by fire, and the situation in which building density has increased due to collective buildings etc., the necessity for an Accidental Fire Liability Act remains in existence today.

C. The Reasonableness, Minimal Restriction, and Balance of Interests of the Accidental Fire Liability Act

As a tool for achieving the legislative goals discussed above, the Accidental Fire Liability Act did not choose the method of mitigating and adjusting the compensation liabilities of the causer of accidental fires in cases of fires caused by ordinary negligence to adjust the burden assigned to the causer, but rather chose to deny entirely the compensation liabilities of the causer, accordingly denying the victim of any right to damages.

Though there exists a necessity to relieve causers of accidental fires who are guilty of only a little negligence, considering the characteristics of damages caused by fire, the method selected by the Accidental Fire Liability Act in order to serve this purpose is excessive even for achieving these goals and ignore the obligation to protect the victims of accidental fires, only stressing the protection of causers of accidental fires, and thus cannot be regarded as reasonable.

First of all, in cases of damages caused by accidental fires and the spread thereof, it can be said that those who are negligent regarding the start and spread of the fire contributed to the cause, but usually there are no grounds to assign liability to the victim of the accidental fire. Therefore, regarding the damages caused by accidental fires and the spread thereof, denying in entirety the liability of the causer of

the accidental fire and putting the burden of all the damages on the victim cannot be considered reasonable or specifically appropriate. This method cannot be considered an appropriate method for achieving the legislative goals of the Act.

Also, in cases where the damages accrued by the accidental fire and the spread thereof are extended beyond expectations and assigning all of the liability for compensation to the causer is too harsh, you can apply Article 765 of the Civil Code to mitigate the compensation liability of the causer according to the specifics of the case and thus reasonably adjust the harsh burden assigned to the causer of the accidental fire. Denying the liability of the causer of accidental fires in entirety in cases of ordinary negligence and burdening the victim to bear all of the damages when there is such a reasonable policy in existence is placing a restriction on the accidental fire victim's right to damages compensation that is in excess of the minimal restriction needed to achieve the legislative goal of this Act.

What is more, under current circumstances where there are no protective measures in place for the victim of fires, denying indiscriminately the compensation liability of the causer and the victim's right to damages in cases of accidental fires caused by ordinary negligence without considering the various factors relating to fair allocation of damages such as the scale and cause of the fire and the spread thereof, the contents and extent of the damages caused, the capacity of the causer to make reparations, whether or not the damaged items are insured for fire damage, and the financial status of the victim. It is equivalent to unilaterally protecting the causer and ignoring the obligation to protect the victim, and such a method cannot be considered one that balances the necessity for protecting the causer with that for protecting the victim.

D. Sub-conclusion (Method of Curing the Unconstitutionality of the Accidental Fire Liability Act)

The Accidental Fire Liability Act, in an effort to achieve the legislative objective of relieving the causer of the accidental fire from unexpected harsh burdens of compensation, excessively restricts the victim's right to damages and is also in violation of the principle of

the balance of interest, thus overstepping the limits that apply to legislation that restrict the basic rights and is in violation of Article 23 Section 1 and Article 37 Section 2 of the Constitution.

The Supreme Court has reduced the scope of application of the Accidental Fire Liability Act through interpretations stating that the Act does not apply to the direct fire that is inseparable from the point of origin of the fire, but only to the parts that were damaged by the spread of the fire therefrom (82 Da-Ka 1038, Dec. 13, 1983), nor to gas explosion accidents (93 Da 58813, June 10, 1994), nor to fires caused by defects in structures (97 Da 12082, Feb. 23, 1999), nor to fires caused by non fulfillment of obligations (67 Da 1919, Oct. 23, 1967; 80 Da 508, Nov. 25, 1980; 93 Da 43590, Jan. 28, 1994). However, it is difficult to say that such efforts on the part of the Supreme Court will suffice regarding the issue of constitutionality of the Accidental Fire Liability Act. Therefore, declaring the Act unconstitutional is unavoidable.

However, as mentioned above, there does exist the need to limit the liability of the causer of the accidental fire, considering the characteristics of fire and the spread thereof, and as for methods to achieve this legislative goal, various legislative policies such as mitigating or remitting the liability of the causer according to the specifics of the individual case, and mitigating and remitting the liability of the causer while protecting the victim through public insurance policies should be considered before making a choice. Such activities fall within the purview of the legislative branch of the government.

Therefore, rather than declaring the Accidental Fire Liability Act simply unconstitutional, it is more desirable to announce that it is not in conformity with the Constitution and to call for an improved legislation.

However, if the Accidental Fire Liability Act continues to be enforced, the unconstitutional state in which the victims of accidental fires caused by ordinary negligence cannot receive any compensation will continue, and therefore, the application of the Act must be stopped even before the legislator implements an improved legislation that will cure the unconstitutionality of the Act.

4. Conclusion

Therefore, the Accidental Fire Liability Act is hereby declared not to be in conformity to the Constitution, and the Courts along with other government agencies and municipalities will not apply the Act until the legislator has amended it to conform with the Constitution. As for the Constitutional Court Decisions that declared the Act to be in conformity to the Constitution, including 92 Hun-Ka 4, Mar. 23, 1995, is hereby altered inasmuch as it conflicts with the holding of this decision.

Seven Justices joined this majority opinion, with Justice Lee Dong-heub filing a supplementary opinion to the majority opinion under item 5 below, and with Justices Lee Kong-hyun and Song Doo-hwan filing a Simple Unconstitutionality Opinion stating that the Accidental Fire Liability Act should simply be declared unconstitutional under item 6 below.

5. Supplementary Opinion by Justice Lee Dong-heub

Article 119 Section 1 of our Constitution stipulates that the economic system of Korea is based on respecting the freedom and creativity of individuals and enterprises, in effect declaring that our economic system is basically a free market economy the pillars of which our private property, the principle of private autonomy, and the principle of fault liability, and the Civil Code holds this principle of fault liability - derived from the free market economy system - to be the basic principle of general torts liability. On the other hand, the Accidental Fire Liability Act renders cases of accidental fires caused by ordinary negligence exempt from the application of Article 750 of the Civil Code, which lays out the principle of fault liability, and stipulates that liability will only be assigned in cases of gross negligence, thus restricting the accidental fire victim's right to claim compensation, a property right, as an exception to the principle of fault liability, the basic principle of tort liability.

Of course, fire is a basic necessity for human life that possesses certain inherent dangers, and the causes and extent of damages of accidental fires can only be different from case to case. Also, when a

fire occurs it is difficult for the causer of the accidental fire to control the fire and the damages incurred can expand without limits, and thus other countries also generally regulate the matter of compensation in cases of fire differently from cases of general torts. However, legislative practices that unilaterally deny the victim in entirety the right to claim compensation in cases of accidental fires caused by ordinary negligence, as is the case with the Accidental Fire Liability Act, is unique to Japan where there exists a custom in which causers of accidental fires are not imposed any liability for civil compensation.

In the case of our country, there exists no such custom and unlike the days when the Accidental Fire Liability Act established, today the wooden structures that are weak against fire are almost all gone, replaced mostly be large structures built according to highly fire retardant construction styles. Laws related to fire fighting promoting early suppression and prevention have been implemented or amended, and the National Emergency Management Agency was established as an agency specializing in total emergency management leading to a reduction in large fires and damages thereof, not to mention the development of insurance policies and improvements made to the individual bankruptcy policies, all working together to reduce the necessity for an Accidental Fire Liability Act aimed at relieving the causer of accidental fires from the burden of harsh compensation liabilities.

Also, considering the modern legislative tendencies of applying the principle of fault liability or introducing principles such as the principle of no fault liability or risk liability in cases such as mining accidents, accidents caused by toxic substances, gas leaks and explosions, and the destruction of levees and roads(all of which have the potential for extensive damages beyond expectation, just as in the case of accidental fires)in efforts to expand compensation provided to the victim, a lot of questions are raised regarding whether to maintain an Accidental Fire Liability Act that ignores the obligation to protect the victim and prioritizes protecting the causer.

Therefore, the Accidental Fire Liability Act, which does not acknowledge any separate mode of protection for victims of accidental fires caused by ordinary negligence but rather entirely denies the

victim the right to claim compensation is unconstitutional as it excessively restricts the property rights of the victim, emphasizing only the characteristics of fire and the protection of the causer.

However, such nonconformity to the Constitution did not exist from the time the Accidental Fire Liability Act was enforced, but rather came about due to a change in the actual conditions such as changed construction styles, development of fire fighting, and improvements made to the relative legislations, and no doubt there will be various methods to render the act constitutional again. Therefore I agree with the opinion to announce the Act not to be in conformity to the Constitution and for its application to be stopped, and hereby express my supplementary views on the matter.

6. Simple Unconstitutionality Opinion by Justices Lee Kong-hyun and Song Doo-hwan

Unlike the majority opinion, we believe that the Accidental Fire Liability Act should be declared Unconstitutional, rather than simply not in conformity with the Constitution.

The Act was legislated with objectives to relieve causers of accidental fires from excessively harsh burdens by imposing liability only to cases of gross negligence, as fires, due to their inherent properties, always pose a potential danger for the damage they cause to spread infinitely.

However, in order to achieve this legislative objective, the Accidental Fire Liability Act excludes the principle of fault liability – the basic principle for general tort liability – and completely deprives the accidental fire victim's right to seek compensation, and regardless of whether the damage accrued from the accidental fire caused by ordinary negligence is to property or to the lives or wellbeing of people, the Act chooses to burden the victim with the entirety of the damages. This method, as pointed out by the majority opinion, focuses only on the protection of the causer of the fire and ignores the obligation to protect the victim of the accidental fire, and is thus a clearly unreasonable and unfair selection of a method.

Therefore, the Accidental Fire Liability Act infringes upon the property rights of victims of accidental fires in violation of the limits

imposed on legislations restricting the basic rights of the people as stated in Article 37 Section 2 of the Constitution, and is, therefore, unconstitutional.

As long as the Accidental Fire Liability Act is an unconstitutional piece of legislation infringing upon the property rights of the victims of accidental fires, as we have determined, the Constitutional Court should not allow the Act to continue its existence and stop its application, but rather simply declare it unconstitutional and remove the Act from the legal system, taking a firm stance towards upholding the Constitution. Also, even if the Act is declared unconstitutional, the courts can utilize Articles 750 and 765 of the Civil Code to allot the damages caused by accidental fires justly between the causer and the victim, and the legislative branch can still implement new laws promoting the protection of both the accidental fire victim and causer even after the Act is declared void. Therefore, declaring the Act unconstitutional will leave no legal void that gap that may cause confusion, nor is there any danger of infringing upon the legislative branch's right to implement legislations.

Therefore, unlike the majority opinion, we assert the opinion that the Accidental Fire Liability Act should simply be declared unconstitutional.

Justices Lee Kang-kook(Presiding Justice), Lee Kong-hyun, Cho Dae-hyen(Assigned Justice), Kim Hee-ok, Kim Jong-dae, Min Hyeong-ki, Lee Dong-heub, Mok Young-joon, Song Doo-hwan

[Annex] List of Petitioners (omitted)

4. Prohibition of Labor Campaigns by Public Officials Case

[19-2 KCCR 215, 2003 Hun-Ba 51 et al., Aug. 30, 2007]

In this case, the Constitutional Court held the National Public Officials Act constitutional, which prohibits public servants from doing collective actions for non-public affairs including labor movement and criminally punishes its violation.

Background of the Case

Articles 66 and 84 of the National Public Officials Act punished a public servant when he or she did 'collective actions for non-public affairs including labor movement' but allowed exceptions when the public servant belonged to the exceptional group permitted by Presidential Decree(hereinafter, referred to as 'the statutory provision at issue in this case'). A public servant's application for establishing a labor union to labor office was refused due to the statutory provision at issue in this case while another public servant was indicted for having held a meeting to establish a labor union for public servants. The complainant filed this constitutional complaint claiming that the statutory provision at issue in this case was unconstitutional. Also, the presiding court referred the case to the Constitutional Court, sua sponte, asking whether the statutory provision at issue in this case is unconstitutional or not.

Summary of the Opinions

1. Summary of the Majority Opinion

A. The notion of 'labor movement' at the statutory provision at issue in this case should be narrowly interpreted as the acts directly related to the right to independent association, collective bargaining and collective action for the improvement of working conditions of workers based upon the purport of Article 33 Section 2 of the Constitution. Considering the freedom of assembly and association in the Constitution, the notion of 'collective actions for non-public affairs' should not be interpreted as all kinds of collective actions but

narrowly interpreted as the acts against the public interests among collective actions for non-public affairs. The courts have interpreted and the notions above as similar to the above. In addition, the notion of 'public servants engaging in actually physical labor' is clearly interpreted as the public servants engaging in physical activities contrasted with general public servants engaging mainly in mental activities. Then, the notions above are not as unclear as to give room for the executive to arbitrarily interpret or harm the predictability.

B. Article 33 Section 2 of the Constitution provides that only those public servants who are designated by statute can enjoy the right to independent association, collective bargaining and collective action. Hence, the public servants who are not designated by statute cannot enjoy those three rights and cannot argue for the application of the Principle Against Excessive Restriction under Article 37 Section 2 of the Constitution on the assumption that they enjoy those three rights. The fact that the provision above restricts the scope of public servants, to whom the three labor rights apply, only to public servants engaging in actually physical labor is based upon the Article 33 Section 2 of the Constitution which entrusted the legislator with broad latitude to decide the scope of public servants who can enjoy three labor rights. It is not beyond the discretionary power given to the legislators and, accordingly, the statutory provision at issue in this case does not intrude upon the three labor rights of public servants.

C. Even when the contents of a statutory provision conflict with those of another one, any constitutional problems such as the matter of unconstitutionality do not arise in principle, but only the problem of statutory interpretation on how to harmoniously interpret the conflicting provisions arises.

D. The statutory provision at issue in this case prohibits the collective actions for non-public affairs by public servants because the collective actions by public servants can be obstacles to pursue the interests of people as a whole by representing the interests of public servants' group. Hence it provides for one of the obligations from

special status, a public servant. Since the notion above is restrictively interpreted meaning 'collective actions that cause one to neglect the duty of commitment to the job for the aims against the public interests,' the statutory provision at issue does not excessively infringe upon the essential contents of the freedom of speech, press, assembly and association.

E. It is based upon Article 33 Section 2 of the Constitution that the three labor rights are guaranteed only to the public servants engaging in actually physical labor and that they are materially restricted for the other public servants. In addition, since it has reasonable grounds in the classification, it is not against the Principle of Equality provided by the Constitution.

F. International human rights covenants admit the restriction by law on the labor rights so far as it is necessary and does not intrude upon the essential contents of the rights. Hence, they do not squarely conflict with the statutory provision at issue in this case which restricts the three labor rights. The other international covenants, agreements and recommendations on labor rights cannot be a criterion in deciding the constitutionality of the statutory provision at issue in this case since Korean government has not ratified them or they only have advisory effect.

G. Since Articles 64 and 75 of the Constitution could be a basis entrusting the scope of public servants engaging in actually physical labor to Presidential Decree, it is not right to say that, without any constitutional basis, Article 66 Section 2 entrusts to Presidential Decree the scope of public servants engaging in actually physical labor who could be exempted from criminal punishment. In addition, it is against the principle of delegation of legislative power that a statute entrust the whole statutory matters to lower regulations with no outlines. However, if the statute provides outlines and entrust to lower regulations specifying the delegated scope, it is not against the Constitution.

H. If public servants engage in collective actions against Article 66

of the Act, the actions are highly likely to intrude upon the general interests of the public which affect the whole range of people's life. Accordingly, Article 84 of the Act which punishes these actions with criminal penalties are neither beyond the limit of legislative discretion nor against the Constitution. In addition, although public servants could be criminally punished with doing the actions above and, separate from this, be subject to disciplinary action pursuant to Article 78 Section 1 Paragraph 1, the disciplinary action has different power basis, purpose, contents, and subjects with criminal punishment. Besides, there is no special situation justifying that one year imprisonment in maximum or three million won fine in maximum provided by the Article 84 is too heavy a punishment which exceeds the limit of legislative discretion.

2. Dissenting Opinions of Three Justices

A. Justice Cho Dae-hyen

The purport of Article 33 Section 2 of the Constitution is that a public servant has three labor rights in principle according to Article 33 Section 1 of the Constitution but that the three labor rights of public servant could be concretely adjusted and their concrete contents should be provided by statute within the limits that they are in harmony with special status and responsibility of public servant provided by Article 7 of the Constitution. The statutory provision at issue in this case never considers the public character of the duties of public servants at all that are given according to the classes and rankings of public servants and the contents of the duties. Only whether he or she is the public servant engaging in actually physical labor becomes a criterion in deciding to allow the collective actions for labor movement. Hence, it is unconstitutional because it excessively restricts the collective actions for labor movement. However, since the statutory provision at issue in this case has both constitutional parts and unconstitutional ones together, it would be appropriate to declare that the provision at issue as a whole does not conform to the Constitution and to urge a revision.

B. Justice kim Jong-dae

According to Article 33 Section 2, the legislator should enact a law guaranteeing the three labor rights to a certain range of public servants. At this time, the form of legislation has to be "statute" Article 66 Section 1 of National Public Officials Act provides the scope of public servants to whom the three labor rights are applied as "the public servants engaging in actually physical labor," and, for the concrete contents, it entrusts to the lower regulations. Therefore, it is against Article 33 Section 2 of the Constitution as well as 'void for vagueness' in the principle of 'nulla poena, nullum crimen sine lege.' In addition, it is beyond the limits of legislative delegation.

C. Justice Song Doo-hwan

Article 33 Section 2 of the Constitution provides that the three labor rights of some public servants could be partially restricted due to the special character of public servants compared to other workers, but only on the premise that the public servants enjoy three labor rights as workers as a matter of course. In that case, it should follow the restriction principle provided by Article 37 Section 2 of the Constitution. However, Article 66 Section 1 of the National Public Officials Act restricts and deprives of the labor rights considering only whether to be a public servant engaging in actually physical labor and, due to that, it is against the Rule of Least Restrictive Means and intrudes upon the essential aspect of the three labor rights. In addition, it is against the Principle of Equality as well. Since the unconstitutionality of the statutory provision at issue in this case is vivid and any specific legal chaos does not seem to happen by rendering a decision of simple unconstitutionality, it is appropriate to issue a judgment of simple unconstitutionality.

Reference Facts

The Act on Establishment and Management of Labor Union for Teachers' was enacted in January 29, 1999, and the right to establish labor union and the right to collective bargaining have been

guaranteed to the teachers since July 1, 1999. By the agreement for the labor rights of public servants and teachers reached in the Tripartite Commission (labor, employer, and government) on February 6, 1998 just before the start of President Dae-Joong Kim's adminstration, 'the Act on Establishment and Management of Workplace Council for Public Servants' was enacted and the Workplace Council has been established and managed since January 1999. 'The Act on Establishment and Management of Labor Union for Public Servants' was enacted on January 27, 2005, and same level of labor rights with those of teachers have been guaranteed to the public servants under 6th rank since January 28, 2006.

JoongAng Daily pointed out in an editorial that the decision by the Constitutional Court was reasonable and the public servants should be engaged in labor movement within the limits provided by law (*JoongAng Daily*, August 31, 2007).

Parties

Complainant

Cha ○ Cheon (2003 Hun-Ba 51)

Counsel : Law Firm General Law Office for Citizens
Attorney in Charge Kim Nam-Jun and 4 others

Requesting Court

Seoul Administrative Court (2005 Hun-Ka 5)

Relevant Cases

Seoul Central District Court 2003 No 1118 Violation of the Punishment of Violence Act (2003 Hun-Ba 51)

Seoul Administrative Court 2004 Gu-Hab 26123 Cancellation of Decision to Return Labor Union Establishment Report (2005 Hun-Ka 5)

Judgment

The parts of "National Assembly Rule" and "Presidential Decree" of Article 66 Sections 1 and 2 of the National Public Officials Act (amended by Act No. 5452 on December 13, 1997), and the section of Article 84 of the same Act that refers to violations of the National Assembly Rule of Article 66 Sections 1 and 2 of the same Act are not in violation of the Constitution.

Reasoning

1. Introduction of the Case and Subject Matter of Review

A. Introduction of the Case

(1) 2003 Hun-Ba 51

The complainant is a public official of 6th rank belonging to the National Assembly Secretariat, and is the head of the ○○ Public Official Labor Union and representative for the National Assembly Secretariat Workplace Council.

The complainant was sentenced to 1 year imprisonment to be suspended for 2 years by the court of first instance for violation of the National Public Officials Act because the complainant founded the ○○ Public Official Workplace Council Alliance as the preparatory step for getting the aforementioned Public Official Labor Union recognized, held multiple assemblies, and established the Public Official Labor Union (Seoul Central District Court, 2001 Go-Dan 10150, Jan. 21, 2003).

