Preface

The publication of this volume is aimed at introducing to foreign readers important cases decided from January 1, 2011 to December 31, 2011 by the Korean Constitutional Court.

This volume contains 28 cases, 6 full opinions and 22 summaries.

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

December 24, 2012

Kim Taeck-Soo
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, "96Hun-Ka2" means the constitutionality case referred by an ordinary court, the docket number of which is No. 2 in the year 1996.

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I. Full Opinions

1. Case on Prohibition of Filing a Complaint against Lineal Ascendants

[23-1(A) KCCR 12, 2008Hun-Ba56, February 24, 2011]

Questions Presented

Whether Article 224 of the Criminal Procedure Act (enacted by Act No. 341 on September 23, 1954; hereinafter, the 'Instant Provision'), which does not allow a person to file a complaint against his/her lineal ascendant(s), violates the principle of equality (negative)

Summary of Decisions

A victim's right to make a complaint against an alleged criminal offender is merely a legal right stipulated in the criminal procedural laws, over which the legislature should exercise extensive policy-making power considering the nation's traditional judicial culture, morality and cultural traditions as well as the purpose pursued. With regard to family matters, traditional morality plays a more important role, and such traditional morality is inherently affected by the nation's distinct cultural and moral traditions, which have been chosen and accumulated by the people of the nation and society, as well as universal values and ethics. Parts of the Confucian tradition, which our country adopted and made part of our tradition over a long period of time, still remain as an innate part of our morality. In this respect, the Instant Provision appears to be reasonable in its differential treatment in restraining a descendant of the would-be accused, from exercising the right to file complaints when that prohibition is for the purpose of deterring the unethical nature of such complaint and maintaining our tradition of 'Hyo,' the filial duty of children to take care of their parents. Therefore, the Instant Provision does not violate the principle of equality set by Article 11 Section 1 of the Constitution.

Opinion of Unconstitutionality by Justice Lee Kong-Hyun, Justice Kim Hee-Ok, Justice Kim Jong-Dae, Justice Lee Dong-Heub, Justice Mok Young-Joon

The Instant Provision aims to maintain the basic order in the family system founded upon the Confucian tradition and this legislative goal is legitimate. However, its way of restricting the basic right, in other words, depriving certain victims of their right to file complaints in criminal proceedings, appears to be problematic in terms of proportionality between the purpose and the extent of such differential treatment. While an ascendant-descendant relationship can be a factor to be considered in determining the gravity of a crime in terms of the nature of the crime and the responsibility of the perpetrator, it shall not be a reason to deny the State's exercise of its power to punish criminals. We cannot see a reasonable balance between the aim and means in differential treatment among victims of criminal offences, especially when the government renounces its power to criminally punish ascendants that do not deserve protection of the law, while neglecting its duty to protect descendants as criminal victims. Moreover, the deprivation of the victim's right to file complaints cannot be regarded to be the only and absolutely necessary measure to be taken in maintaining the basic order of the family system.

Hence, the Instant Provision does not provide a proportionate means to achieve the objective of the differential treatment, in violation of the principle of equality.

Parties

Petitioner
Suh, ○-Hyeon
Representative: Jung, Bo-Keun

Underlying case
Seoul High Court 2008ChoJae687 Petition for Adjudication

Holding

Article 224 of the Criminal Procedure Act (enacted by Act No. 341 on September 23, 1954) does not violate the Constitution.

Reasoning

I. Introduction of the Case and Subject Matter of Review

A. Introduction of the Case

1. Petitioner, after being found not guilty of several charges including injury to lineal ascendant, etc., for which his mother named Oh, X Rae had filed a complaint against, in turn filed a complaint against his mother alleging false accusation and malicious perjury. But, on December 26, 2007, the prosecutor dismissed the complaint, thereby not instituting an indictment, on the ground that the complaint, filed against his lineal ascendant, violates Article 224 of the Criminal Procedure Act (Suwon District Prosecutors' Office, 2007HyungJae90858).

2. The petitioner appealed against the prosecutor's non-charge decision and filed a petition for adjudication by the court pursuant to the Prosecutors' Office Act (Seoul High Court, 2008ChoJae687).

While pending the suit, the petitioner moved the court to file a request for a constitutional review of Article 244 and Article 235 of the Criminal Procedure Act, but upon dismissal, the complainant filed this constitutional complaint on June 12, 2008.