After appealing, the complainant filed a motion to request the constitutional review of Article 66 Sections 1 and 2 of the National Public Officials Act and the section of Article 84 of the same Act that refers to violations of Article 66, while the case was pending. When the appeals court rejected the appeal of the complainant (Seoul Central District Court, 2003 No 1118, July 9, 2003) and the aforementioned filing for request of constitutional review (2003 Chogi 966), the complainant filed this constitutional complaint in accordance with Article 68 Section 2 of the Constitutional Court Act on July 14, 2003.

The complainant filed an appeal with the Supreme Court on the 22nd of the same month, but was rejected (Supreme Court, 2003 Do 4331, May 12, 2005).

(2) 2005 Hun-Ka 5

The ○○ Labor Union for Public Officials in Physical Labor Service is a labor union made up of public officials in physical labor service who are with the various police stations and their subordinate institutions. 30 public officials in physical labor service completed the general assembly for establishment on July 24, 2004, and filed a labor union establishment report on the 27th of the same month with the Seoul Southern District Labor Office.

The head of the Seoul Southern District Labor Office turned down said report of establishment on July 30, 2004, stating that the public officials in physical labor service who established ○○ Labor Union for Public Officials in Physical Labor Service were not workers who could freely establish and join labor unions in accordance with Article 5 of the Trade Union and Labor Relations Adjustment Act (hereinafter referred to as the 'Trade Union Act'), nor were they included in the scope of public officials engaging in actually physical labor, who are able to conduct labor campaigns according to the proviso of Article 66 Section 1 of the National Public Officials Act, Section 2 of the same Article, and Article 28 of the old 'National Public Officials Service Obligations Rule' (as before being amended by Presidential Decree No. 18580 on November 3, 2004). ○○ Labor Union for Public Officials in Physical Labor Service filed an administrative action to cancel this decision (Seoul Administrative Court 2004 Gu-Hab 26123), and the court filed this request for constitutional review on March 22, 2005, *sua sponte*, on the grounds that Article 66 Section 2 of the National Public Officials Act was in violation of the Constitution.

B. Subject Matter of Review

The subject matter of review in this case is the constitutionality of the parts of "National Assembly Rule" and "Presidential Decree" (hereinafter referred to as Presidential Decree etc.) of Article 66

Sections 1 and 2 of the National Public Officials Act (amended by Act No. 5452 on December 13, 1997) (the complainant and requesting court filed a constitutional complaint or request for constitutional review against Section 2 as a whole, but the adjudication should be confined to the aforementioned sections that apply to the relevant case), and the section of Article 84 of the same Act that refers to violations of the National Assembly Rule of Article 66 Sections 1 and 2 of the same Act. The contents of the relevant sections of said articles are underlined below, and other relevant articles are laid out in [Annex 1].

National Public Officials Act (amended by Act No. 5452 on December 13, 1997) Article 66 (Prohibition of Collective Action)

(1) No public official shall do any collective action for any labor campaign, or activities other than public services: Provided that those who engage in physical labor shall be excluded

(2) The scope of public officials who engage in actually physical labor, as referred to in the proviso of Section 1, shall be determined by the National Assembly Rule, the Supreme Court Rule, the Constitutional Court Rule, the National Election Commission Rule or the Presidential Decree.

Article 84 (Penal Provisions) Except as otherwise provided by other Acts, any person who violates the provisions of Articles 44, 45, 65 and 66, shall be punished by imprisonment for not more than one year, or a fine not exceeding three million won.

2. Arguments of Complainants, Court's Reason for Rejecting the motion to Request Constitutional Review, Court's Reason for Filing Request for Constitutional Review, and Opinions of the Relative Agencies (Omitted)

3. Constitutionality of Article 66 Section 1

A. The Principle of Clarity

(1) The Principle of Clarity concerning Penal Provisions

The principle of nulla poena sine lege, ensured by Articles 12 and 13

of the Constitution, signify that all crime and punishment must be decided by statute. The Principle of Clarity, which is derived from this principle, demands that the elements of the crime be clearly stipulated so that anyone can predict what action is punishable and by what sort of punishment, and thereby decide their actions accordingly.

However, demanding that the elements of the crime in penal provisions be clear does not mean all of the elements of crime need to be regulated using simple descriptive concepts. The use of concepts of relatively wide parameters that require supplementary interpretation by judicial officials is still not in violation of the Principle of Clarity the Constitution demands of penal provisions, so long as a person of common sense who shares in the usual legal consensus can understand the protected legal interests of the relevant penal provision, the prohibited act, and the kind and extent of punishment imposed, by applying the usual methods of interpretation. The extent to which the elements of crime of penal provisions have to be clear cannot be decided uniformly, but must be determined by considering all the relevant factors such as the uniqueness of the elements of crime, the conditions of the grounds for such legal regulation, and the level of punishment imposed (1 KCCR 357, 383, 88 Hun-Ka 13, Dec. 22, 1989 and 12-1 KCCR 741, 748, 98 Hun-Ka 10, June 29, 2000, etc.).

(2) The 'Labor Campaign' and 'Activities Other Than Public Services' Part

Though there is no explicit legal definition of the concept of 'labor campaign' as stated in Article 66 Section 1 of the Act, the aforementioned article was established based on Article 29 Section 2 of the Constitution as wholly amended on December 26, 1962, which stipulated that workers who are public officials cannot enjoy the three primary labor rights unless stipulated otherwise by statute, and is maintained until this day. In light of the objective of said article of the Constitution, the concept 'labor campaign' should be interpreted as referring to the three primary labor rights recognized in order to improve working conditions, namely, the right of association, the right of collective bargaining, the right of collective action, and acts directly related to these rights. Similarly, the concept 'activities other than public services' is also quite broad, and there may be questions

regarding whether it violates the Principle of Clarity. If we connect the aforementioned concept with the freedom of assembly and association ensured by the Constitution, and consider the legislative objective of the National Public Officials Act, said concept does not refer to all collective action, but only to collective actions for activities other than public services which go against public interest.

Meanwhile, the aforementioned Article, which was established on April 17, 1963, has been maintained for a long time until this very day. In interpreting and enforcing said article, the courts define the concept of 'labor campaign' as the right of association, the right of collective bargaining, and the right of collective action, by considering the relationship between the Constitution and the National Public Officials Act, as well as the fact that the Constitution restricts the three primary labor rights of public officials even while ensuring those rights separately from the freedom of assembly and association. The courts also interpret the concept narrowly, stating that the restricted rights are the rights of workers to form, join, and take action through labor unions, which are economic associations the purpose of which is to demand the employer maintain and improve working conditions, namely the three primary labor rights of workers (Supreme Court, 90 Do 2310, Feb. 14, 1992; Supreme Court, 2004 Do 5035, Oct. 15, 2004). The courts go on the say that the concept of 'collective action for activities other than public services' does not refer to all of the collective actions carried out by public officials regarding matters besides public services. They take into consideration the legislative objectives of the National Public Officials Act and Article 21 Section 1 of the Constitution, which guarantees the freedom of speech, press, assembly and association, as well as the duty of good faith and commitment to the job as laid out by the National Public Officials Act, and limit the interpretation of the aforementioned concept to mean 'collective actions that cause one to neglect the duty of commitment to the job etc., for purposes that do not conform with public interest' (Supreme Court, 90 Do 2310, Feb. 14, 1992; Supreme Court, 91 Nu 9145, Mar. 27, 1992; Supreme Court, 2004 Do 5035, Oct. 15, 2004). Therefore this Court must also respect such circumstances, in determining the clarity of the 'labor campaign' and 'collective actions for activities other than public services'.

So, the 'labor campaign' and 'collective actions for activities other than public services' parts of the aforementioned articles warn people of common sense who share in the usual legal consensus about who the articles apply to and what actions are prohibited, so that the people may avoid being disadvantaged. Therefore, the parts of the articles in question are not in violation of the strict Principle of Clarity required by the principle of due process or nulla poena sine lege, much less the general Principle of Clarity (4 KCCR 255, 270, 90 Hun-Ba 27 et al., Apr. 28, 1992; 11-1 KCCR, 734, 740, 97 Hun-Ba 61, June 24, 1999; 17-2 KCCR 238, 247-248, 2003 Hun-Ba 50 et al., Oct. 27, 2005).

(3) The 'Public Officials Engaging in Physical Labor' Part

With regards to whether the concept of 'public officials engaging in actually physical labor' is in violation of the Principle of Clarity, usually the concept of 'physical labor' refers to 'the performance of tasks through physical labor'. Therefore, 'public officials engaging in physical labor' refer to public officials engaged in physical activities rather than the mental activities that constitute main tasks of public officials. So, the concept of 'public officials engaging in physical labor' used by Article 66 Section 1 of the Act, is not so unclear as to give the enforcing authorities room for arbitrary interpretation or to harm the people's ability to predict the meaning of the article as suggested by the complainant (17-2 KCCR, 238, 248-249, 2003 Hun-Ba 50 et al., Oct. 27, 2005).

B. Whether the Basic Labor Rights are Infringed

In consideration of the particularity of the status of public officials and the public nature of their work, our Constitution states in Sections 1 and 2 of Article 7 that all public officials shall be servants of the entire people and shall be responsible to the people, and the status and political impartiality of public officials shall be guaranteed as prescribed by statute. The Constitution also restricts the duty of the state and certain public officials to make compensation regarding the torts of public officials through Sections 1 and 2 of Article 29.

Moreover, while our Constitution guarantees the three primary labor rights of workers through Article 33 Section 1 which states that to enhance working conditions, workers shall have the right to independent association, collective bargaining and collective action, it restricts the scope of the subjects capable of exercising these rights by allowing only certain public officials to enjoy said rights through Section 2 of the same article, which states that only those public officials who are designated by statute, shall have the right to association, collective bargaining and collective action.

Article 33 Section 2 of the Constitution is significant in that the Constitution directly makes room for the legislations that do not just restrict, but prohibit the exercising of these rights in the case of public officials other than those designated by statute. Therefore, if Article 33 Section 2 of the Constitution did not exist, public officials would also enjoy the three primary labor rights in accordance with Article 33 Section 1 of the Constitution, and in that case, laws that restrict public officials' right to association, collective bargaining and collective action should be reviewed to see whether they observe the limits of restricting basic rights laid out in Article 37 Section 2 of the Constitution. However, since Article 33 Section 2 of the Constitution directly stipulates that only 'public officials who are designated by statute' shall enjoy the three primary labor rights, public officials not designated by statute cannot enjoy those rights, and therefore, the Principle Against Excessive Restriction laid out in Article 37 Section 2 of the Constitution does not apply here, as said Principle assumes that the three labor rights are acknowledged in the first place.

Public officials are divided into national public officials and local public officials, according to the appointer. These officials are again divided into public officials in career service who are further divided into general service, special service, and technical service officials, and public officials in special career service, who are further divided into political service, special services, contracted, and physical labor service officials (cf. Article 2 of the Act, and Article 2 of the Local Public Officials Act). Generally, the term public official refers to those people chosen or appointed directly or indirectly by the people and who carry out tasks of a public nature under the employment of the state or public organizations. Since public officials are 'workers' in the

sense that they live on the income they receive as compensation for the work they perform (cf. Articles 14 and 16 of the Labor Standards Act and Article 2 Paragraph 1 of the Trade Union Act), Article 32 Section 2 of the Constitution is based on the premise that public officials are also workers by nature.

However, as the appointers of public officials are ultimately the sovereign people, public officials hold a special status which obliges them to serve and be responsible towards the people, and since the work they do is public work of the state or public organizations, they are in a special type of employ which demands that they conduct their work publicly, fairly, impartially, and in good faith. These such factors cause public officials to be treated differently from normal workers in terms of restrictions on their actions for improved working conditions, or the form and nature of their right of association.

Meanwhile, the financial burden for improving the working conditions of public officials, such as the level of remuneration, is technically imposed on the state, but is actually imposed on the people as a whole through taxation etc. So, the improving the working conditions of public officials should be made to the extent that it does not wrongfully interfere with the promotion of public welfare and is not excessive considering the financial conditions and tax bearing capacity of the community. Therefore, decisions on this matter must be made according to the democratic process of consultation and resolution on a bill and budget at the National Assembly, which represents the people.

Therefore, Article 33 Section 2 of the Constitution restricting the three primary labor rights of public officials and stipulating that the scope of public officials who may enjoy those rights be determined by statute signifies the following;

First, it signifies that the legislature can control and unify the public official system, considering the maintenance and development of the system, which was formed in accordance with the history and culture of the state and society, and the welfare of the public, by balancing the various interests of parties related to the system without damaging the basic framework of the system as ensured by the Constitution.

Second, public officials are servants of the people as a whole, and

their work is special in that it must be carried out publicly, fairly, impartially, and in good faith. With that in mind, the legislature is granted the legislative discretion to preserve and protect a public official system that contributes to the order of society through specific legislative action, based on the consensus of the people as a whole.

That being said, the National Assembly, in accordance with Article 33 Section 2 of the Constitution, possesses a wide ranging latitude of legislation regarding whether to grant public officials right of association, the right of collective bargaining, and the right of collective action, and to what extent.

Of course, before being amended Article 33 Section 2 of the Constitution stated that “public officials shall not have the right of association, the right of collective bargaining, or the right of collective action, save those who are designated by statute”, whereas the current provision reads “only those public officials who are designated by statute, shall have the right to association, collective bargaining and collective action”, thus switching to a more positive expression. Therefore, there is some cause to interpret that the National Assembly is politically obliged to enact legislations that actively guarantee three primary labor rights of public officials, but the significance of Article 33 Section 2 of the Constitution as a standard for measuring constitutionality is not altered by this amendment. Article 33 Section 2 of the Constitution stipulated that public officials shall not have the three labor rights save those designated by statute, therefore allowing only 'those designated by statute' to enjoy said rights, and the same clause of the current Constitution grants the three labor rights to those 'who are designated by statute'. Thus, the amendment does not change the fact that the Constitution only grants the 3 labor rights to those 'designated by statute'.

However, Article 66 Section 1 of the Act stipulates that no public official shall do any collective action for any labor campaign, or activities other than public services: provided, that those who engage in physical labor shall be excluded Section 2 of the same article states that the scope of public officials who engage in physical labor, as referred to in the proviso of Section 1, shall be determined by the National Assembly Rule, the Supreme Court Rule, the Constitutional

Court Rule, the National Election Commission Rule or the Presidential Decree. Thus, the scope of public officials whose three labor rights are guaranteed is thereby limited to 'public officials who engage in physical labor'.

Therefore, in determining whether the aforementioned article is constitutional, we must first inspect whether restricting the scope of public officials whose three labor rights are guaranteed to public officials engaging in physical labor is in violation of the objective of the statutory reservation of Article 33 Section 2 of the Constitution, which stipulates that said scope of public officials be determined by statute.

Generally speaking, the three primary labor rights of workers is a constitutional expression for balancing the values of actual equality, guaranteeing the right to property, and the freedom of contract. Therefore, when the legislature determines the scope of public officials who will enjoy the three labor rights in accordance with Article 33 Section 2 of the Constitution, it must respect the spirit of our Constitution that guarantees these rights, and take into consideration the labor related regulations of the international community. Also, matters such as the position and rank of the public officials, the nature of their work, and the current situation of the state and society must also be considered. Only when a reasonable decision is made after taking all of these factors are taken into consideration can the values that should be realized through by constitutionally guaranteeing the 3 labor rights of workers be balanced with the welfare of the sovereign people that is to be achieved through maintenance and development of an appropriate public official system.

With this in mind, it seems that the aforementioned article restricts the scope of public officials that are granted the three labor rights to those who engage in physical labor by considering how public a given task is, as well as the national and social circumstances, and thus employing the standard of whether the work of a public official is actually physical labor. More specifically, it seems that the National Assembly determined that 'public officials engaging in physical labor' was the group whose work affected the people less and therefore posed no significant threat to the public services even if the three labor rights were guaranteed, and for whom the necessity of those

rights being acknowledged was greatest, considering their working conditions. Such a legislation is based on efforts to actually ensure the three labor rights, and is not in violation of the objective of Article 33 Section 2 of the Constitution, which is to unify and balance the need for an appropriate public official system, in light of the public officials' position as servants of the people and the public nature of their work, with the interests of the relevant parties.

Therefore, the aforementioned act does not exceed the limits of the discretion granted by Article 33 Section 2 of the Constitution to the legislature for determining the scope of public officials who are to be given the right to vote, and thus, is not in violation of the Constitution (4 KCCR 255, 261-266, 90 Hun-Ba 27 et al., Apr. 28, 1992; 17-2 KCCR 238, 249-252, 2003 Hun-Ba 50 et al., Oct. 27, 2005).

C. Whether the Principle of Priority of New Law is Violated

The complainant contends that Article 66 Section 1 of the Act is an old provision which existed since before the current Constitution was proclaimed, and should therefore cease to be enforced or eliminated by Article 5 of the Trade Union Act which states that workers shall be free to establish a trade union or to join it, according to the Principle of Priority of New Law.

However, articles of law are not always unconstitutional when the contents of a certain article of law clash with another one. This situation only gives rise to the issue of how to interpret said articles in harmony. Also, the proviso of Article 5 of the Trade Union Act stipulates that the case of public officials and school teachers will be separately regulated by statute, and therefore, said article does not clash with Article 66 Section 1 of the Act.

The complainant argues that punishing a person by law simply because they conducted labor union activities is in violation of the Constitution when there is now a social consensus on labor unions of public officials. However, even if there existed a social consensus allowing labor unions of public officials when the complainant violated Article 66 of Section 1 and there are presently many more legislations ensuring the labor rights of public officials, such factors cannot be a

standard for determining the constitutionality of said article. Therefore, this argument by the complainant is not acceptable (17-2 KCCR 238, 252, 2003 Hun-Ba 50 et al., Oct. 27, 2005).

D. Whether the Freedom of Speech, Press, Assembly and Association is Violated

Sections 1 and 2 of Article 7 of our Constitution stipulate that all public officials shall be servants of the entire people and shall be responsible to the people, and the status and political impartiality of public officials shall be guaranteed as prescribed by statute. Therefore, public officials enjoy the rights that accompany their special status and are also obliged to fulfill their duties as servants of the people who work to promote the interest of the public. Therefore, the National Public Officials Act, which was enacted in order to establish the fundamental standards to be applied to the personnel administration of national public officials to ensure fairness and to ensure that public officials-as servants of the people-operate the administrative system democratically and efficiently, impose various duties on public officials regarding their work including the duty of good faith (Article 56) and the duty of kindles and fairness (Article 59). Article 66 Section 1 of the Act prohibits collective action by public officials for activities other than public services because collective action by public officials may hinder the promotion of the people's interests by promoting the interests of the public officials. It is understood as one of the duties of public officials derived from their special status.

Therefore, considering that Article 7 of the Constitution stipulates that public officials are servants of the entire people and the basic duties of public officials derived from this status, such as the duty of good faith and commitment to the job, the legislative objective and employed methods of Article 66 Section 1 of the Act prohibiting collective action by public officials for activities other than public services, and Article 84 imposing punishment for violations of Article 66 are just and appropriate.

The freedom of speech, press, assembly and association are basic rights required for people to protect their dignity, and the same is

true for public officials. Though the need to restrict such freedoms may be greater for public officials than for others, those freedoms should still not be uniformly and entirely restricted simply on the basis of necessity of public interest, and even when there is cause for restriction, these freedoms and the public interest that is to be protected by their restriction should be compared and balanced. When it is determined that restriction is inevitable as a result of such comparison and balancing, the restriction should be minimal and not violate the essence of the rights in question.

As such, we have already explained that the courts do not understand the 'collective action for activities other than public services' part of the aforementioned article to mean all of the collective action conducted by public officials regarding matters other than public services. The courts take into consideration the legislative significance of Article 21 Section 1 of the Constitution, which ensures the freedom of speech, press, assembly and association as well as the duty of good faith and commitment to the job etc., to interpret said part of the article to mean ‘collective actions that cause one to neglect the duty of commitment to the job etc., for purposes that do not conform with public interest.’ Therefore, as long as the ‘collective action for activities other than public services’ part of Article 66 Section 1 of the Act is interpreted as supra, the requirements of least restrictive means and proportionality are satisfied.

Therefore, Article 66 Section 1 of the Act prohibiting collective action by public officials for activities other than public services, and Article 84 imposing punishment for violations of Article 66 does not excessively infringe the freedom of speech, press, assembly and association as laid out by Article 21 Section 1 of the Constitution (17-2 KCCR 238, 253-254, 2003 Hun-Ba 50 et al., Oct. 27, 2005).

E. Whether the Right to Equality is Infringed

The complainant asserts that since 'public officials engaging in actually physical labor' are guaranteed the three labor rights including the right to collective action, and the teachers of the Act on Establishment and Management of' Labor Unions for Teachers

(hereinafter referred to as the 'Teachers Labor Union Act') are guaranteed the right of association and the right of collective bargaining, not guaranteeing other public officials the right to vote is unreasonable discrimination and in violation of the principle of equality.

The principle of equality defined by Article 11 Section 1 of the Constitution does not refer to absolute equality that prohibits any and all discriminative treatment, but means that there should be no discriminative treatment in terms of the application and establishment of law based on unreasonable conditions. Therefore, even if there exists some discriminative treatment, such treatment is not in violation of the principle of equality as long as it is based on reasonable grounds.

So, the principle that all people are equal in the face of the law does not just refer to the technical equality regarding the application of the law, but is an expression of the goal of realizing the principle of actual equality in all state functions including establishing the law. In this aspect, we need to inspect the actual contents of the law and not just the technical form it takes on when determining whether the right to equality is guaranteed.

In the case of public officials who engage in actually physical labor, it is less likely that acknowledging their three labor rights will affect their public work as servants of the people, and their remuneration and other working conditions are relatively inferior compared to other public officials. Also, public officials who do not engage in physical labor, their work generally needs to be carried out very publicly, fairly, impartially and in good faith. Thus, we must consider the fact that the relationship between public officials and their employer, the government(the actual employer would be the entire sovereign people), is one of mutual cooperation and respect with the common goal of inheriting, maintaining, improving, and developing the public official system. This being said, it is the working relationship of public officials and their employer should not be regulated by labor laws which developed through conflict and compromise between the worker and employer, but rather by different rules that allow that relationship to form and develop in accordance with the status of public officials and the public nature of their work.

Therefore, the aforementioned article treating public officials who do not engage in physical labor differently from other public officials by guaranteeing the three labor rights only to the former and restricting the exercising of said rights by the latter is not only based on Article 33 Section 2 of the Constitution, but is also reasonable, as seen supra. Therefore, the article is not in violation of the principle of equality laid out in Article 11 Section 1 of the Constitution (4 KCCR 255, 271-272, 90 Hun-Ba 27 et al., Apr. 28, 1992; 17-2 KCCR 238, 255-256, 2003 Hun-Ba 50 et al., Oct. 27, 2005).

The complainant also asserts that the article in question violates the principle of equality by not guaranteeing other public officials labor rights when said rights are guaranteed to teachers by the Teachers' Labor Union Act. However, the work of normal public officials and those of teachers differ in terms of duties and the actual work that is carried out, and there is also a difference in the effects suffered by the public when these groups exercise their basic labor rights. Therefore, granting labor related rights to teachers is not an arbitrary act of discrimination (17-2 KCCR 238, 256-257, 2003 Hun-Ba 50 et al., Oct. 27, 2005).

Therefore, since there are reasonable grounds to justify the discriminative treatment of Article 66 Section 1 of the Act, it is not in violation of Article 11 Section 1 of the Constitution.

F. Whether it Violates International Law

One of the basic ideals of our Constitution is to respect international order and contribute to lasting world peace and the mutual prosperity of mankind by abiding by and fulfilling in good faith the treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law (cf. the Preamble and Article 6 Section 1 of the Constitution). Therefore, it is only natural that efforts be made to promote the objectives of international laws and regulations out of respect for the spirit of international cooperation. However, with regards to the actual application of international law, it is equally natural that efforts be made to balance this spirit of international cooperation with the traditions and realities of our society as well as the legal

consensus of our people in interpreting and operating our Constitution.

First, in the case of the Universal Declaration of Human Rights, it is significant as it declares as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction, but the separate articles of the declaration are not directly legally binding nor do they have any effect as international law (3 KCCR 387, 425-426, 89 Hun-Ka 106, July 22, 1991).

However, the International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights, established to support the effectiveness of said declaration have practical significance.

Article 4 of the International Covenant on Economic, Social and Cultural Rights is a provision for general statutory reservation which states that "…… The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by statute only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society." Then in Article 8 Section 1 Paragraph (a) it allows for the possibility of restricting the right to form trade unions and to join a trade union of one's choice as prescribed by statute and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others.

Next, in the case of the International Covenant on Civil and Political Rights, Article 22 Section 1 of said covenant states that "everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests." However, Section 2 of the same article provides that

such rights may be restricted as prescribed by statute and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others, and since said article was reserved when our country joined the covenant due to the necessity for modification according to domestic law, it does not even effective as domestic law.

Therefore, even the aforementioned covenants allow for restrictions on basic labor rights prescribed by statute as long as they do not infringe the essence of said rights and are imposed through democratic processes. Thus, they do not clash with the aforementioned article that restricts the labor rights of public officials (3 KCCR 387, 425-429, 89 Hun-Ba 106, July 22, 1991; 17-2 KCCR 238, 257-258, 2003 Hun-Ba 50 et al., Oct. 27, 2005).

Agreements 87(agreement on the protection of the freedom of association and right of association), 98(agreement on the application of the principle of the right of association and collective bargaining), 151(agreement on the decision of employment conditions and the protection of the right of association in the public sector), which are cited by the complainant, have not been ratified by us, and there is no basis for them to have any constitutional effect. Therefore, these cannot be a standard for determining the constitutionality of the subject matter of review in this case (10-2 KCCR 243, 265, 97 Hun-Ba 23, July 16, 1998; 17-2 KCCR 238, 259, 2003 Hun-Ba 50 et al., Oct. 27, 2005).

Meanwhile, the recommendations of the 'Committee on Freedom of Association' of the ILO or the UN 'Committee on Economic, Social, and Cultural Rights' or the OECD 'Trade Union Advisory Committee' to guarantee the three labor rights to public officials of all areas cannot be used as a standard for determining the constitutionality of the subject matter of review in this case (17-2 KCCR 238, 259, 2003 Hun-Ba 50 et al., Oct. 27, 2005; Supreme Court, 93 Do 1711, Dec. 24, 1993).

Therefore, the complainant's assertion based on the reasoning that Article 66 Section 1 of the Act is in violation of international law is unacceptable.

4. The Constitutionality of the Part of Presidential Decree etc., of Article 66 Section 2 of the Act

According to Article 84 and Article 66 Section 1 of the Act, public officials can generally be criminally prosecuted for conducting labor campaigns. In this case, 'public officials who engage in physical labor' are exempt from prosecution and Article 66 Section 2 of the Act states that the scope of public officials who engage in actually physical labor will be determined by Presidential Decree etc.

The complainant argues that Article 66 Section 2 of the Act delegates the matter of the scope of public officials who engage in physical labor, and who are exempt from criminal prosecution, to Presidential Decree etc., without any basis for doing so, and is thus in violation of the Constitution. However, Article 75 of the Constitution states that The President may issue presidential decrees concerning matters delegated to him by statute with the scope specifically defined, and Article 64 of the Constitution stipulates that The National Assembly may establish the rules of its proceedings and internal regulations: Provided, That they are not in conflict with the law. As the aforementioned articles are grounds for delegating the scope of public officials who engage in physical labor to Presidential Decree etc., this argument of the complainant is baseless.

The complainant asserts that Article 66 Section 2 of the Act delegates the matter of determining which public officials are granted the three labor rights to Presidential Decree etc., when the Constitution already delegates this matter to be determined by statute. It would be a violation of the principle of delegation of legislative power if the Act were to re-delegate a matter that was delegated to be determined by statute without making any regulations. However, when the outlines of a delegated matter are determined and the specifics are again delegated to lower regulations with the scope defined, there is no violation of the Constitution (14-2 KCCR 84, 101, 2001 Hun-Ma 605, July 18, 2002). In this case, Article 66 Section 1 of the Act states that the three labor rights are guaranteed to 'public officials who engage in actually physical labor' and Section 2 of the same article simply re-delegates the matter of determining the specific scope of such public officials to Presidential Decree etc.

Therefore, we cannot say that Article 66 Section 2 of the Act is in violation of the principle of delegation of legislative power simply because a matter delegated to statute was again delegated to Presidential Decree etc.

The delegation of penal provisions by statute is undesirable considering that the Constitution especially calls for due process and the principle of nulla poena sine lege and emphasizes punishment by Act in order to protect human rights to the fullest. Therefore, the requirements and scope of such delegation must be strictly limiting. Therefore, delegation of penal provisions should only be allowed when there is an urgent need to do so or when there exist unavoidable circumstances that prevent said provisions from being established in advance as Acts. Even in such cases, the Act itself must provide the elements of crime specifically enough so that one is able to predict what kind of acts are subject to punishment. However, in determining whether this standard of predictability is followed, one should not simply look at just the article in question but study all of the relevant articles of law to make an comprehensive systematic determination(10-1 KCCR 213, 219-220, 96 Hun-Ka 20, Mar. 26, 1998; 14-1 KCCR 478, 487, 2001 Hun-Ba 5, May 30, 2002).

Article 66 Section 1 of the Act clearly separates the public officials who can be punished for conducting labor campaigns from those who cannot, and Section 2 of the same article delegates determining the scope of the public officials exempt from punishment to Presidential Decree etc. As deciding who falls within this scope through laws without considering the special circumstances of the National Assembly or the Administration is not plausible, the case in question falls within the scope of cases where there exist unavoidable circumstances that prevent specific regulation by Act in advance. Meanwhile, the meaning of 'public officials who engage in physical labor' is clear, as mentioned above, and thus lower regulations will not be able to establish regulations that differ from the original intent, and it is clear that the item delegated by Article 66 Section 2 of the Act is the 'scope' of public officials who engage in physical labor (17-2 KCCR 238, 260, 2003 Hun-Ba 50 et al., Oct. 27, 2005).

Also, the requesting court asserts that it is impossible to predict that only the railway and information and communications unions,

which have existed since Japanese rule, would be regulated as public officials who engage in physical labor by Presidential Decree etc. However, Presidential Decrees being unconstitutional by including too few public officials in the scope of public officials who engage in physical labor is a separate matter, and cannot be the cause for the parental Act being declared unconstitutional (18-2 KCCR 445, 458, 2004 Hun-Ba 18 et al., Nov. 30, 2006).

Therefore, Article 66 Section 2 of the Act does not violate the limits placed on delegation of legislative power.

5. The Constitutionality of the Section of Article 84 of the Act that Refers to Violations of the National Assembly Rule of Article 66 Sections 1 and 2 of the same Act

Article 84 of the Act stipulates that public officials other than those public officials who engage in physical labor may be punished for violating Sections 1 and 2 of Article 66 of the same Act, which prohibits conducting labor campaigns or other collective actions for activities other than public services, by a sentence of up to 1 year imprisonment or a fine of 3 million won or lower. Also, according to Article 78 Section 1 Paragraph 1 if the Act, public officials may be disciplined for such actions.

The complainant contends that the section of Article 84 which is related to the labor campaign mentioned in Article 66 is in violation of Article 33 Sections 1 and 2 of the Constitution, which guarantee the basic labor rights. Complainant also contends that although violations of Sections 1 and 2 of Article 66 of the Act may be grounds for disciplinary action as violations of the public service duties as defined by administrative law, stipulating that those violations are grounds for criminal punishment is a violation of the Principle Against Excessive Restriction and the Rule of Least Restrictive Means, and exceeds the limits of legislation restricting basic rights.

The issue of determining what acts are to be defined as punishable crimes is generally has to do with the legislative policies of a nation, and the legislature must consider factors such as our history and culture, the current situation, the values and legal consensus of the people, the reality and nature of the crime, the protected legal

interests, and the effects of crime prevention in making this determination. Therefore, this is an area where a great deal of legislative discretion or formative freedom must be granted. Thus, unless this discretion is exercised arbitrarily in violation of provisions or the principles of the Constitution the as when the statutory sentence of a crime is so harsh in comparison to the severity of the crime and the liability of the actor that it disrupts the balance of the entire penal system and therefore violates the constitutional principle of equality with regards to other criminals, or the sentence is so severe that it surpasses the sentence necessary to achieve the original objectives and functions of punishment for that type of crime and is therefore in violation of the principle of proportionality or prohibition of excessive restriction, the severity of a statutory sentence is only a matter of legislative policy and not one of constitutionality.

Also, matters such as determining whether to view a certain violation of administrative law as simple neglect or a violation of duties and stop at imposing administrative disciplinary action or to view it as an act infringing upon the administrative objectives and public interest and imposing administrative punishment(and deciding the severity and type of punishment in this case) are subject to legislative discretion unless a mistake is made regarding the legal determination of which of the aforementioned categories a certain violation belongs to (6-1 KCCR 281, 303, 91 Hun-Ba 14, Apr. 28, 1994; 9-2 KCCR 177, 193-194, 93 Hun-Ba 51, Aug. 21, 1997; 17-2 KCCR 238, 261-262, 2003 Hun-Ba 50 et al., Oct. 27, 2005, etc.).

That Article 66 Section 1 of the Act, which prohibits the labor campaigns and collective actions for activities other than public services of public officials, is constitutional has already been established supra. Also, since public officials taking such actions are highly likely to affect people's lives and violate public interests, Article 84 deciding to impose administrative punishment for such actions is neither an abuse of the legislative discretion nor a violation of the Constitution. Meanwhile, even though Article 78 Section 1 Paragraph 1 of the Act stipulates that public officials can additionally be subject to disciplinary action for such acts when these actions are already subject to punishment, punishment and disciplinary action are different in terms of authority, purpose, substance, and subject etc.,

and therefore such circumstances do not affect this decision

Also, the sentence of up to 1 year imprisonment or 300 million won or lower in fines provided by Article 84 of the Act is not a sentence so severe that it is outside the scope of legislative discretion (17-2 KCCR 238, 262, 2003 Hun-Ba 50 et al., Oct. 27, 2005).

6. Conclusion

As such, the articles of law in question are not in violation of the Constitution, and with the exception of the dissenting opinions expressed by Justices Cho Dae-hyen, Kim Jong-dae, and Song Doo-hwan under items 7 through 9 below, respectively, we hereby render our decision as laid out in the judgment.

7. Dissenting Opinion of Justice Cho Dae-hyen

I believe that Article 66 Section 1 of the Act prohibiting collective actions for labor campaigns by public officials who engage in actually physical labor and punishing these actions through Article84 of the same Act is not in conformity with the Constitution.

The objective of Article 33 Section 1 of the Constitution stipulating the three labor rights of workers is not only to guarantee the workers their freedom regarding the three labor rights, but also to guarantee that they lead humane lives. As the three labor rights of workers are absolutely necessary in order to guarantee the value and dignity of man to workers, the state is obliged to protect these rights to the fullest. This holds true for workers of private companies, public companies, and workers who are public officials.

However, as the three labor rights are ensured in order to improve the working conditions of workers, the extent to which the three labor rights must be preserved may differ according to the substance or level of the actual working conditions. The working conditions of public officials are different from those of workers of private companies in that public officials are tasked with ensuring and promoting the safety, freedom, and happiness of the people as servants of the entire people, are responsible to the people, and hold statuses protected by statute (Article 7 of the Constitution). Also, the

public nature and actual working conditions of public officials are different depending on the type, position, and duties of the public officials, and therefore, the necessity for improving working conditions is also different. Thus, the three labor rights of public officials may be adjusted to suit the special status, public nature of the work, and actual working conditions of public officials. These are inherent limits derived from the fundamental objective of ensuring the three labor rights.

Individual articles of the Constitution must be interpreted to conform to the basic order set out by the Constitution itself. The purpose of Article 33 Section 2 of the Constitution stipulating that Only those public officials who are designated by statute, shall have the right to association, collective bargaining and collective action is to balance the objectives of Article 33 Section 1 of the Constitution, which guarantees the three labor rights of workers with the inherent limits of the three labor rights, and the objective of Article 7 of the Constitution, which defines the special status and responsibility of public, assuming that even public officials enjoy the three labor rights according to Article 33 Section 1 of the Constitution. Therefore, Article 33 Section 2 of the Constitution cannot be interpreted as granting unlimited legislative discretion and formative freedom with regards to the three labor rights, but rather as imposing the limits and duty of balancing the objectives of Article 33 Section 1 if the Constitution with those of Article 7 of the Constitution.[6)]

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6) Article 18 of the original Constitution stipulated that "the right of association, the right of collective bargaining, and the right of collective action of laborers will be protected as prescribed by law" and had no special provisions regarding said rights of public officials, recognized that all public officials save those working in public security had the right of association and the right of collective bargaining, and granted the right of collective action only to those public officials actually engaged in labor. When the Constitution was amended in 1962 it stipulated in Article 29 Paragraph 2 that "no public official shall have the right of association, the right of collective bargaining, nor the right of collective action, except those designated by law". This provision was maintained until the Constitution was amended to the current version so that in actuality the law only granted the 3 labor rights to public officials actually engaged in labor and not to other public officials. As Article 33 Paragraph 2 of the present Constitution grants public officials the three labor rights as a principle, as it does in the case of other laborers, and delegates

Though Article 33 Section 2 of the Constitution stipulates that Only those public officials who are designated by statute, shall have the right to association, collective bargaining and collective action, the objective of said article is to adjust the context of the three labor rights granted to public officials to the extent that they are balanced with the special status and responsibility of public officials as laid out in Article 7 of the Constitution, and to determine the specifics of such adjustments by statute, all the while recognizing that public officials also possess the three labor rights according to Article 33 Section 1 of the Constitution. Though the section reads "right to association, collective bargaining and collective action", the intent is not to determine which public officials are granted all 3 of the labor rights by statute,[7] but to decide by statute which public officials are to be granted all or part of the three labor rights, taking into consideration the type and position of the public official, the public nature of the work, the extent to which the public official is supervised and managed as a worker, the contents of the working conditions, and the level of necessity for improving working conditions.

The articles in question in this case prohibit collective actions for labor campaigns by national public officials, punish said actions, and only list public officials who engage in physical labor as exceptions. The articles in question do not completely prohibit the right to association, collective bargaining and collective action, but only prohibit collective action, and allow public officials engaging in physical labor to enjoy the right to collective action as well. However, said articles do not take into consideration the type and position of the public official, the public nature of the work, the extent to which

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so that the scope of said rights are decided by law, it can be said that the current Constitution puts more emphasis on the intentions of Article 7 of the Constitution than on Article 33 Paragraph 1 of the Constitution.

7) If we determine that the sole purpose of Article 33 Paragraph 2 of the Constitution is to have the law decide which public officials will be granted all three of the labor rights, it may be difficult to say that Article 66 Paragraph 1 of the Act allowing only public officials who are actually engaged in labor to exercise the right of collective action does not conform with Article 33 Paragraph 3 of the Constitution. However, such an interpretation will make it hard to harmonize the intented purpose of Article 33 Paragraph 1 of the Constitution with that of Article 7.

the public official is supervised and managed as a worker, the contents of the working conditions, and the level of necessity for improving working conditions, the context of the collective action for labor campaigns, whether the collective action was held during working hours, or whether it affected the conducting of public services or caused public officials to neglect their duty to commit to the job. It simply determines whether or not collective action is permitted on the basis of whether the public official engages in physical labor. This is an excessive restriction of collective action for labor campaigns, in violation of the objective of Article 33 Section 2 of the Constitution.

However, the Supreme Court interprets the collective action part of the articles in question narrowly to mean only the collective actions that cause one to neglect their duty to commit to the job for purposes in violation of public interest in an effort to mitigate their unconstitutionality. Also, even when conforming to the intent of Article 33 Section 2 of the Constitution, there will still be public officials whose rights to collective action should be prohibited, and the articles in this case include parts(parts that conform to the Constitution) that prohibit the collective actions of such public officials. Moreover, the constitutionality of the articles in question has greatly improved with the enforcement of the Act of Establishment and Management of Trade Unions for Teachers (Act No. 5727) beginning on July 1, 1999, and the Act of the Establishment and Management of Trade Unions for Public Officials beginning on January 28, 2006.

However, the articles in question have not become completely constitutional. Factors such as the type of public official, the public nature of different public services, and whether collective actions for labor campaigns obstruct public work or cause public officials to neglect their duty to commit to the job have not been sufficiently considered. Labor campaigns that do not affect the conducting of public work should not be completely prohibited and subject to punishment, even in the case of collective actions by public officials.

In conclusion, the articles in question include both parts that conform to the Constitution and parts that do not, and it is difficult to isolate the unconstitutional parts. It is difficult to isolate the

unconstitutional parts and render them null by declaring them unconstitutional, and we cannot declare the articles entirely unconstitutional just because they include some unconstitutional parts when the rest is constitutional. We can only entrust the legislative actions of the National Assembly with the task of curing the unconstitutionality of said articles. Therefore, I suggest that we declare the entirety of the articles in question as non-conformant to the Constitution and urge the establishment of improved legislations.

8. Dissenting Opinion of Justice Kim Jong-dae

I believe that the National Assembly Rule and Presidential Decree of Article 66 Sections 1 and 2 of the National Public Officials Act (amended by Act No. 5452 on December 13, 1997) (hereinafter referred to as 'the Prohibiting Provisions in Question'), and the section of Article 84 of the same Act that refers to violations of the National Assembly Rule of Article 66 Sections 1 and 2 of the same Act (hereinafter referred to as 'the Penal Provision in Question') violate the Constitution and hereby express my dissenting opinion.

A. The Constitutionality of The Prohibiting Provisions in Question

(1) The Meaning of Article 33 Section 2 of the Constitution

(A) The Constitutional Basis for Restricting the Three Labor Rights of Public Officials

Article 33 Section 2 of the Constitution stipulates that only those public officials who are designated by statute, shall have the right to association, collective bargaining and collective action'. Since Article 33 Section 1 of the Constitution acknowledges the three labor rights in all laborers, public officials would be guaranteed said rights directly by this provision, had Section 2 of the same article not existed.

Meanwhile, Article 7 of the Constitution stipulates that public officials are the servants of the entire people and are responsible towards the people, and also that their status and political impartiality is guaranteed, thus stating that the work and status of

public officials differ from those of normal workers.

Article 33 Section 2 of the Constitution is a provision that intends not to guarantee the three labor rights of public officials generally but only to guarantee said rights to the public officials designated by statute. It is, therefore, the provision that is the constitutional basis for restricting the three labor rights of public officials.

(B) Guaranteeing the Three Labor Rights of Certain Public Officials

As seen above, Article 33 Section 2 of the Constitution is the constitutional basis for restricting the three labor rights of public officials, but it is also a provision that protects the three labor rights of certain public officials.

Article 33 Section 2 of the Constitution should be understood as a provision stating that although the three labor rights of public officials are restricted, said rights must be guaranteed to certain public officials, just like with normal workers, but the scope of those certain public officials must be determined by the legislature through Acts. This such interpretation of Article 33 Section 2 of the Constitution is not only derived from the expression of the article itself, but can be inferred from the circumstances involved in the latest amendment of the Constitution, and this has been confirmed by the decision of 88 Hun-Ma 5 of Mar. 11, 1993 of this Court (5-1 KCCR 59, 68-69, 88 Hun-Ma 5, Mar. 11, 1993).

Therefore, according to Article 33 Section 2 of the Constitution, the legislature has a duty to implement legislation that guarantees the three labor rights of certain public officials, and the form of legislation in this case must be an Act.

(2) Whether the Public Officials who are Granted the Three Labor Rights are Designated by Statute

(A) Under our Constitution, which adopts the principles of popular sovereignty, the separation of powers, and the rule of law, creating policies on important matters regarding the constitutional basic rights and obligations of the people, or matters relating to the essence thereof must be done in the for of Acts by the legislature, which

consists of representatives chosen by the sovereign people (11-1 KCCR 1, 7, 97 Hun-Ka 8, Jan. 28, 1999; 12-1 KCCR 1, 8, 98 Hun-Ka 9, Jan. 27, 2000). Especially in areas relating to the realization of the people's basic rights, the legislature, which represents the people, must determine the essential matters itself (11-1 KCCR 633, 643, 98 Hun-Ba 70, May 27, 1999).

The 'matter of determining the scope of public officials to whom the three labor rights will be granted', which is delegated to Acts by Article 33 Section 2 of the Constitution, is not only an important political matter relating to the operation of the state, but a matter that significantly affects the realization of the basic rights of public officials. Therefore, it must be regulated in the form of Acts by the National Assembly, which consists of representatives chosen directly by the people.

What is more, Article 33 Section 2 of the Constitution demands that the scope of public officials to whom the three labor rights will be granted be determined by statute.

(B) The prohibiting provisions in question stipulate that the scope of the public officials who are granted the three labor rights be confined to public officials engaging in physical labor. So, technically it may seem that they regulate the matter delegated to Acts by Article 33 Section 2 of the Constitution.

However, considering Article of the Constitution which defines the peculiarities of the status and work of public officials and the objective of Article 33 Section 1 of the Constitution which guarantees the three labor rights without restriction to all workers, the concept of public officials engaging in physical labor is simply an abstract standard that may be used to fulfill the legislative duties imposed by Article 33 Section 2 of the Constitution.

An important reason for restricting the three labor rights of public officials, unlike the case of normal workers, is that public officials are not only servants of the people, but conduct tasks that affect individuals directly or are related to public interest, and therefore the necessity of imposing the obligation to commit to the job is great in the case of public officials. Such work usually entails much more than simple physical labor. However, in the case of public officials

engaging in physical labor, the nature of their work is much closer to that of the work of normal workers than that of the work of public officials, even though they are also public officials by status. Thus, there is no need to treat them differently from normal workers with regards to protecting or restricting their three labor rights. Therefore, having to protect the three labor rights of public officials engaging in physical labor is naturally derived from interpreting Articles 7 and Article 33 Section 1 of the Constitution, as mentioned above, and is an abstract legislative course that the legislature should use as a standard in determining the specifics of which public officials are to be granted the three labor rights.

However, in determining the scope of public officials who will be granted the three labor rights, the prohibiting provisions in question simply confirm the abstract legislative standard of public officials engaging in physical labor, which is naturally derived from interpreting the Constitution. There is no specific legislation on which public officials are public officials engaging in physical labor. This is delegated again to the lower regulations of National Assembly Rule and Presidential Decree. This cannot be construed as fulfilling the legislative duty imposed by Article 33 Section 2 of the Constitution.

(C) As such, by confirming only an abstract legislative standard and delegating the specifics to National Assembly Rule and Presidential Decree, the prohibiting provisions in question have created a situation in which the scope of public officials to whom the three labor rights will be granted will be determined entirely by the lower regulations of National Assembly Rule and Presidential Decree.

The majority opinion contends that the unjust situation stemming from lower regulations failing to include certain public officials engaging in physical labor in the scope of public officials who are granted the three labor rights is simply an issue of whether the relevant lower rule is constitutional, and has nothing to do with the prohibiting provisions in question. However, such problems of the lower regulations stem directly from the unconstitutionality of the prohibiting provisions in question delegating the issues required by Constitution to be regulated by statute to lower regulations(lower regulations that deny the three labor rights to those whose three labor

rights should be protected or acknowledge the three labor rights of public officials whose rights should be restricted can exist because of the unconstitutionality of the prohibiting provisions in question).

(3) Sub-Conclusion

In conclusion, the prohibiting provisions in question do not contain any specific regulations on the scope of public officials to whom the three labor rights will be granted and simply delegate the matter to lower regulations, and are therefore in violation of Article 33 Section 2 of the Constitution, which demands that the matter be determined by statute.

B. The Constitutionality of the Penal Provision in Question

(1) As seen above, the prohibiting provisions in question are in violation of the Constitution, and thus the penal provision in question which uses the prohibiting provisions in question as the elements of crime is obviously in violation of the Constitution as well. However, since the principle of nulla poena sine lege is additionally applied in the case of penal provisions, let us explore this issue.

(2) In the case of penal provisions, when delegated by Act to lower regulations, the requirements and scope of such delegation must be strictly limited, and when defining the elements of a crime, the essence must be defined specifically by act so that one can understand what action is punishable.

As the penal provision in question punishes the collective actions of public officials other than those engaging in physical labor, any collective action by public officials engaging in physical labor and a violation of this prohibition is punishable. Therefore, public officials engaging in physical labor is a core element of this penal provision in question.

However, as mentioned supra, public officials engaging in physical labor is but a legislative guide naturally derived from interpreting the Constitution in determining the scope of public officials whose three labor rights are protected. The meaning of this concept is abstract

and so if one does not refer to lower regulations that define such public officials more specifically, they cannot determine which public officials are public officials engaging in physical labor. Therefore, it is very difficult to predict which public officials can be punished for conducting collective actions using only the penal provision in question.

What is more, as the penal provision in question delegates the matter of determining the scope of public officials engaging in physical labor to National Assembly Rule, only those designated as public officials engaging in physical labor by the National Assembly Rule will be exempt from punishment. However, the Article 53 of the National Assembly Personnel Rule which was established following the delegation by the penal provision in question delegates the matter once again, and no regulations have been established following this re-delegation, and thus the meaning of public officials engaging in physical labor is not defined at all even through the lower regulations. This also demonstrates the injustices that can occur when Acts do not clearly define the elements of crimes.

(3) In conclusion, the penal provision in question only provides an abstract regulation of the core element and delegates the matter of determining all of the specifics to lower regulations. It is thus in violation of the Principle of Clarity of the principle of nulla poena sine lege, and in violation of the Constitution as it does not conform with the limits of delegation of legislative power.

9. Dissenting Opinion of Justice Song Doo-hwan

I disagree with the majority opinion regarding the constitutionality and infringement of basic labor rights by Article 66 Section 1, and hereby express my thoughts.

A. The gist of the majority opinion on this matter is that the Constitution granted the legislature wide ranging legislative discretion by directly delegating the scope of public officials who are to enjoy the three labor rights to be determined by Act, thereby the prohibition of excessive restriction as laid out by Article 37 Section 2 of the

Constitution does not apply here, and the articles in question do not exceed the limits of the formative discretion granted to the legislature, and are thus not in violation of the Constitution. I believe that this is a misinterpretation of the intent of Article 33 Section 2 of the Constitution.

B. The Constitution is not just a collection of separate independent provisions, but a unified system of values consisting of interacting provisions. Therefore, when interpreting and determining the meaning of a certain article of the Constitution, we must first, of course, focus on the literary meaning of said article, but we must also consider factors such as the basic ideals and governing principles of the Constitution, the relationship between said article and other articles, and the historical objectives of the establishment or amendment of said article, and interpret accordingly.

C. The Constitution defines the basis and limits of restricting basic rights through various provisions; Article 10 emphasizes the state's duty towards the people to protect their basic rights, stating that all citizens shall be assured of human worth and dignity and have the right to pursue happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals; Article 11 Section 1 defines the right to equality which ensures that no one is discriminated on the basis of sex, religion, or social status; Article 37 Section 2 stipulates that "the freedoms and rights of citizens may be restricted by Act only when necessary for national security, the maintenance of law and order or for public welfare. Even when such restriction is imposed, no essential aspect of the freedom or right shall be violated."

Meanwhile, if we take a look at the history of Article 33 Section 2 of the Constitution, our original Constitution (established on July 17, 1948) only stated in Article 18 that the right of association, the right of collective bargaining, and the right of collective action of laborers will be protected as prescribed by statute, thus protecting the three labor rights as basic rights, and had no special provision regarding public officials like the current Article 33 Section 2 of the Constitution. That special provision was first established during when

the Constitution was wholly amended on December 26, 1962, as Article 29 Section 2 which read no public officials will have the right of association, the right of collective bargaining, and the right of collective action, except those designated by statute. Since then, the provision was maintained undergoing only minor adjustments to the wording. On October 29, 1987, when Constitution was wholly amended to become the current Constitution, Article 33 Section 1 guaranteed the right to collective action to workers without any individual reservations. Section 2 of the same article was adjusted to grant the three labor rights to certain public officials, and Section 3 limited those whose rights to collective action were to be restricted to workers of important defense industries. The basic intent of these latest amendments is to expand and protect the three labor rights (Constitutional Court decision 88 Hun-Ma 5, Mar. 11, 1993).

What is more, Article 6 Section 1 of the Constitution declares that we accept and respect international, stating that treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea, and currently our nation is an official member of the ILO and a treaty power that has accepted most all international human rights covenants, with the consent of our National Assembly. Therefore, interpretations of the Constitution should be made so that they are in harmony with international laws and regulations including the Universal Declaration of Rights and International Human Rights Covenants of the UN, and the agreements and recommendations of the ILO. Also, though domestic laws that do not conform with such international regulations cannot immediately be declared unconstitutional, international laws should serve as important standards when evaluating the constitutionality of said laws.

Also, in its 93 Hun-Ba 21 decision of December 29, 1994, in the constitutional complaint regarding the proviso of Article 2 Section 1 of the State Compensation Act, the Constitutional Court held that the state has an obligation to protect the basic rights of the people, and as Article 29 Section 2 of the Constitution is a provision that restricts the right to compensation from the state, which is ensured by Article 1, within the Constitution, its application should be strictly limited. This signifies that even with articles of the Constitution that directly

restrict basic rights, one should not stop at interpreting the articles literally, but make interpretations and enforce the relevant articles strictly and limitedly in light of the general principles and ideals of the Constitution.

D. Let us determine the meaning of Article 33 Section 2 of the Constitution with these factors and Section 1 of the same article in mind. Article 33 Section 2 of the Constitution recognizes the dominant principle of Section 1 which stipulates that all workers enjoy the right of association, the right of collective bargaining, and the right of collective action, and accepts the premise that public officials, as workers, also enjoy said rights. However, it declares that the three labor rights may partially be restricted in light of the peculiarities of public officials in comparison to normal workers. Specifically, only the right of association may be recognized, or just the rights of association and collective bargaining, or all of the three labor rights may be recognized depending on the contents and properties of the public services concerned and the position of the public official. Thus, Article 33 Section 2 of the Constitution declares that the scope and level of protection of the three labor rights can differ in the case of public officials, and it delegates the matter of establishing more detailed and reasonable regulations on the matter to the legislature.

From this point of view, the legislative discretion granted by such delegation is not without limits, but must abide by the rules stipulated by Article 37 Section 2 of the Constitution, namely the Rule of Least Restrictive Means and the prohibition of infringing the essential aspects of basic rights. If any Act or regulation unilaterally and completely denies or deprives one of even one of the three labor rights, that would be an infringement of the essential aspect of these basic rights.

E. From this point of view, Article 66 Section 1 of the Act states the labor campaign of public officials as a type of collective action for activities other than public services, grants the three labor rights to 'public officials engaging in physical labor' as an exception, and prohibits labor campaigns to 'all other public officials', thereby denying and depriving them of their three labor rights.

As a result, the three labor rights are completely denied to public officials besides the 'public officials in technical service and physical labor service who are engaged in labor at the work sites of currently operating institutions of the Ministry of Communications and Information and KORAIL, or national medical centers' who are designated as 'public officials engaging in physical labor' by Article 28 of the Public Officials Service Obligations Rule, a lower rule of the aforementioned article. It is a worldwide phenomenon to grant public officials the three labor rights. The US, Japan, and Germany grant public officials the right of association and collective bargaining, and England and France even guarantee them the right to collective action as a principle. Considering that there are few nations that strictly restrict even the right to association in the case of public officials, revisions need be made

F. In conclusion, Article 66 Section 1 of the Act which denies and deprives the three labor rights of all public officials save public officials engaging in physical labor, is unconstitutional for the following reasons.

First, it violates the Rule of Balancing Competing Interests.

Restricting the basic labor rights of public officials should only de done when necessary for national security, the maintenance of law and order or for public welfare, and the promotion of the interests of the workers should be balanced with the need for public welfare etc. However, the aforementioned article is in violation of the Rule of Balancing Competing Interests as it restricts and deprives the basic labor rights of public officials without considering any other factor besides whether the public official engages in physical labor.

Second, the aforementioned article violates the Rule of Least Restrictive Means which only allows the minimum amount of restrictions in unavoidable cases.

The public nature of the tasks of public officials may vary greatly according to the contents and nature of the work or the position of the official, and the type and extent of the effects of ceasing to carry out such work have on people's lives also vary greatly.

For example, there is work that is related to the protection of the

people's lives, welfare, and property such as fire fighting and police work and work that simply provides comforts like managing parks or libraries. There are services the stoppage of which infringes the interests of people directly such as supplying water and electricity, and services that infringe only indirectly such as issuing resident registration certificates. Some work cannot be carried out by others such as the confidential, information related work or military work, whereas some services such as hospital work can be substituted by the private sector, at least to an extent.

Therefore, when protecting or legislatively restricting the basic labor rights of public officials, this variety must be considered to restrict or protect said rights to different extents. However, since the aforementioned article does not take such variety of the public nature of different services into consideration and uniformly deprives public officials of their basic labor rights, this violates the Rule of Least Restrictive Means and even infringes the essential aspect of the three labor rights.

Third, the aforementioned article violates the Principle of Equality.

There may be public officials who conduct public services of the same or similar public nature to the work of the teachers as defined by the Act on the Establishment and Operation of Teachers' Trade Unions, and the public nature of different public services differ greatly according to the content and properties of the work, as seen above. In spite of this, the aforementioned article denies public officials their basic labor rights simply because they are public officials, and thus treat 'same things differently' or 'different things equally'. As there is no reasonable basis for such treatment, said article is in violation of the principle of equality ensured by Article 11 Section 1 of the Constitution.

G. As established supra, Article 66 Section 1 of the Act, which denies public officials their three labor rights completely and uniformly, is unconstitutional. Therefore, said article should be declared unconstitutional to resolve this unconstitutional state, and in order to have the legislation implement legislations that conform to the intentions of Article 33 Section 2 of the Constitution as described above.

H. Outside this case, the Act on the Establishment and Operation of Public Officials' Trade Unions was established by act no. 7380 on January 27th, 2005, granting public officials in technical and physical labor services and public officials in regular service of level 6 or lower the right of association and collective bargaining. However, this does not solve the issue of protecting the public officials' basic labor rights, which remains for public officials to whom the aforementioned act does not apply. Therefore, the need for a declaration of unconstitutionality in this case remains.

I. On the one hand, some may contend that Article 66 Section 1 of the Act contains some constitutional aspects in that there may be public officials whose three labor rights should be denied due to the nature or contents of their work, and that it is therefore inappropriate to declare it simply strike it down. However, the unconstitutionality of said provision is extremely grave as it completely denies public officials all of the three labor rights as a principle, and the constitutional aspect is extremely insignificant in comparison. Moreover, there will not be any unusual legal confusion or damages resulting from a declaration of unconstitutionality, and therefore, I do not see the need to render a modified decision.

For these reasons, I believe that Article 66 Section 1 of the National Public Officials Act and the section of Article 84 of the same Act that refers to violations of Article 66 are unconstitutional, and thus dissent from the majority opinion.

Justices Lee Kang-kook(Presiding Justice) Lee Kong-hyun, Cho Dae-hyen, Kim Hee-ok, Kim Jong-dae, Min Hyeong-ki, Lee Dong-heub (Assigned Justice), Mok Young-joon, Song Doo-hwan

[Annex 1] Relevant Articles

Trade Union and Labor Relations Adjustment Act

Article 5 (Establishment and Admission of Trade Union)

Workers shall be free to establish a trade union or to join it: Provided, That matters with respect to public officials or school teachers shall be prescribed by other Acts

Act on Establishment and Management of Trade Unions for Public Officials

Article 1 (Objective) The purpose of this act is to regulate matters pertaining to the establishment and operation etc., of trade unions by public officials in accordance with the proviso of Article 5 of the Trade Union and Labor Relations Adjustment Act in order to protect the basic rights of public officials as per Article 33 Section 2 of the Constitution

Article 2 (Definitions) The term public officials in this act refers to public officials as defined by Article 2 of the National Public Officials Act and Article 2 of the Local Public Officials Act. The public officials engaging in physical labor as per the proviso of Article 66 Section 1 of the National Public Officials Act and the proviso of Article 58 Section 1 of the Local Public Officials Act, and the teachers subject to the 'Act on Establishment and Management of Trade Unions for Teachers are excluded.

Article 3(Guarantee and Limits of Trade Union Activities) ① The main sentence of Article 66 Section 1 the National Public Officials Act and the main sentence of Article 58 Section 1 the Local Public Officials Act do not apply to the organization and joining of the Public Officials' Trade Unions regulated by this Act(hereinafter referred to as Trade Unions) and lawful actions related to trade unions.

② In conducting the activities of trade unions, public officials cannot conduct acts that violate the duties of public officials laid out by other acts and regulations.

Article 6(Scope of Admission) ① The public officials capable of joining trade unions are as follows:

1. Public officials in regular service of levels 6 and lower and public officials in regular service in research or special technique who correspond to the same levels

2. Of public officials in special service, those who work in foreign affair administration and foreign affair information management and

correspond to public officials in regular services of level 6 or lower

3. Public officials in technical service

4. Public officials in special services and contracted public officials who correspond to public officials in regular services of level 6 or lower

5. Contracted public officials

② In spite of Paragraph 1, the following public officials cannot join trade unions.

1. Public officials who supervise and direct other public officials or whose work consists of overseeing the work of other public officials

2. Public officials who work on the side of administrative agencies in relation to trade unions, such as public officials who conduct human resources or remuneration work

3. Public officials who are engaged in corrections, investigation and other similar work

4. Public officials engaged in work not suitable to be carried out as a member of a trade union such as work which consists mainly of adjusting or supervising labor relations

③ When a public official is dismissed, discharged, or relieved and files an application for remedy of unfair labor practices to the Labor Relations Commission according to Article 82 Section 1 of the Trade Union and Labor Relations Adjustment Act, said public official does not lose his/her status as a member of the trade union until there is a re-deliberation decision by the Labor Relations Commission.

④ The scope of the public officials mentioned in Section 2 is to be determined by Presidential Decree.

The Act on Establishment and Management of Trade Unions for Teachers

Article 1(Objectives) The purpose of this act is to regulate matters on the establishment of teachers' trade unions and establish special provisions to the 'Trade Union and Labor Relations Adjustment Act' to be applied to teachers in accordance with the proviso of Article 5 of the Trade Union and Labor Relations Adjustment Act, and in spite of Article 66 Section 1 of the National Public Officials Act and Article 55 of the Private School Act.

Article 2(Definitions) The term teachers in this act refers to teachers as defined by Article 19 Section 1 of the Elementary and Secondary School Education Act. A dismissed person who has filed an application for remedy of unfair labor practices to the Labor Relations Commission according to Article 82 Section 1 of the Trade Union and Labor Relations Adjustment Act is defined as a teacher until there is a re-deliberation decision by the Labor Relations Commission.

Article 4(Establishment of Trade Unions) ① Teachers may establish trade unions at special city, metropolitan city, special corporate town (hereinafter referred to as "Si · Do") levels and a national level.

② The establisher of a trade union must submit a report of establishment to the Minster of Labor.

The old National Public Officials Service Obligations Rule (before being amended by Presidential Decree No. 18580 on November 3, 2004)

Article 28(public officials engaging in physical labor) The public officials engaging in physical labor mentioned in Article 66 of the Act are limited to public officials in technical service and labor service who are engaged in labor at the work sites of currently operating institutions of the Ministry of Communications and Information and KORAIL, or national medical centers and who do not correspond to any of the following.

1. Persons engaged in general affairs, human resources and confidential work
2. Persons engaged in accounting and the handling of goods
3. Persons engaged in supervising laborers
4. Persons engaged in guarding the security and target facilities as defined by the Security Task Rule
5. Persons engaged in the task of driving passenger cars and ambulances National Assembly Personnel Rule

Article 53(Public Services) Matters required for the regarding oaths, the scope of the business aiming at profit-making, the prohibition of political acts, the scope of public officials engaging in physical labor as defined by Article 55, Article 64 Section 2, Article 65 Section 4, Article 66 Section 2, and Article 67 of the Act as well as other public service issues will be separately determined through regulations.

5. Request for Constitutional Review of Article 53 Section 1 of the Military Criminal Act

[19-2 KCCR 535, 2006 Hun-Ka 13, Nov. 29, 2007]

In this case, the Constitutional Court declared Article 53 Section 1 of Military Criminal Act unconstitutional, which provided for death penalty as the only statutory punishment when a subordinate killed a superior, due to the violation of the Principle of Proportionality between criminal punishment and responsibility.

Background of the Case

Article 53 Section 1 of Military Criminal Act provides, "Any one who killed a superior shall be punished with death penalty (hereinafter, "the statutory provision at issue in this case").

The petitioner was indicted for murdering a superior, was convicted to death penalty at a General Military Court of the Third Army Headquarters on November 23, 2005, got the decision of dismissal of appeal after appealing to Higher Military Court of the Ministry of National Defense on April 21, 2006. Then, during the pending second appeal to the Supreme Court, he filed a motion to request a constitutional review on the statutory provision at issue in this case. The Supreme Court accepted the motion and referred the case to the Constitutional Court on August 31, 2006.

Summary of the Opinions

The Constitutional Court declared Article 53 Paragraph 1 of the Military Criminal Act unconstitutional. The reasons are as follows.

1. Summary of the Majority Opinion

A. It is illegitimate in the criminal penalty system and remarkably out of proportion to the gravity of the offence that the statutory provision at issue in this case uniformly punish with the death penalty for the murder of a superior in the military in time of peace regardless of the motive and the mode of the act. In addition, it is

not an appropriate enactment of criminal penalty in terms not only of criminal policy but also of current legislative trend in the world.

B. The statutory provision at issue in this case is against the substantial ideas of the rule of law respecting and protecting the human worth and dignity and loses its legitimacy in the criminal penalty system because it did not observe the proportionality between the nature of the crime and the responsibility of the offender by providing for too heavy penalty when compared to the gravity of the crime.

2. Summary of the Nonconformity Opinion of Justice Cho Dae-hyen

The statutory provision at issue in this case has legitimate aim of legislation since it is to contribute to the achievement of special mission, national defense, by firmly establishing the chain of command and order. However, it does not differentiate one case when the murdered is the superior with the power of order from another case when the murdered is just the superior with no power of order to the murderer. It does not differentiate one case when the murder occurred before the enemy from the opposite case. It included all of them in "the murder of a superior" and punish them with death penalty. Therefore, it is against the Principle of Proportionality between the responsibility and penalty as well as against the Least Restrictive Means Rule because it uniformly punish them with the death penalty without differentiating the degree necessary to achieve legislative aim.

3. Summary of Dismissal Opinion of Justice Kim Jong-dae

The purport of referral by the Supreme Court is not that the murder of superior itself is unconstitutional but that providing only death penalty in the provision makes them unable to avoid the sentence of death penalty. However, if the Supreme Court judges the lower court's sentencing of death penalty to be proper, the Supreme Court would maintain the sentencing of death penalty by applying other legal provision in spite that the referred provision is decided to be unconstitutional. If the Supreme Court judges the sentencing of death penalty unreasonable, the Supreme Court could reverse the lower

court's decision even without referring to the Constitutional Court and avoid sentencing the death penalty. For this reason, the referral in this case lacks the interest of decision, is illegal and should be dismissed.

Parties

Requesting Court
The Supreme Court

Petitioner
Kim ○ Min

Relevant Case
Supreme Court 2006 Do 2783, Murder of Superior etc.

Judgment

Article 53 Section 1 of the Military Criminal Act (enacted on January 20, 1962, Act No. 1003) is unconstitutional.

Reasoning

1. Introduction of the Case and Subject Matter of Review

A. Introduction of the Case

The Petitioner was accused of killing his superior and was sentenced to death at the General Military Court of the Third Army Headquarters on November 23, 2005 (2005 Godan 11) and filed an appeal, which was dismissed at the High Military Court of the Ministry of National Defense on April 21, 2006 (2005 No 265). He then appealed to the Supreme Court (2006 Do 2783), and while pending, filed a motion for Constitutional Review of the Article 53 Section 1 of the Military Criminal Act, the provision which regulates the crime of killing one's

superior. The Supreme Court granted the motion and requested constitutional review on August 31, 2006.

B. Subject Matter of Review

The subject matter of review in this case is the constitutionality of Article 53 Section 1 of the Military Criminal Act (enacted on January 20, 1962, Act No. 1003) (hereinafter referred to as the statutory provision at issue in this case), which provides:

Military Criminal Act
Article 53 (Killing Superior, Preparations and Conspiracies) (1) A person who kills his or her superior shall be punished by death.

2. The Requesting Court's Reason for Requesting Constitutional Review and the Opinions of Related Agencies. (omitted)

3. Reasoning

A. The Decision on the Precondition of Adjudication

In order for a request of Constitutional Review of a law to be legitimate, the constitutionality of the law applied to the case pending at the requesting court shall constitute a precondition of the adjudication of that case. To establish a precondition of adjudication, first, a specific case should be pending at the court; second, the law the unconstitutionality of which is in issue should be the one that is to be applied to said pending case; and third, the adjudication of the court that tries the case will depend on the constitutionality of the law. The adjudication of a court is considered to 'depend', not only when the conclusion or judgment itself of the pending case is to be affected by the unconstitutionality of the law in issue, but also when, owing to such unconstitutionality, even though the judgment itself will stay the same, a different reasoning will be used to support that conclusion of the case, or the legal meaning of the substance or effect of the decision is expected to change considerably (5-2 KCCR 578, 587, 93 Hun-Ka 2, Dec. 23, 1993; 12-1 KCCR 848, 864, 99 Hun-Ba 66

et al., June 29, 2000).

The Minister of the Ministry of National Defense contends that, because the charge in this case is proved by the relevant evidence and the conclusion of the case will not differ according to a sentencing condition, the statutory provision at issue in this case does not function as the precondition of adjudication. However, if the Constitutional Court accepts the request of Constitutional Review and ultimately declares unconstitutional the statutory provision at issue in this case which provides death penalty as the only statutory punishment, the statutory provision at issue in this case will thereby loose effect retroactively and no longer be applicable to all cases where the charges are based upon the statutory provision at issue in this case, and as a result, will affect the court's judgment of the pending case. Also, even when the indictment is amended whereby the provision applied to the petitioner is replaced by, for instance, that concerning ordinary murder under the Criminal Act, the reasoning of the adjudication will differ from before. Therefore, it can be stipulated that the substance of the trial will differ according to the conclusion of the Constitutional Review, and that the constitutionality of the statutory provision at issue in this case thereby constitutes a precondition of adjudication of the pending case.

B. Review on Merits

(1) The Limit on the Legislative Power in Establishing Statutory Punishment

With regard to the limit on the legislative power in establishing statutory punishment, the Constitutional Court has consistently ruled as follows: The legislator's decision on what conduct and punishment shall be defined as crime and imposed thereto is primarily an issue that is subject to the legislative policy of the government, and thereby should be concluded with overall consideration for the history and culture of the country, the values and legal sentiment of the general people as well as the current at the time of enactment, actual conditions and the nature of the crime, the legal interest that is protected by the law and the law's efficiency in preventing the crime. Therefore it is a decision that should

be granted with an extensive legislative discretion, namely freedom of legislative formation. Thus, unless it can be established that the statutory punishment to a crime is too severe in light of the nature of that crime and the due liability that the offender should bear, and hence frustrates the balance of the punishment system as a whole and thereby violates the constitutional principle of equality in respect to other crimes, or that the statutory punishment exceeds the degree that is necessary in accomplishing the function and purpose of the punishment to the crime of the sort and thereby violates the principle of proportionality or the principle against excessive restriction both of which can be derived from Article 37 Section 2 of the Constitution, or it can be established in other ways that the legislative discretion has been exercised in an arbitrary fashion without giving thought to Constitution or other constitutional principles, the severity of a statutory punishment is merely a problem that concerns the propriety of the legislative policy, and is not a subject of the review for unconstitutionality (4 KCCR 225, 229, 90 Hun-Ba 24, Apr. 28, 1992; 7-1 KCCR 478, 487, 91 Hun-Ba 11, Apr. 20, 1995; 7-2 KCCR 397, 404, 92 Hun-Ba 45, Oct. 26, 1995; 11-1 KCCR 529, 538-539, 96 Hun-Ba 16, May 27, 1999; 11-1 KCCR 622-629, 98 Hun-Ba 26, May 27, 1999 etc.).

(2) The Principle of Proportionality between Liability and Punishment

The Constitution sets forth the realizing of a law-governed country, where the people's fundamental rights are protected against abusive exercise of state power, as the founding principle. Here, the substantial concept of a law-governed country includes a doctrine that stipulates that when establishing a statutory punishment, the nature of the crime and the offender's liability thereto should abide by a reasonable relationship of proportionality (4 KCCR 225, 230, 90 Hun-Ba 24, Apr. 8, 1992).

When the legislator chooses to regulate a crime with punishment, it shall be ensured that such punishment is enacted proportionately to the degree of unlawfulness and liability. An excessive punishment, that is not in accord with both the unlawfulness which constitutes the crime and the liability of the offender, departs from the principle of proportionality and therefore cannot be tolerated by the Constitution.

It is primarily in the legislator's discretion to determine the sort and range of a punishment, and in doing so, the legislator shall; abide by Article 10 of the Constitution that provides that the State shall respect and protect human worth and dignity from the threat of punishment, leave room for the principle of individualization of punishment to be applied when establishing the range of statutory punishment and thereby realize the substantial ideas of the rule of law, and abide by the principle of proportionality so that the punishment might accord with the nature of the crime and the offender's liability. This is the same when aggravating a punishment (4 KCCR 225, 230, 90 Hun-Ba 24, Apr. 8, 1992) - thus even when it is necessary to raise the penalty in light of the legislative purpose, if such aggravation clearly infringes the balance and the legitimacy of the punishment system when compared to other punishments in general, such legislation is deemed unjustifiable and the provision at issue becomes an unconstitutional one that violates the Constitution's fundamental principle that guarantees human worth and dignity (13-2 KCCR 570, 592, 2001 Hun-Ka 16, Nov. 29, 2001).

For above reasons, the Constitutional Court has issued a decision of unconstitutionality in the following cases: Constitutional Complaint of Article 5-3 Section 2 Paragraph 1 of the Act on the Aggravated Punishments of Specific Crimes etc. (4 KCCR 225-254, 90 Hun-Ba 24, Apr. 28, 1992), Constitutional Complaint of Article 11 Section 1 of the Act on the Aggravated Punishments of Specific Crimes etc.(15-2(B) KCCR 242-257, 2002 Hun-Ba 24, Nov. 27, 2003), Request of Constitutional Review of the part of the crime of threat in Article 3 Section 2 of the Act on Punishment of Violences, etc. (16-2(B) KCCR 446-460, 2003 Hun-Ka 12, Dec. 16, 2004), Request of Constitutional Review of Article 5 Section 4 Paragraph 1 of the Act on the Aggravated Punishments of Specific Economic Crimes etc. (18-1(A) KCCR 491-502, 2006 Hun-Ka 5, Apr. 27, 2006) etc.

(3) Whether the Principle of Proportionality has been violated

The question at issue in this case is whether the statutory provision at issue in this case is, however crucial the liability of killing one's superior may be, justifiable in providing death penalty as the only

statutory punishment without inquiring into whether the crime has been committed during a time of war or not, or what the motive and the specific act of the crime were.

(A) The most important factor that should be taken into account when defining the sort and range of a punishment is the legal interest that is protected by such punishment and the nature of the crime. Where the legal interest differs, the statutory punishment may differ accordingly, and where the nature of the crime differs, the statutory punishment again should differ accordingly even if the legal interest is the same (9-1 KCCR 290, 298-299, 95 Hun-Ba 50, Mar. 27, 1997).

The Criminal Act provides that, without distinguishing deliberate murder and manslaughter, a person who intentionally kills another shall be punished by death, or imprisonment for life or not less than five years. Such wide-ranging statutory punishment leaves room for the judge when trying an actual case to flexibly choose one of the pronounceable sentences in consideration of the specifics of the criminal act and the nature of the crime, and to pronounce suspension of execution when grounds that call for mitigation of punishment in extenuation of circumstances exist. Also, the Criminal Act provides that a person who kills one's own or one's spouse's lineal ascendant shall be punished by death, imprisonment for life or for not less seven years, and the Military Criminal Act punishes killing a sentinel by death or imprisonment for life. In comparison to above statutes, it is too heavy a punishment to regulate the crime of killing a superior during time of peace only by death, without inquiring into what the motive and the specific act of the crime were. Such excessive punishment is grossly disproportionate to the severity of the crime and thus cannot be justified in light of the punishment system, and is hardly an adequate enactment of punishment in light of the criminal policy and current worldwide trend of legislation.

(B) The statutory provision at issue in this case is not in accord with the constitutional intent that assumes educational improvement and rehabilitation of the criminal as the basis of punishment - it rather is an enactment that puts undue emphasis on the punishment's function of general prevention and is under the harsh doctrine of

retribution that primarily employs pre-modern, heavy penalties in regulating a crime. Also, a provision that, with the pretense of maintaining the line of command and preserving national defense, unconditionally prescribes death penalty for the crime of killing any superior without distinguishing between the time of war and peace or asking whether or not the offender was a subordinate to the victim, is hardly a regulation that is proportionate to the nature of the crime and the liability thereto. Even though it is provided that the judge may resort to mitigation of punishment in extenuation of circumstances, if the statutory punishment itself fails to be proportionate to the nature of the crime and the liability thereto, a mere possibility of mitigation at the trial is not sufficient to make up such deficit.

(C) Considering that in other provisions of the Military Criminal Act, for instance as in the provisions that regulate assaulting or injuring the superior, the statutory punishments are separately prescribed when confronted with an enemy from that of other circumstances, it can be assumed that the legislator can also regulate the crime of killing the superior with distinction between a state of confronting an enemy and other circumstances, or between the time of war and peace. If so, it should be provided that at least when not confronting an enemy or when not in time of war, a reasonable punishment may be determined with consideration to the motive, circumstances and the method used in the crime. There is no foreign legislation that provides death penalty as the only sentence pronounceable for the crime of killing a superior, furthermore, it is difficult to spot a country that even aggravates the punishment when the victim is a superior. Even if allowing the unique state of confrontation between South and North Korea, the strength and integrity is not expected to be restored by an intimidating effect of a severe statutory punishment. Therefore, there is small practical benefit in sustaining such legislation. Moreover, even though one cannot deny the strong intimidating effect of the punishment restricted only to death penalty, it is not certain whether such restriction actually fulfills the function of general prevention, namely, whether it successfully prevents one from killing his or her superior

in actual circumstances. Also, a provision that provides death penalty as the only statutory punishment regardless of the motive and the nature of the crime is hardly a regulation that is proportionate to the nature of the crime and the liability thereto, and violates the substantial ideas of the rule of law that stipulates that the punishment shall be enacted with respect to human worth and dignity and in proportion to the nature of the crime and the offender's liability.

4. Conclusion

As seen above, the statutory provision at issue in this case regulates a crime with excessive punishment that is grossly disproportionate to the severity of the crime and thus violates the principle of proportionality between the nature of the crime and the offender's liability thereto. Such excessive punishment violates the substantial ideas of the rule of law that intends to respect and protect human worth and dignity, and thus cannot be justified in light of the punishment system. We thereby decide as set forth in the judgment. This decision is a unanimous one except Justice Cho Dae-hyen who wrote the opinion of nonconformity to the Constitution set forth in below 5. and Justice Kim Jong-dae who wrote the dissenting opinion set forth in below 6.

5. Opinion of Nonconformity to the Constitution by Justice Cho Dae-hyen

The statutory provision at issue in this case defines the act of a soldier killing his or her superior as an independent crime and regulates it with the sole sentence of death penalty. The military is an institution responsible of national defense, and to accomplish this mission, it has to participate in acts dangerous to life and limb of the soldiers, such as war, and thus it is crucial to maintain a strict chain of command. The legislative purpose of the statutory provision at issue in this case can be justified in that it seeks to accomplish the distinctive mission of national defense by establishing a chain of command.

It can also be said that in order to accomplish said legislative purpose, it is necessary to devise an independent crime such as the statutory provision at issue in this case. However, the extent of such need differs between in a case where the victim is a superior officer who holds the right to command and in a case where he or she is a mere senior who lacks the right to command. Still, the statutory provision at issue in this case does not distinguish between those two cases nor does it ask whether the crime is committed while confronting an enemy, and rather includes all of above into killing superior and regulates it only with death penalty. A law, that uniformly punishes a crime with maximum penalty without considering the respective extent of need in accomplishing the legislative purpose, violates the principle of proportionality between the liability and punishment and also departs from the principle of minimum necessary restriction of fundamental rights.

However, the statutory provision at issue in this case does not violate the Constitution with respect to the cases where the offender, while confronting an enemy, kills a superior officer who holds the right to command. In conclusion, the statutory provision at issue in this case contains both constitutional and unconstitutional part, and distinguishing the two is a task of the National Assembly. Therefore the Court should issue a decision of nonconformity to the Constitution and urge to replace the law by legislation.

6. Opinion of Dismissal by Kim Jong-dae

I think the Request of Constitutional Review of the statutory provision at issue in this case presents no justiciable interest and thus is legally insufficient, thereby submit the opinion of dismissal as below.

A. Need of the Justiciable Interest

In order to try a case of general lawsuit in the court, a justiciable interest should be present. Similarly, an interest of judgment should be present in order to receive constitutional adjudication. An interest of action or judgment implies that the court can actually contribute to

the solution of a dispute, and is required so as to prevent exploiting the judicial system futilely and unhelpfully.

An interest of action or judgment is required in all trials as a matter of course, and it is a requisite for a trial to be legally sufficient even when the law does not expressly state such interest as necessary, since it is a factor inherent in the essence of all trials. Therefore, a request of a trial that does not present an interest of judgment cannot be but legally insufficient.

In a case of a Request of Constitutional Review pursuant to Article 41 of the Constitutional Court Act, if the dispute in issue can be settled regardless of the decision of the Constitutional Court, it shall be deemed that there is no interest for the Constitutional Court to decide on the constitutionality of the provision at issue.

The Request of Constitutional Review in this case, as to be seen below, does not present an interest of judgment in light of the Requesting Court's cause of the request and the relevant provisions.

B. Interest of Judgment of the Request of Constitutional Review in the Instant Case

(1) Requesting Court's Cause of the Request and Subject Matter of Review

The Requesting Court stated that the statutory provision at issue in this case extremely restricts the judge's discretion in deciding a sentence with respect to a crime of killing superior, which can be carried out in various forms of action with different level of severity, by providing death sentence as the only statutory punishment. Also, when compared to murder with the purpose of rebellion prescribed in Criminal Act and murder as an action of rebellion prescribed in Military Criminal Act, regulating a crime uniformly with death penalty, without considering various forms of action and respective sentencing conditions, infringes the balance and the legitimacy of the punishment system. This is the reason that the Requesting Court sets forth in finding Article 53 Section 1 of the Military Criminal Act which provides A person who kills his or her superior shall be punished by death. seemingly unconstitutional.

To arrange above argument of the Requesting Court, it is not insisting the unconstitutionality of Article 53 Section 1 with respect to the constituting factors of the crime (A person who kills his or her superior), namely, punishing defendant for the crime of killing superior. Rather, according to the Requesting Court, merely the part of the statutory provision at issue in this case that provides death penalty as the only possible statutory punishment is where the unconstitutionality may reside in.

If so, the subject matter of review that the Requesting Court ultimately submitted for the Court's decision is not the whole text of Article 53 Section 1 of the Military Criminal Act, but rather, the part of said provision where it provides the statutory punishment by stating shall be punished by death (hereinafter referred to as the 'Instant Statutory Punishment Provision'). And the cause of request of Constitutional Review of the Instant Statutory Punishment Provision is that it is unlawful to provide death sentence as the only statutory punishment without considering various forms of action and respective sentencing conditions (therefore, had the statutory punishment of Provision 53 Section 1 been death or imprisonment for life, there no such request would have taken place.)

(2) Lack of Interest of Judgment

The Requesting Court requested the Constitutional Review of the Instant Statutory Punishment Provision arguing that it is unlawful to provide death sentence as the only statutory punishment without considering various forms of action and respective sentencing conditions. Accordingly, in deciding whether or not an interest of request is present, one shall distinguish between the cases where the sentence of death penalty is justifiable and cases where it is not.

(A) Cases where the Requesting Court decides the Sentence of Death Penalty by the Trial Court to be Justifiable

If the Requesting Court decides, in consideration of the charges proved by evidence and the sentencing conditions, that the sentence of death penalty by the trial court is justifiable, it follows that the

Requesting Court will also dismiss the appeal and confirm the lawfulness of the sentence of death penalty. In this case, the fact that the Instant Statutory Punishment Provision provides death penalty as the only statutory punishment does not affect the court in deciding the sentence because, even if the Instant Statutory Punishment Provision provides other punishments, the court handling the instant case will sentence death penalty all the same.

Meanwhile, the Requesting Court contents that even when the sentence of death penalty by the trial court is deemed justifiable in consideration of the charges and the sentencing conditions, the precondition of adjudication can be recognized because once the Instant Statutory Punishment Provision is declared as unconstitutional, at least a different provision will be applied to the instant case.

However, such contention of the Requesting Court is fettered with too formal a logic considering the precondition of adjudication, and in the case in issue where the defendant filed a motion for Constitutional Review, the interest for judgment cannot be found due to following reasons.

It is clear that the defendant filed a motion for Constitutional Review so as to avoid death penalty, and the Requesting Court also requested the Constitutional Review of the statutory provision at issue in this case that provides death penalty as the only statutory punishment in order to avoid sentencing a death penalty. That granted, a decision of the Constitutional Court with respect to the unconstitutionality of the statutory provision at issue in this case that provides death penalty as the only statutory punishment does not have any significance for the defendant or the court of the case in issue, because the court will all the same sentence death penalty by merely applying a different provision. It is doubtful that while at all events sentencing death penalty, merely applying a different provision will contribute to the solution of the specific case other than preserving the integrity of a theoretical formal logic. It has to be asked whether it is fine to allow a procedure of the Constitutional Court be exploited that way.

(B) Cases where the Requesting Court decides the Sentence of Death Penalty by the Trial Court to be Unjustifiable

Even if the Requesting Court decided the sentence of death penalty by the trial court to be unjustifiable and thereby requested the instant Constitutional Review in order to reverse the sentence, the interest of judgment is not to be found.

Article 383 Paragraph 4 and Article 391 of the Criminal Procedure Act provides that in a case where either punishment of death or imprisonment or imprisonment without prison labor for life or not less than ten years, a leave is granted to an appeal on the grounds of improper sentence and if such appeal is allowed, the court can reverse the original judgment.

Meanwhile, even though the Instant Statutory Punishment Provision provides death sentence as the only statutory punishment, it does not necessarily follow that death penalty is the only pronounceable sentence as the Requesting Court contents. A court can, through mitigation of punishment in extenuation of circumstances pursuant to Article 53 and 55 of the Criminal Act, freely sentence either 'imprisonment or imprisonment without prison labor for life or not less than ten years'

Therefore, even though the Instant Statutory Punishment Provision provides death sentence as the only statutory punishment, the Requesting Court may, if it decides that such sentence by the trial court is unjustifiable, reverse the original judgment and impose punishment other than death penalty pursuant to the provisions of the Criminal Act and the Criminal Procedure Act, with or without the Constitutional Court's decision on the unconstitutionality of the Instant Statutory Punishment Provision (it does not seem that the cause of request set forth by the Requesting Court includes the argument that it is unlawful in the sense that a sentence of imprisonment or imprisonment without prison labor 'less than ten years' is impossible even after mitigating the punishment in extenuation of circumstances).

Therefore, even if the Requesting Court's intention was to avoid sentencing death penalty, there is no legal interest in requesting a Constitutional Review of the Instant Statutory Punishment Provision which provides death penalty as the only statutory punishment.

(3) Sub-conclusion

As seen above, in light of the cause of request set forth by the Requesting Court, the request of the instant case fail to present an interest of judgment.

Only, if the Requesting Court requested the instant case on the grounds of the unconstitutionality of the death penalty itself, there might have been an interest of judgment because once the death penalty itself is declared as unconstitutional, the Requesting Court will have to reverse the original judgment and the defendant will no longer be sentenced to death penalty.

C. Conclusion

In the case where the Requesting Court decides the sentence of death penalty by the trial court to be justifiable, such sentence will still be maintained by simply applying a different provision even if the provision requested for review is decided unconstitutional. In the case where the sentence of death penalty is deemed unjustifiable, the Requesting Court can still reverse the original judgment and avoid such sentence even without requesting for Constitutional Review.

Therefore, the Request of Constitutional Review of the instant case lacks an interest of judgment and thus legally insufficient, and should be dismissed.

Justices Lee Kang-kook(Presiding Justice), Lee Kong-hyun, Cho Dae-hyen, Kim Hee-ok, Kim Jong-dae, Min Hyeong-ki, Lee Dong-heub(Assigned Justice), Mok Young-joon, Song Doo-hwan

II. Summaries of Opinions

1. Pension Payments Reduction for Public Employees due to Crimes They Committed

[19-1 KCCR 211, 2005 Hun-Ba 33, Mar. 29, 2007]

Held, Article 64 Section 1 of the Act on Pensions for Public Service Personnel, providing that the former and incumbent public service personnels who are sentenced to imprisonment without prison labor or heavier punishment due to crimes committed during their active service, would get reduced retiring pension and allowance, is not in conformity with the Constitution.

Background of the Case

Article 64 Section 1 Paragraph 1 of the Act on Pensions for Public Service Personnel (hereinafter referred to as "the Statutory Provision at Issue") provides that the former and incumbent public service personnels who are sentenced to imprisonment without prison labor or heavier punishment due to crimes related to their employment, would get reduced retiring pension and allowance (hereinafter referred to as "pension"). The complainant, a local public service employee, caused a car accident killing a person while he was drunk-driving. He was sentenced to 10-month-imprisonment as well as for 2-year-probation. On the same day the ruling became final, he voluntarily terminated his employment pursuant to the Local Public Officials Act. The complainant requested pension by contacting the Government Employees Pension Service. But the Pension Service provided him with reduced pension pursuant to the Statutory Provision at Issue. On, April 19, 2005 the complainant, claiming that the Statutory Provision at Issue is unconstitutional because it violated his property right and the principle of equality, requested the Constitutional Court to review the constitutionality of the Statutory Provision at Issue.

Summary of the Opinions

The Constitutional Court has held, in a six-to-three decision, that

the Statutory Provision at Issue is unconstitutional. The summary of the grounds for the Court's decision is stated in the following paragraphs.

1. Summary of the Majority Opinion

A. Opinion of Five Justices

(1) Providing the convicted public employees with reduced pension where the crimes convicted are not related to their employment and those of negligence is not a proper means to serve a legitimate purpose as it is for preventing public service personnel's crime, and motivating public service personnels to serve diligently. Rather, this infringes the property right as the Least Restrictive Means Rule and Balancing Competing Interests Rule are violated by giving severely harsh disadvantage to the public employees.

(2) Providing the convicted public employees with reduced pension where the crimes were committed during their active service is discriminatory treatment without reasonable ground (1) with regards to retiring pension because it discriminates in favor of workplace subscribers under the National Pension Act, and (2) with regards to retiring allowance because it discriminates in favor of workers under the Labor Standards Act, thereby violating the Principle of Equality.

(3) The Legislators should revise the Statutory Provision at Issue toward a constitutional way by restricting the reasons of awarding reduced pension in which there is reasonable and especial need to take such actions. Also, it is necessary that the Statutory Provision at Issue shall continue to apply on a temporary basis. We hereby issue a decision of nonconformity to the Constitution, to the effect that the legislators shall be obligated to affirmatively complement the current system by at the latest December 31, 2008 therefore fixing the unconstitutional situation of the Statutory Provision at Issue.

B. Opinion of One Justice

Among "the crimes committed during their active service" which were provided in the Statutory Provision at Issue, the part of "crimes not being related with a public employee's status or duty" is unconstitutional. Also, the part of "crimes being related with a public employee's status or duty" is not in conformity with the Constitution as being a mixture between constitutional and unconstitutional portions, thereby making the distinction between the two impossible.

C. Conclusion

Since one Justice expressed an opinion of simple unconstitutionality in part and nonconformity in part and there are five justices expressing the opinion of nonconformity in whole, the numbers of justices constitute the required passing votes for unconstitutionality decision. We hereby issue a decision of nonconformity to the Constitution on the Statutory Provision at Issue.

2. Summary of the Dissenting Opinion of Three Justices

A. The legislators are endowed with certain degree of discretion in firstly 'forming' the property right for social security, and the legislation based on the discretion does not violate the property right as long as the discretion is being exercised within the boundary of endowed legislative discretion. The Statutory Provision at Issue in this case providing reduced pension due to the crimes the public employee committed has reasonable grounds for such measures and it is within the boundary of legislative discretion. Also, even if the balancing principle necessary for the restriction of fundamental rights is strictly construed, the Statutory Provision at Issue has all the aspects of justifiable restriction of fundamental rights.

B. There is a fundamental difference between the pension at issue here and a national pension or a retirement allowance provided by laws. Also, given that the reduction pursuant to the Statutory Provision at Issue has legislative purposes of encouraging public service employees to pay attention to their legal obligations for observation of rules, considering the obligations for observation of

rules and devotion for service as an assesment criterion in forming pension system for the public employees, has reasonable grounds.

3. Summary of the Separate Concurring Opinion of One Justice

Pension for the public service employees is a kind of social insurance and one of the minimum social safety net to guarantee a life worthy of human beings for the retired public service employee. Therefore, it is unjust and improper to put any restrictions on the pension payments according to whether or not the crime is related to his or her duties or whether being intentional crime or negligent crime. Merely, the restriction would be allowed only when there is a compelling policy demand justifying the restriction on the retired public service employees' right to a life worthy of human being.

2. Electoral District Tables for Municipal and Provincial Assembly Election

[19-1 KCCR 287, 2005 Hun-Ma 985 et al., Mar. 29, 2007]

Held, among the relevant electoral district tables for municipal and provincial assembly election of the Public Official Election Act, the parts for Gyeonggi-Do and Jeollabuk-Do are not in conformity to the Constitution on the ground that they cause inequality in the value of each vote because they transgress the constitutionally permissible maximum deviation of population in an electoral district, that is the ceiling and floor of 60% from average population of electoral districts. Also, Article 22 Section 1 of the Public Official Election Act, which uniformly allocate two provincial assemblymen for each basic local government unit, Gu·Si·Gun based not upon the population proportions but upon the administrative districts, thereby causing the disparity of inequality in the value of each vote, is not in conformity to the Constitution for the reason that the relevant provision violates the right to equality as well as the right to vote.

Background of the Case

The complainants, residents of Yongin-Si, Gyeonggi-Do as well as Gunsan-Si, Jeollabuk-Do, were about to exercise their rights to vote for the election scheduled on May 31, 2006. They filed this Constitutional Complaint, claiming that among the relevant electoral district tables for municipal and provincial assembly election of the Public Official Election Act, the parts for Gyeonggi-Do and Jeollabuk-Do cause inequality in the value of each vote because inequality in the value of each vote originated from population disparity is too great compared with average population of other districts within Gyeonggi-Do and Jeollabuk-Do, and thereby violating their right to equality and right to vote.

Summary of the Opinions

The Constitutional Court has held, in a seven-to-two decision, that among the relevant electoral district tables for municipal and provincial assembly election (hereinafter referred to as 'the electoral district table at issue in this case') of the Article 26 Section 1 of the Public Official Election Act, the parts for Gyeonggi-Do and Jeollabuk-Do districts and Article 22 Section 1 of the same Act, which uniformly allocate two provincial assemblymen for each basic local government unit, Gu·Si·Gun, are both not in conformity with the Constitution. The summary of the grounds for the Court's decision is stated in the following paragraphs.

1. Summary of Majority Opinion of Six Justices

A. In drawing electoral districts for municipal and provincial assemblies, besides population, other factors such as administrative districting, geographical aspects, transportation should be considered. The constitutional standard for the electoral district drawing should be decided by considering the following three factors : (1) the principle of population proportionality as the most significant factor, (2) the representativeness of a member of municipal or provincial assembly, and (3) the excessive disparity in terms of population between the urban and the rural areas due to population concentration towards the urban areas, the latter two factors being the unique situations of

Korea. At the point of present time, setting the constitutionally permissible maximum deviation of population in an electoral district from average population of electoral districts at 60% (equivalent to setting the permissible maximum ration between the most populous district and the least at 4:1) is mostly appropriate for the election for municipal and provincial assembly.

In case of the first, third, fourth electoral district of Yongin-Si and the first electoral district of Gunsan-Si, Jeollabuk-Do, it passes over the constitutionally permissible maximum deviation of population, which is 60%. Such inequality in the value of each vote originated from population disparity in electoral districts cannot be justified with any reasonable grounds. Therefore, among the electoral district tables at issue in this case, "the first, third, fourth electoral district of Yongin-Si, Gyeonggi-Do" and "the first electoral district of Gunsan-Si, Jeollabuk-Do" are the deviation from constitutionally allowed legislative discretion, thereby violate the right to vote as well as the right to equality of the complainants residing such districts.

B. The electoral district tables corresponding to each Si and Do (municipality and province) are inseparably related to each other. Therefore, in case there is one unconstitutional element in the system of electoral district tables, the system is constitutionally flawed in entirety. Also, if drawing one particular electoral district is found to be unconstitutional because of its redundant population, it could make more unfair result for other electoral districts where the inequality in the value of the vote is greater because the current system is being applied. Thus, if parts of electoral district tables are found to be unconstitutional, declaring the entire electoral district tables unconstitutional would be proper. For this reason, among the electoral district tables at issue in this case, it is proper to declare unconstitutional the entire Gyeonggi-Do districts and the entire Jeollabuk-Do districts.

C. Inequality in the value of each vote originated from population disparity exists in drawing the first, third, fourth electoral district of Yongin-Si and the first district of Gunsan-Si, Jeollabuk-Do. Furthermore, such inequality was originated from the Article 22

Section 1 of the Act which uniformly allocate two provincial assemblymen for each basic local government unit, Gu·Si·Gun based not upon the population proportions but upon the administrative districts. Therefore, the above provision results in violating the constitutionally guaranteed right to vote and the right to equality.

D. Since the matters of allocating the full numbers of municipal or provincial assemblymen and of deciding the electoral district tables can be affected by the size of different counties, municipality, and other factors such as administrative districting, geographical aspects, transportation, the excessive disparity in terms of population between the urban and the rural areas as well as the imbalance in terms of development among different regions, it is extremely hard for the Court to suggest a way for the newly improved legislation. Considering all the factors above, the Court declares that the Article 22 Section 1 of the Act and the pertinent electoral districts among the electoral district tables at issue in this case are unconstitutional.

E. The fact that municipal and provincial assembly election has occurred pursuant to the electoral district tables at issue in this case of the Act should be taken into account. Also, rendering a decision of simple unconstitutionality will not fasten the legislative amendment process thereby causing a legal vacuum in case reelection or by-election becomes reality. In addition, considering conducting reelection or by-election pursuant to the provisions above as well as the electoral district tables at issue in this case would be proper for the purposes of both preventing any confusion any change could generate and maintaining the uniformity of municipal and provincial assemblies. Given all of the above, we hereby issue a decision of nonconformity to the Constitution, to the effect that the legislators shall be obligated hereby to affirmatively complement the current system by at the latest December 31, 2008. Therefore, the above provision at Issue and the electoral district tables at issue in this case shall continue to apply on a temporary basis.

2. Summary of Separate Concurring Opinion of One Justice

In drawing electoral districts, the key component is by all means the principle where the electoral constituencies are to be equal in population. Other non-population factors such as administrative districting, geographical aspects, transportation, the difference between urban and rural areas, and other additional policy factors are only for the secondary consideration. The permissible maximum ratio between the most populous district and the least is 2:1 because the ratio beyond 2:1 will cause conspicuous inequality due to the fact that one person of the least populous district will be able to exercise more than two votes of the most populous district. Therefore, the ratio 2:1 is the logical and mathematical limitation in restricting the right to vote.

3. Summary of Dissenting Opinion of Two Justices

Article 118 Section 2 of the Constitution provides that "the organization and powers of local councils, and the election of members; election procedures for heads of local governments shall be determined by statute." Also, the Public Official Election Act provides that the population of each election district should be considered when council members of foundational local governments are voted for. Meanwhile, the Act provides that no such consideration needs to be taken into consideration when council members of wide area local governments are elected. It simply provides that two members will be elected regardless the size of population of each electoral district of foundational local governments. Such distinction is a reflection of the duplex structure and the different functions of basic local governments and wide-area local governments, which has certain reasonable ground as a choice of scheme, thereby not unconstitutional. Therefore, in the current system where electing two members of council members for the wide-area local governments, as a norm for deciding one person one vote principle the proportionality of population between the same basic local governments should be considered, not the proportionality of population between the two different basic local governments.

3. Requirements for Eligibility to Take Bar Examination and Substitution English Tests for Bar Examination English Test Case

[19-1 KCCR 514, 2003 Hun-Ma 947 et al., Apr. 26, 2007]

Held, the Bar Examination Act, providing that both acquiring certain points from TOEFL or other official English examinations and taking law courses over 35 credits are required for the Bar Examination candidates, is in conformity to the Constitution.

Background of the Case

There used to be various foreign language tests in the Bar Examinations, where candidates were free to choose one foreign language test out of many different ones. Also, eligibility to sit for the bar examination did not include a requirement of taking law courses. The Bar Examination Act enacted in the year 2001 provides that the candidates satisfying the both requirements of (1) obtaining certain score or above from TOEFL or other official English examinations (hereinafter referred to as 'System of Substitution English Tests for Bar Examination English Test') beforehand and (2) obtaining certain credits or above by taking law courses are eligible for the first-round Bar Examination (hereinafter referred to as 'System of completing law courses'). The complainant, claiming that those eligibility requirements are unconstitutional, filed the constitutional complaint.

Summary of the Opinion

1. The System of Substitution English Tests for Bar Examination English Test has justifiable purposes in which lawyers should be globalized and they need to improve their lawyering skills for international legal problems. Also making English as a required subject is an effective and appropriate choice for such purposes. Besides, since there are ten different opportunities given for each substitution English tests, it satisfies the Least Restrictive Means Rule. Although someone can argue that globalization can be achieved

by including other foreign languages as exam subjects as well, considering the reality where English has become the international language practically and the numbers of legal literature are on the rise, it cannot be said the Least Restrictive Means Rule would not be satisfied just because English was chosen as the only foreign language test subject. Also the passing score of each substitution English test is not excessively high since the passing score is based upon the standard used for Level 5 national public employees applying for the long term training abroad opportunity. In addition, since the public interest of globalization of lawyers is a lot greater than the drawback bar examination candidates should suffer, this satisfies the principle in which there must be a balance between two conflicting legal interests. Thus, it cannot be said the freedom of occupation of the complainants was violated. Meanwhile, although it can be acknowledged that the bar examination candidates who have studied other foreign languages would be at some disadvantage compared with the ones who have studied English, considering the System of Substitution English Tests for Bar Examination English Test has justifiable purpose and three year grace period for the System is provided by law, the right to equality of the complainants is not violated.

2. The purpose of introducing the System of completing law courses is to test expert knowledge and legal knowledge of the candidates in related with legal education and throughout this test to achieve the normalization of college education as well as the effective distribution of national human resources. Therefore, the legislative purpose is just and the means of requiring 35 law course credits to sit for the bar examination is appropriate. Meanwhile, there are other alternative ways to satisfy the requirement such as distance learning option. Furthermore, since the public interest to achieve throughout this system is a lot greater than the additional effort some bar examination candidates should make, the conflicting legal interests are in balance, thereby the freedom of occupation of the complainants was not violated. Moreover, although the complainants claims that the right to equality is being violated because the undergraduate students majoring in other subjects, middle school or high school graduates

would not be able to take the bar examination under the current System, the System itself has reasonable grounds as it was said above and there are other alternative system to satisfy the eligibility requirements and the eligibility requirements are related with the bar examination preparation. Therefore, it is given that some bar examination candidates need to make an extra effort to satisfy such requirements, the Statutory Provision at Issue does not infringe the right to equality of the complainants.

4. Competence Dispute on Rice Negotiation

[19-2 KCCR 26, 2005 Hun-Ra 8, July 26, 2007]

In this case, the Constitutional Court dismissed the competence dispute claim by reason that 'third party suit' is not allowed and the authority of discussion and voting of Congressman cannot be intruded by national agencies including the President except for National Assembly.

Background of the Case

1. The Korean Administration came to adopt 'Partial Revision Bill of Agreement Table by Korean Government' after the rice negotiation with WTO member states in 2004 in order to postpone the moratorium levying customs on rice. During that process, the Administration wrote the agreement in this case which partially accepted the demands from the countries of gain and loss such as United States, India and Egypt at the cost of postponing the moratorium levying customs on rice.

2. As the Administration had tried to get the consent from National Assembly only for the above 'Revision Bill of Agreement Table' except for the written agreement in this case, the plaintiffs who were Congressmen brought this competence dispute suit against the President claiming that he intruded upon the consenting rights of the National Assembly to the conclusion and ratification of treaties and the paintiffs' authority to discuss and vote on the treaty bills by concluding and ratifying the written agreement in this case without

the consent of National Assembly.

Summary of the Opinions

The majority opinion of the Court supported by 7 Justices dismissed the case based on the following reasons.

1. Summary of the Majority Opinion by 7 Justices

A. If a decision of National Assembly was made by majority vote and nevertheless the minority group of Congressmen who were against the majority's will could bring competence dispute suit, it is against the nature of majority rule and parliamentarism. In addition, it would be an overuse of judicial power to resolve all kinds of political disputes by judicial means instead of making efforts to decide the will of the organization through discussions and conversations under democratic procedures in the organization. Under current legal systems without express legal provisions allowing 'third party suit' in which a part of a national organization can assert something belonging to the competence of the national organization in the name of the part, Congressmen, members of National Assembly, cannot bring competence dispute suit in which they allege the intrusion of consenting power of National Assembly on the conclusion and ratification of treaties.

B. The authority to discuss and vote of Congressmen can be exercised and intruded not in the external relationships with other national organizations but only in the internal relations of National Assembly. Hence, the direct legal relationships could be taken place only internally in National Assembly — for example, between Congressmen or between Congressman and the Speaker — not with other national organizations outside of National Assembly. For this reason, although the President, defendant, concluded and ratified a treaty without the consent of National Assembly, there is no possibility that it intruded upon the right to discuss and vote of the plaintiffs, Congressmen.

C. (Concurring Opinion of One Justice) Regarding the written

agreement not as a binding treaty in the Constitution but a gentlemen's agreement based on the faith of the countries concerned would be reasonable considering the fact that the written agreement in this case has not gone through the domestic procedures for the conclusion of treaty which made the treaty take effect, that the written agreement was concluded in different name and form with general treaties, and that the written agreement was made based on the faith for a smooth conclusion of 'Revision Bill of Agreement Table' in this case. This suit cannot help being dismissed in that there is no object of the suit because it was on the false assumption that the written agreement was a treaty.

2. Summary of the Dissenting Opinion of One Justice

A. Although the constitutional competence of National Assembly has intruded or gotten into the danger of being intruded by the executive because the executive and the legislature came to be under the control of majority party, the majority in National Assembly or the majority in a specific bill has not held in checks including competence dispute suit in order to protect the competence of National Assembly. This made the situation where the constitutional competence of National Assembly cannot be protected well and the constitutional order of separation of powers is distorted. Under this situation, we need to admit that the minority of Congressmen has legal status to challenge against the competence intrusion of National Assembly on behalf of it so that we might finally protect the constitutional competence of National Assembly through protecting their authority. As a concrete scheme for that, we need to admit 'third party suit.'

B. 'Third party suit' in the competence dispute suit like this case should admit at least a negotiation body or a group of Congressmen which have equivalent substantiality with a negotiation body to the legal status to bring competence dispute suit.

5. Punishment on the Concealment of Cultural Assets and the Possession and Keeping of Stolen Cultural Assets

[19-2 KCCR 90, 2003 Hun-Ma 377, July 26, 2007]

In this case, the Constitutional Court held constitutional the provisions of the Cultural Properties Protection Act punishing the concealment of the stolen cultural assets in spite that the acts such as stealing were unpunishable which had been conducted by other person before the concealment. However, the Court held unconstitutional the provisions which required the obligatory confiscation of the cultural assets concerned and which punished the possession and keeping by the concealer and required obligatory confiscation of the cultural assets when the concealer knew it to have been stolen in spite that the acts such as stealing were unpunishable which had been conducted by other person before the concealment.

Background of the Case

The statutory provisions at issue in this case punishes the acts which was interpreted as unpunishable by a Supreme Court's decision (Supreme Court, 87 Do 238, October 13, 1987). The Supreme Court's decision regarded as unpunishable the preparation to transfer the stolen cultural assets because 'the stolenness in Cultural Properties Protection Act' cannot be recognized in the cultural assets in case that the government cannot exercise the penalty power to the thieves who excavated the cultural assets with no permission due to the completion of the prosecutorial prescription. For this reason, the dealers of cultural assets, the complainants, brought this constitutional complaint claiming that the concerned statutory provisions in this case intrude upon the freedom of occupation, property right and right to equality of the complainants as well as are against the principle of "nulla poena nullum crimen sine lege" and the principle of individual autonomy.

Summary of the Opinions

The Justices were divided 7 to 1 and the majority opinion of the 7

Justices held constitutional the provision of Cultural Properties Protection Act punishing the concealment of the stolen cultural assets in spite that the acts such as stealing were unpunishable which had been conducted by other person before the concealment. However, the majority opinion held unconstitutional the provision which required the obligatory confiscation of the cultural assets concerned and which punished the possession and keeping by the concealer and required obligatory confiscation of the cultural assets when the concealer knew it to have been stolen in spite that the acts such as stealing were unpunishable which had been conducted by other person before the concealment. The summary of the reasons are as follows.

1. Summary of the Majority Opinion

A. The concerned statutory provision in this case which punishes the concealment of cultural assets provides the concealer of the assets should be punished although the harmful acts of other person before the concealment such as stealing it are not punished in order to suppress the causes of taking cultural assets out of Korean territory and of their illicit traffic. The restriction of private interests caused by the provision is just that one cannot use and dispose of the assets in the way to harm the value of the assets by the specific way of behavior, the concealment, and one can use, fetch profits, and dispose the cultural assets in whatever manner only except for the concealment. Hence, this provision does not intrude upon property right violating the Principle of Proportionality.

B. The concerned statutory provision in this case which punishes the possession and keeping of stolen cultural assets is to prevent the cultural assets from being unlawfully traded out of the government's control and, accordingly, the Legitimacy of Legislative Aims Rule in the Principle of Proportionality is met. However, the concerned provision punished even the case when the concealer knew it stolen regardless of whether there was any possession right according to private law, especially when the concealer came to know it stolen after he had taken the possession right according to private law. This goes beyond the sphere of legislative aim. Considering the fact that

the legislative aim stated above could be satisfied by imposing the report duty and registration duty on the possessor and keeper of the assets and by taking sanctions to the violations, the concerned provision is against the Least Restrictive Means Rule. In addition, it makes the disposal of property right of bona-fide purchaser practically impossible. This is against the Constitution in that it imposes needless and excessive burden by going beyond the social restriction on the individual exercise of property right.

2. Summary of Partial Unconstitutionality Opinion of One Justice

If we applying the concerned provisions in this case to the occasion that the cultural assets lawfully belong to an individual's possession, it results in the situation that the acts of possessing, keeping, and concealing of the property by an lawful owner are criminally punished and the properties become confiscated. It is against the Constitution in that it completely denies the property right of an individual.

Aftermath of the Decision

There was a mass media report saying that the Constitutional Court's decision above would cause enormous turmoil to the legal disputes and suits surrounding the ownership problems of stolen cultural assets in the future (Joins.com July 27, 2007).

6. Labor Rights of Foreign Trainees of Industrial Technology

[19-2 KCCR 297, 2004 Hun-Ma 670, Aug. 30, 2007]

In this case, the Constitutional Court declared unconstitutional the regulation of Ministry of Labor which intruded upon the right to equality of foreign trainees of industrial technology by applying only some parts of Labor Standard Act to foreign trainees of industrial technology.

Background of the Case

Some provisions of the regulation of Ministry of Labor entitled 'Guideline for the Protection and Supervision of Foreign Trainee of Industrial Technology' (hereinafter, 'the regulation of Ministry of Labor in this case') protected foreign trainees of industrial technology (hereinafter, 'industrial trainees') with the prohibition of assault and forced labor, the guarantee of minimum wage and the guarantee of industrial security and health. However, they did not include to protect the retirement allowance, preference payment of wage debt, yearly vacation with payment, the protection of pregnant worker in Labor Standard Act.

The complainant, who had come to Korea in March 2004 as an industrial trainee, brought a suit against the regulation of Ministry of Labor claiming that the regulation was unconstitutional because it discriminated against industrial trainees in favor of Korean workers and foreign workers who were not industrial trainees.

Summary of the Opinions

The Constitutional Court, by a 7:2 decision, declared the regulation of Ministry of Labor unconstitutional and the summary of the reasoning is as follows.

1. Summary of the Majority Opinion by Seven Justices

A. The labor rights includes not only "a right for a working seat" but also "a right for a working environment." Since the latter has a character of liberty to defend the infringement upon the human dignity, it includes the right to claim a healthy working environment, a just reward for work, and the guarantee of reasonable working conditions and a foreign worker could enjoy this right. In other words, according to concrete contents of labor right, the right to demand social and economic policies to the government for the acceleration of employment is the social right which should be applied to Korean people. However, since the right to claim a minimum working condition for the workers in order to secure basic means of living and get their human dignity guaranteed under capitalistic economic order has a character as a liberty right, it would be appropriate that a

foreign worker could enjoy the right in this case.

B. If an administrative regulation is applied repeatedly as a standard of exercising discretionary power to be an administrative custom, the administrative agency would be placed under self-restraint to follow the regulation according to the principle of equality and the principle of the protection of trust, and the exercise of power in this case by the administrative agency becomes the exercise of governmental authority with external binding force.

The chief of local government office does administrative guidance so that the employers may follow the regulation of Ministry of Labor in this case, requires the trainee recommending organization for necessary measures when the employer violates the administrative guidance, and should exercise the competence of special supervision and take measures against the violation according to the concerned provisions. On the other hand, the employer is the object of protection in Labor Standard Act and any measures above cannot be taken when the employer violates something that is not prohibited by the regulation of Ministry of Labor and the chief of local government office cannot help repeating such administrative practices against all the employers due to the principle of equality and the principle of the protection of trust. Accordingly, the regulation above becomes the exercise of governmental power with external binding force.

Further, the regulation of Ministry of Labor in this case has the possibility to intrude upon the basic rights of the complainants such as the right to equality since the regulation protects only some matters in Labor Standard Act. Therefore, the regulation of Ministry of Labor is the exercise of the governmental power with external binding force, has the possibility to intrude upon the basic right, and, accordingly, becomes the subject of constitutional complaint.

C. It is difficult to find reasonable grounds that essential particulars of labor standards guaranteed by Labor Standard Act are not applied to foreign industrial trainee even when the industrial trainees are practically in labor relationships offering their services such as having directions and supervision from the employer under the pretext of training, rendering their services, and receiving money under the

name of allowances. Especially, according to official notice by the Small & Medium Business Administration, only the companies equipped with various conditions concerning the employer's ability to observe Labor Standard Act including the employer's ability to observe law and the government's ability to supervise labor can be selected as training company. Hence, it must be irrational discrimination that such companies exclude industrial trainee from the workers to whom all the provisions in Labor Standard Act are applied. According to Article 5 of Labor Standard Act and Article 4 of 'International Covenant on Economic, Social and Cultural Rights of United Nations,' only a statute can limit 'the right to enjoy equal labor conditions on the labor of same value.' In this case, not a statute but an administrative regulation limits the right, and, therefore, it is against the principle of limiting the rights by law. For the reasons, the regulation of Ministry of Labor in this case infringes upon the right to equality of the complainant.

2. Summary of the Dissenting Opinion by Two Justices

The regulation of Ministry of Labor in this case directly binds the chief of local labor office. Hence, although the chief of local labor office is bound to follow the regulation above in the relations to the employer by the administrative practice, that does not mean the regulation itself directly change the right-duty relations of industrial trainees and give effect to their legal status as the norm with external binding force.

The the regulation of Ministry of Labor in this case which excludes industrial trainee from the application of some of the Labor Standard Act is not about the exercise of discretionary power but about the application scope of Labor Standard Act. Hence, we cannot admit its external binding force by the legal principle of self-binding. The regulation above has no legal effect although it arbitrarily restricts the application scope of Labor Standard Act to industrial trainee with no legal foundation.

Therefore, the regulation of Ministry of Labor in this case does not belong to the case when the exercise of governmental power can intrude upon the people's constitutional rights, so we dismiss the claim.

Aftermath of the Decision

The government abolished the foreign industrial trainee system in January 1, 2007 and adopted 'the employment sanction system' which equally guaranteed the basic rights in Labor Standard Act such as retirement allowances and vacation for foreign workers as well. Therefore, the improvement in the level of system has already come true. However, since the industrial trainee system was supposed to exist until the end of the year of 2007, some of the industrial trainee come to be benefited from this decision by the Constitutional Court. In addition, this decision means a foreign worker should be protected equally in terms of labor rights with Korean workers, and that seems to give big impact on other polices concerned with foreign workers (Hankyoreh Newspaper, August 31, 2007).

7. Rating System of Video Materials

[19-2 KCCR 362, 2004 Hun-Ba 36, Oct. 4, 2007]

In this case, the Constitutional Court decided that a part of Article 18 Section 5 of the Disk, Video and Game Materials Act, which provided a video material should go through the rating test by the Korea Media Rating Board before its distribution and the distribution without rating was prohibited, was not against the Constitution.

Background of the Case

The complainant was indicted and convicted in the first and second instance by violating the Disk, Video and Game Materials Act on the ground that he had imported DVDs of foreign movies from early December 1999 to November 22, 2000 without getting the import recommendation by the Korea Media Rating Board and circulated these through internet without having rating test. The complainant appealed to the Supreme Court and, during the pending suit, filed a motion to request constitutional Review on Article 18 Section 5 of Disk, Video and Game Materials Act prohibiting the circulation of video materials with no

rating test. When the Supreme Court denied the motion, the petitioner filed this constitutional complaint against the provision based on Article 68 Section 2 of the Constitutional Court Act.

Summary of the Opinion

The Constitutional Court declared unanimously that prior restraint of the circulation of video materials with no rating test neither comes under the censorship nor violated the principle of the prohibition of excessive restriction. The reasons are as follows.

1. The censorship prohibited by Article 21 Section 2 of the Constitution is an administrative authority's act of deliberating on the contents of an idea or opinion and suppressing it from being published on the basis of its contents – in other words, a ban on publication of the unlicensed material. The censorship is impossible even by law and prohibited under any circumstances.

By the way, rating system in this case is not the procedure where Korea Media Rating Board decides in advance on whether to allow the opening and circulation of a expressive material to the public or not. However, it is just a procedure to prevent the violation of law by the opening and circulation of a expressive material and to rate the ages enjoying the material before the opening and circulation so that it may intercept the bad influence to the minors due to the circulation of the video materials. If the video materials in this case are given the rating which the minors cannot use, the access is denied to the minors at the time of rating by the restrictions of access age. However, when the minors get older and become the age to enjoy the video materials, they can freely access and use the materials because the opening and circulation itself is not prohibited. For this reason, the rating system is different from the censorship which prohibits the opening and circulation of an expressive material in advance and makes impossible for the people to access and use the material after time passes.

Conclusively, as far as the rating system on video materials is put into effect on the premise of their opening and circulation, prohibiting the circulation of video materials with no rating test does not come under the

censorship prohibited by the Constitution.

2. The rating system in this case is to strive for the sound growing of minors and, further, to contribute to the cultural and sentimental life of Korean people by prohibiting the circulation of video materials with no rating test and firmly establishing the rating system of video materials. Accordingly, the legitimacy of the end and the propriety of means are satisfied. In addition, the video materials cannot be effectively regulated by their attributes once spread, so they should be regulated in advance before circulated in order to intercept the bad influences of illegal video materials to minors. Then, the compulsory rating test before their circulation satisfies the Least Restrictive Means Rule in the Principle Against Excessive Restriction.

On the other hand, prior rating system on video materials has something to do with the restriction of basic rights in a certain part according to the result of the rating. However, comparing the bad influences that minors would get from the circulation of exceedingly inflammatory or violent video materials, the disadvantages of the circulators of video materials which are incurred from the age restrictions according to what grating is given could not be an excessive restriction. Hence, the Balancing Competing Interests Rule would be satisfied. As mentioned above, the rating system of video materials in this case satisfies all the requirements of the Principle Against Excessive Restriction including the legitimacy of the end, the propriety of the means, necessary minimum restriction, and balance of interests.

8. Listing Order of Candidate's Name on Ballot Paper

[19-2 KCCR 412, 2006 Hun-Ma 364 et al., Oct. 4, 2007]

In this case, the Constitutional Court declared constitutional the Article 150 Section 4 of Public Official Election Act putting the listing order of candidates on the ballot paper; the candidate from majority party as of the voting day first, the candidate from minority party later, and the independent candidate latest. The Court also declared constitutional the latter sentence of Article 150 Section 5 of Public Official Election Act putting the listing order of candidates on the

ballot paper alphabetically who run for the municipal election nominated by same political party.

Background of the Case

The complainants ran for the fourth nationwide municipal election on May 31, 2006 nominated by Uri Party and failed in the election. They had been assigned the sign "1-Na" or in non-partisanship according to the latter sentence of Article 150 Section 5 of Public Official Election Act and were assigned the sign "7" according to Article 150 Section 4 of Public Official Election Act. The complainants brought constitutional complaint claiming that the latter sentence of Article 150 Section 5 of Public Official Election Act was unconstitutional because it discriminated against the candidates based on the family name, an accidental factor inherited from their parents, and that Article 150 Section 4 of Public Official Election Act was unconstitutional because it discriminated against nonpartisan candidate and intruded upon the Petitioners' rights such as right to equality and the right to hold public office.

Summary of the Opinion

The Constitutional Court unanimously ruled that Article 150 Section 4 and the latter sentence of Section 5 did not intrude upon the complainants' rights and the reasons are as follows.

1. Sign Assignment based on the number of the Representatives belonging to the Political Party (Article 150 Section 4)

On this part, the Court has already decided in 96 Hun-Ma 9 (8-1 KCCR 289, Mar. 28, 1996), 96 Hun-Ma 94 (9-2 KCCR 523, Oct. 30, 1997) and 2003 Hun-Ma 601 (16-1 KCCR 337, Feb. 26, 2004), that the system did not intrude upon the right to equality considering the purport to protect political party system in the Constitution although discriminating against the candidates from minority party and non-partisan candidates. In this case, we follow the precedents because they seem neither to have any important errors in principles

of law nor to have any changes in situation to justify to overrule them.

2. Sign Assignment in alphabetical order of the candidates' names when a political party nominates more than one candidate in the same electoral district (Latter Sentence of Article 150 Section 5)

A. Latter Sentence of Article 150 Section 5 gives advantages to the candidates with earlier number in sign order and discriminates against the candidates with latter number concerned with the preparation of election campaign and the effect of propaganda. However, assigning the sign alphabetically according to the family name of candidates when a political party nominates more than one candidate is to set standards for the sign assignment and to strive for smooth management of election. Hence, its legislative purpose is legitimate and the means to achieve the legislative purpose is proper compared with drawing lots for turns and having voting competition in the party. For this reason, the provision above does not intrude upon the right to equality of the complainants.

B. In addition, the provision above is just about the method to decide the listing order on the ballot paper of the candidates who registered in the same electoral district nominated by same political party. It does neither limit the range of choice among candidates nor block the winning chance of a candidate with the family name of latter order. Hence, it does not excessively limit the right to hold public office of the complainants and the right to name because it does not intervene with and deprive of the name of the candidates.

9. Statutory Provision Punishing Both Sides in Unlicensed Medical Practice

[19-2 KCCR 520, 2005 Hun-Ka 10, Nov. 29, 2007]

In this case, the Constitutional Court declared unconstitutional the provisions in the Special Act on the Control of Public Health Crimes

which punished the business proprietor together with the employee in the same jail sentence when an employee did unlicensed medical practice.

Background of the Case

The Special Act on the Control of Public Health Crimes (hereinafter, 'the statutory provision at issue in this case') provides the business proprietor shall be punished together with the employee in the same jail sentence when an employee did unlicensed medical practice for business. The defendant of the referred case was indicted with his employee (the punishment of stay of execution having become final in the first instance) due to the employee's unlicensed medical practice and got the decision of "not guilty" in the first instance. However, the prosecutor appealed and Seoul District Court for Western Region referred on the statutory provision at issue in this case to the Constitutional Court sua sponte.

Summary of the Opinions

The Constitutional Court declared the statutory provision at issue in this case unconstitutional (8 Unconstitutional : 1 Constitutional) and the reasons are as follows.

1. Summary of Unconstitutionality Opinion by four Justices

The statutory provision at issue in this case provides the business proprietor shall be punished together with the employee in the same jail sentence automatically when an employee did unlicensed medical practice for business regardless of whether there is any blamable act done by the proprietor (for example, the proprietor participated in the employee's crime or the proprietor was negligent in the guidance and superintendence over the employee) or not.

For all that, the statutory provision at issue in this case should not be interpreted different from the clear meaning of the text in the statutory provision adding the requirement of "in the case when the proprietor's negligence on the assignment and superintendence(and

other cases where the business proprietor should take the responsibility) could be found concerned with the employee's crime." That is because it goes beyond the boundary of textual interpretation and cannot be allowed.

Therefore, needless to judge on the statutory penalty itself, the statutory provision at issue in this case is unconstitutional because it is against the basic principle of 'anyone with no responsibility cannot be criminally punished' by imposing criminal penalty on other person's crime regardless of whether there exists responsibility or not.

2. Summary of Unconstitutionality Opinion by four other Justices

The statutory provision at issue in this case provides the business proprietor shall be punished together with the employee in the same jail sentence automatically when an employee did unlicensed medical practice for business without having additional requirements such as the proprietor's participation in the employee's unlicensed medical practice or the proprietor's negligence in the assignment and superintendence over the employee. Namely, it provides as if the business proprietor with no responsibility over the employee's crime could be punished.

Further, although the statutory provision at issue in this case is to punish the business proprietor who is negligent in the assignment and superintendence of the employee, punishing the proprietor with just a negligence same as a main offender with intent cannot be understood as imposing criminal punishment proportionate to each person's own responsibility. However serious the unlicensed medical practice is in its illegality, punishing 'the negligence on the assignment and superintendence over the employee' with 'lifetime imprisonment or imprisonment of two years or more' is excessively heavy statutory penalty compared with the responsibility.

Therefore, the statutory provision at issue in this case is against the Principle of Proportionality between the criminal penalty and responsibility not only by punishing the business proprietor with no responsibility on the employee's crime but also by providing excessively heavy statutory penalty compared with the person's responsibility.

3. Summary of Dissenting Opinion of One Justice

The statutory provision at issue in this case provides in the text that only the business proprietor whose employee infringes the law in his/her 'business.' Hence, interpreting the provision like consistent precedent of the Supreme Court that the provision is applied only to the case when the business proprietor is negligent in the assignment and superintendence over the employee would be 'the interpretation conforming to the Constitution' (die verfassungskonforme Auslegung) which is allowed within the boundary of textual interpretation. When we set this as a premise, the statutory provision above is not against the principle of responsibility. Considering the importance of people's health and responsibility from the status of business proprietor, the business proprietor's criminal liability from the negligence in the assignment and superintendence over the employee could be estimated to be equivalent to that of the actor, the employee. Hence, punishing the business proprietor together with the employee with the same statutory punishment is neither going beyond the limit of legislative discretion nor violating the Principle of Proportionality between the responsibility and criminal penalty.

Aftermath of the Decision

Before this decision, there were several decisions in which the Constitutional Court declared the provision of aggravated penalty in Special Acts unconstitutional due to the fact that their statutory penalty was to heavy. However, this decision is the first decision that declared unconstitutional the provision which punished the business proprietor with the same jail sentence together with the offender, the employee, applying the principle of responsibility in criminal penalty of "no responsibility, no criminal penalty." This decision seems to give some effects to the decisions on the various types of provisions punishing both sides(Seoul Economy Daily, Hankook Economy Daily, Seoul Daily, JoongAng Daily and Hankyoreh Daily, on December 10, 2007).

10. Korean Broadcasting Commission's Warning against MBC

[19-2 KCCR 611, 2004 Hun-Ma 290, Nov. 29, 2007]

This case is about the cancellation of Korean Broadcasting Commission's warning against the contents and the concerned persons of the broadcasting by MBC on the ground that the Commission's administrative measure restricted the freedom of broadcasting without legal basis.

Background of the Case

A complainant, MBC is broadcasting company that produces and broadcasts 'PD pocketbook,' a program dealing with contemporary topics. The other complainants Jin-Yong Choe who is a producer of MBC and was in charge of producing 'PD pocketbook' in February 2004. The complainant broadcast a program entitled 'pro-Japanese group is still alive 2' in 'PD pocketbook' on February 17 2004. In th program, they dealt with the reason why the passage of 'special bill for inquiring into the real state of affairs against Korean people by pro-Japanese group under the regime of Japan.' In addition, they included Congressmen Yon-Hee Choe and Yong-Kyun Kim in the Legislation-Judiciary Committee are against the bill and insisting the elimination of its major contents whose fathers were the chief of township under the Japanese regime.

Congressmen Yon-Hee Choe and Yong-Kyun Kim requested Election Broadcasting Inquiry Commission (hereinafter Inquiry Commission) to correct the broadcasting. On this request, Inquiry Commission issued warning against the contents and the concerned persons of the broadcasting on March 5, 2004 on the ground "that the composition of the contents was intended to be advantageous or disadvantageous to specific expectant candidates and did not make the candidates keep equity with the other candidates who was supposed to run for the election in the same district." The Inquiry Commission also notified Broadcasting Commission (a claimee) about it, the claimee issued the warning against the complainants on March 9, 2004.

The complainants had brought a suit to Seoul Administrative Court for the cancellation of the warning above (this suit was rejected later

on the ground that it was not the subject of administrative suit), and initiated constitutional complaints of this case on April 9, 2004 claiming that the warning against the complainant on March 9 2004 was unconstitutional infringing upon the complainant freedom of speech.

Summary of the Opinions

1. Concerning the Claim of complainant Choe ○ Yong

The complainant Choe ○ Yong insists that he was branded as a person who acted against his company's interests by being treated as an unfair journalist through the warning in this case. However, such disadvantage of the complainant would be only an indirect and factual one and not a legal disadvantage which directly restricts the basic rights of the complainant. Then, complainant Choe ○ Yong's initiation of constitutional complaint would be illegal due to the lack of self-relevancy.

2. Concerning the Claim of complainant MBC

Considering the fact that the warning in this case is for the claimee to take sanctions against the concerned broadcasting by warning against the contents of broadcasting expression to broadcasting company, such sanctions should have legal basis based on Article 37 Section 2 of the Constitution because the sanctions restrict the freedom of broadcasting. Article 11 Section 2 of the old 'Rule on the Composition and Operation of Election Broadcasting Inquiry Commission' (hereinafter 'the Rule in this case') before the revision on January 24, 2006, had provided "Inquiry Commission can decide to give admonishment or warning when the degree of violation is judged to be minor." However, such 'an admonishment or warning' by the Rule in this case could not be included in the sanctions enumerated in Article 100 Section 1 of the old Broadcasting Act before the revision on October 27, 2006 and were beyond the boundary of 'sanctions' that could be decided by the delegation of a statute. Accordingly, because the warning in this case based on Article 11 Section 2 of the Rule in

this case is against the principle, 'a constitutional right could be restricted only by a statute' and, needless to examine further, it infringes upon the freedom of broadcasting of the complainant, MBC, we cancel it.

3. Concurring Opinion and Dissenting Opinion

A. Concurring Opinion of Two Justices

Although the warning itself in this case is not the exercise of governmental authority, the rule enacted by the claimee for the evaluation of broadcasting restricts basic rights. For this reason, it would be reasonable for us to grasp them as a series of act for litigation economy and understand the whole as an exercise of governmental authority which can intrude upon basic rights. Based on this logic, we will judge the merit.

B. Concurring and Dissenting Opinion of One Justice

Because the warning in this case was judging the contents of broadcasting post factum according to Article 8-2 to be illegal, it directly restricted the freedom of speech of the complainants. Therefore, the initiation of constitutional complaint by the complainants are all legal.

As Article 11 Section 2 of the Rule in this case is to apply slighter sanctions than the sanctions law provides based on concrete propriety in case the degree of violation is not serious, it is not appropriate to say that it is against the principle, 'a constitutional right could be restricted only by a statute.' However, it was beyond the purport of Articles 8 and 8-2 of the Public Official Election Act and overused the power of examination and sanction on election broadcasting that Korean Broadcasting Commission judged the broadcasting in this case to be an unfair election broadcasting and gave warning against it. Therefore, the measure in this case cannot be justified by Article 8 or Article 8-2 and unreasonably infringed upon the freedom of speech of the complainants violating Article 37 Section 2 of the Constitution.

C. Dissenting Opinion of One Justice

As the warning in this case was based on Article 11 of the Rule in this case that materialized Article 8-2 Section 5 of Public Official Election Act entrusted by Article 8-2 Section 7 of the same Act, it has legal basis and does not violate the principle, 'a constitutional right could be restricted only by a statute.' Since the warning in this case was against the complainant MBC was to secure the fairness in election broadcasting, it did neither go beyond the boundary of discretion of the claimee nor excessively restrict the freedom of broadcasting. Hence, it did not violate the principle of proportion. For this reason, the initiation of the complainant MBC should be dismissed.

Significance of the Decision

This decision understood that 'warning' of the Broadcasting Commission against PD Pocketbook's broadcasting gave MBC a demerit mark(minus 2 points) when MBC got screening for 'Broadcasting Commission's recommendation for re-authorization to get re-authorization as a broadcasting enterpriser. Hence, the Constitutional Court decided it infringed upon the freedom of broadcasting (freedom of expression).

Article 37 Section 2 of the Constitution provides that the restriction of basic rights of people should be made 'by means of law.' The Constitutional Court decided the warning system of Korean Broadcasting Commission violated the principle, 'a constitutional right could be restricted only by a statute'(the lack of legal basis in restricting basic rights) because the warning system was provided not in Article 100 Section 1 of Broadcasting Act but in the Rule of Korean Broadcasting Commission at the time when the warning was issued. The Court also decided whether such a warning against a broadcasting belonged to excessive restriction was not needed to be judged further. The warning in this case was cancelled by this decision.

This decision emphasized again the fact that restricting basic rights of people such as the freedom of broadcasting should be based on a statute enacted by the people's representatives.

11. Prohibition against the Establishment of Plural Medical Institutions by a Medical Personnel with Plural Licenses

[19-2 KCCR, 795, 2004 Hun-Ma 1021, Dec. 27, 2007]

In this case, the Constitutional Court decided to be not conforming to the Constitution the provision in the Medical Act that a medical personnel with licenses of medical doctor and herb doctor could only establish one medical institution.

Background of the Case

The Medical Act (hereinafter, the provision at issue in this case) provides a medical personnel can establish only one medical institution. The complainants who are medical personnels with the licenses of medical doctor and herb doctor could not establish plural medical institutions for each license due to the provision at issue in this case, and brought this Constitutional Complaint claiming that the provision at issue in this case infringed upon the basic rights such as the freedom of occupation and equality right.

Summary of the Opinions

The Constitutional Court decided the statutory provision at issue in this case to be not conforming to the Constitution (non-conforming 7 : dismissed 2) and the reasons are as follows.

1. Summary of Majority Opinion by 7 Justices

A. Obtaining license means recovering freedom of occupation by the license. As for the freedom recovered like this, it is possible that National Assembly can legislate the methods and contents to attain the license based on the character of the professional field and judgment of policy-making. However, fully prohibiting this again would be out of the boundary of legislative power.

Medical personnels with plural licenses have relatively more knowledge and ability in both western and oriental medicine, and can get and analyze useful information on the effect which the medicines

give to human body and cope with that. Even considering the fact that the impact on human body has not been scientifically verified when western and oriental medical services are piled upon one another, it is enough that the law controls only dangerous spheres. Hence, fully banning even in spheres with no danger such as diagnosis went too far.

B. Medical personnels with plural licenses are treated on the same footing as those with single license in the point that they can establish only 'one' medical institution. Medical personnels with plural licenses graduated medical school and college of oriental medicine each, and passed national examination for medical doctor as well as herb doctor. Hence, they have relatively more knowledge and ability in both western and oriental medicine, can get and analyze useful information on the contents of his medical treatment of both western and oriental medicine and effect which their medical treatments give to human body, and more effectively cope with that. The provision at issue in this case which allowed medical personnels with plural licenses to establish only one single medical institution just like the medical personnels with single license treats 'different things equally,' and has no rational basis.

C. The provision in this case infringes upon the freedom of occupation and the right to equality of the complainants, medical personnels with plural licenses. However, this provision also applies to the medical personnel with single license. It is evident that medical personnels can directly give medical services anywhere if this provision loses force by the decision to be unconstitutional and legal vacuum takes place. In addition, the issue of in what scope and by what method the medical personnels with plural licenses can give medical services as a medical doctor and herb doctor when they are allowed to perform their double occupations ultimately belongs to the category that National Assembly decides after getting enough social consensus. Therefore, we issue 'the Decision of Non-Conforming to the Constitution' which orders tentative application of the provision at issue in this case.

2. Summary of Dismissal Opinion of Justice Lee Dong-heub

The restriction of constitutional rights by the provision in this case destines the exercise of executive power such as administrative agency's retrocession of the establishment report and refusal of establishment permission since the establishment report to the concerned agency and permission by the agency are needed for medical personnel's establishment of medical institution.

Against this administrative disposition, a revocation suit is possible. Considering the fact that medical personnels with plural licenses are both medical doctor and herb doctor and the fact one of the purports of the provision is to put restrictions on the place where direct medical treatment can be made, the provision in this case could be interpreted to mean that the medical personnel with plural licenses can establish 'one medical institution as a medical doctor and another medical institution as a herb doctor' and that the institutions should be established in one place where direct medical treatment can be done. In this case, the administrative disposition could be cancelled and the infringement upon the freedom of occupation by medical personnels with plural licenses are eliminated.

Finally, the provision at issue in this case cannot be the object of Constitutional Complaint provided in Article 68 paragraph 1 of the Constitutional Court Act because the remedial procedure of general administrative action disputing the illegality of the administrative disposition and possibility to win at the administrative action exist.

3. Summary of Partial Unconstitutionality Opinion of Justice Cho Dae-hyen

A medical personnel with plural medical licenses can establish medical institutions for each licenses. The provision at issue in this case allows only the medical personnel with professional licenses to be engaged in direct medical treatment, and restricts the place establishing the medical institution to only one place in order to prevent unlicensed personnel from managing a medical institution. Hence, the aim and means of the provision are reasonable, and it is not against the Principle of Proportionality because it is enacted to

secure the effectiveness of professional license system. Therefore, the provision at issue in this case is not unconstitutional

The Ministry of Health & Welfare interprets 'one' medical institution in this case as 'one kind of' medical institution. This interpretation restricts the freedom of occupation of the medical personnel who got the license of medical doctor and that of herb doctor and are permitted to do both the western medical treatment and oriental one. The rational reason to justify the restriction of freedom cannot be found. Therefore, the provision at issue in this case is against Article 15 and Article 37 Section 2 of the Constitution.

Finally, the provision at issue in this case could be interpreted to be constitutional and only its interpretation by the Ministry of Health & Welfare is against the Constitution. Therefore, we cannot declare the provision at issue in this case to be unconstitutional or not conforming to the Constitution, and we just can declare unconstitutional the interpretation that interprets "one medical institution" as "one kind of medical institution."

12. Cancellation of Fair Trade Commission's No-Suspicion Decision

[19-2 KCCR 832, 2005 Hun-Ma 1209, Dec. 27, 2007]

In this case, the Constitutional Court declared constitutional the no-suspicion decision by Fair Trade Commission which decided the Minister of National Defence's purchase of milk from a member of Agricultural Cooperative by a private contract was not an unfair refusal of a transaction.

Background of the Case

Minister of National Defence purchased milk from a member of Agricultural Cooperative such as Seoul Milk Cooperative by a private contract. The complainants reported to the claimee that the purchase of milk which ignored their demand for public tender as general milk manufacturers becomes unfair refusal of a transaction, but the claimee issued no-suspicion decision. The complainants brought this

Constitutional Complaint claiming that the no-suspicion decision above infringed upon their right to equality.

Summary of the Opinions

The Constitutional Court decided unanimously that the no-suspicion decision by Fair Trade Commission did not infringe upon the constitutional rights of the complainants. The reasons are as follows.

1. In determining whether each refusal of trade is an illegal act which could hinder the fair trade order provided in Article 23 Section 1 of the Monopolization Regulation and Fair Trade Act, various illegal factors such as market situation (market concentration, characteristics of merchandise, discriminative degree of goods, channel of distribution, difficulty of new entry), transactional status of parties (relationships between the parties, market share and ranking of the actor, brand image etc.), the effect of the concerned act to the business activities of the other party and trade order of market(mode of the act, whether the other party can choose alternative business acquaintance, the degree of competition restriction and exclusion effect etc.) should be considered altogether. Firstly, for Minister of National Defense to be furnished with milk from member association of Agricultural Cooperative by free contract is not illegal because it is based upon the proviso of Article 7 in the Governmental Contract Act, Article 26 Section 1 Paragraph 8 of the Enforcement Decree of Governmental Contract Act, Article 57 Section 1 Paragraph 7, Article 111 Paragraph 6, and Article 134 Section 1 Paragraph 10 of the Agricultural Cooperative Act. Secondly, the Minister of National Defense could judge that being furnished from member association of Agricultural Cooperative which could not conduct profit-making enterprise according to Article 5 Section 3 of the Agricultural Cooperative Act could be a way to be stably and timely furnished with milk. Thirdly, as long as the concerned market could be demarcated as the whole white milk market, with 3.2% among the whole, the portion that the Minister of National Defense can purchase, the refusal of transaction could not impede fair trade. Furthermore, 'the test guideline against unfair trade' of Fair Trade Commission exempts the

test in principle when the market share of the enterpriser who refused individual trade is under 3.2% (so-called Safety Zone). Considering these situations synthetically, the Ministry of National Defence's purchase of milk in this case by a private contract was not an unfair refusal of a transaction, and, therefore, the no-suspicion decision by Fair Trade Commission could not be markedly arbitrary and irrational.

2. In order to judge whether the Ministry of National Defence's purchase of milk from a member of Agricultural Cooperative by a private contract was the act (refusal of a transaction) that unreasonably impeded the other enterprisers' business activities provided in Article 3-2 Section 1 Paragraph 3, the decision on whether it belonged to the category of market holder's act and the demarcation of the concerned market should be made first. Since the military milk market and general milk market are same in trade objects (white milk), trade region (nationwide regional market), trade stage (consumption stage), and trade counterpart (general milk manufacturer who are not divided from general milk manufacturer), the military milk market cannot be demarcated as a separate and discernable concerned market and the minister of National Defense only has the purchase portion, 3.2% among the whole white milk market. The portion of market share is far below 50%, the presumed criterion of the market holder provided in Article 4 of the Monopolization Regulation and Fair Trade Act. In such case, in order to admit market-holding power, it should be shown that the minister of National Defense can limit the actual competition in the whole white milk market. However, there is no evidence to admit that. Therefore, since the Minister of National Defence's purchase of milk by a private contract was neither the act (refusal of a transaction) that unreasonably impeded the other enterprisers' business activities nor belonged to the category of the status-abusing act by market holder. Therefore, the no-suspicion decision could not be arbitrary and irrational.

Aftermath of the Decision

This decision is of great significance in the point that it presents a

concrete judging criterion on unfair trade act as an individual refusal of trade and market holder's status-abusing act as unreasonably impeding act against an enterpriser (refusal of trade).