B. Subject Matters of Review

The petitioner requests constitutional review over Article 224 (limitation of complaint) and Article 235 (limitation of accusation), but

the underlying case pertains to filing a petition for adjudication by the court after the complaint against his own lineal ascendant was dismissed by the prosecutor who rendered a non-charge decision, and the one who can file a petition for adjudication by the court refers to the one who has filed a complaint. In this regard, the issue in the underlying case is limited to the constitutionality of the statutory provision limiting the filing of a complaint, which is Article 224 of the Criminal Procedure Act. Therefore, the question presented for the Court's review is whether Article 224 of the Criminal Procedure Act (enacted by Act No. 341 on September 23, 1954) is in violation of the Constitution. The provision subject to review is as follows.

[Provisions at Issue]

The Criminal Procedure Act (enacted by Act No. 341 on September 23, 1954)

Article 224 (Prohibition on Filing a Complaint Requesting Initiation of Prosecution) A complaint shall not be lodged against a lineal ascendant of the principal himself/herself or his/her spouse.

[Related Provision]

(Intentionally omitted)

II. Arguments of Complainants and Related Bodies

(Intentionally omitted)

III. Review on Justiciability

Constitutional complaints filed pursuant to Article 68 Section 2 of the Constitutional Court Act must meet the following requirement: relevance of precondition of the challenged statute for the underlying case. And the relevance of precondition here means the requirement that constitutionality of a challenged statute be a precondition for disposition of the underlying case and therefore, the decision to be rendered by the Constitutional Court concerning whether the provision

at issue is constitutional or not may alter the conclusion on the holding of the underlying case or change the legal significance with respect to the contents and effect of the underlying case (see 19-1 KCCR 482, 498-499, 2006Hun-Ba10, April 26, 2007).

In this case, when the petitioner filed a motion to request for a constitutional review of the Instant Provision, the underlying case, or the petition for adjudication by the court, was pending. The Instant Provision, serving as the statutory basis for the prosecutor's non-charge decision against which the petitioner filed a petition for adjudication by the court, applies to the underlying case. And, since the decision regarding constitutionality of the Instant Provision may alter the holding of the underlying case or change the legal significance with respect to the contents and effect of the underlying case, the constitutional complaint fulfils the requirement that the Instant Provision be a precondition for the adjudication of the underlying case.

Meanwhile, although the underlying case, or the petition for adjudication by the court, was concluded as the decision to dismiss was finalized, it cannot be said that the constitutional complaint in this case ceases to meet the requirement that the Instant Provision be a precondition for the adjudication of the underlying case, as Article 75 Section 7 of the Constitutional Court Act stipulates that the party may request a retrial of the case before the court when a constitutional complaint prescribed in Article 68 Section 2 of the Constitutional Court Act is upheld and when the underlying case has already been decided by a final judgment.

IV. Review on Merits

A. Review on the Legislative History and Purposes of the Instant Provision

The Instant Provision is based on our historical ideology of "Hyo," or the Confucian tradition of the filial duty imposed on children to take care of their parents or grandparents. According to this tradition, it is regarded as a fine custom for a child to endure any harm that

may be caused by their parents or grandparents and to file a criminal complaint against one's parents or grandparents has been regarded as an action against morality.

While the Criminal Procedure Act during the time of Japanese Occupation, which was identically modeled after Japanese Criminal Procedure Act, prohibited complaints or accusations only against one's parents or grandparents (Article 259 and Article 270), the Instant Provision prohibits complaints or accusations even against a lineal ascendant of the principal's spouse. This ideological basis of the prohibition placed on complaints against lineal ascendants dates from the criminal justice system in the Josun Dynasty.

"Gyongguk Daejeon," or the Great Code of National Governance in the Joseon Dynasty, in its "Hyeongjeon," the criminal law part of the Great Code, clearly stipulated that "in case when a descendant, a wife, a concubine or a slave accuses one's parents or a head of household for their wrongdoings, he/she shall be executed by hanging except when a case is related to a rebellion or treason; and when a spouse of a slave accuses a head of household in the master's family for his wrongdoing, he/she shall be sentenced to get 40 lashes and is to be sent into exile to a 3000ri-off place." "Sok Daejeon," the Supplement to the Create Code, also stipulates in its "Hyeongjeon (criminal law)," that "if a descendant accuses his/her parents or grandparents of their wrongdoings, he/she shall be punished by law, thereby reinforcing ethics and morals by bringing people to justice without looking into the merits," which was inherited by "Daejeon Tongpyeon," the Unified Create Code and "Daejeon Hoetong," the Compendium of the Great Code.

B. Guarantee of the right of complaint and protection of complainant' rights

1. Meaning of complaint

A "complaint" is when a victim of a crime or anyone who has a certain relationship with the victim reports the crime to an investigation agency and expresses intention seeking punishment of the

alleged criminal offender. In case of a crime requiring victim's complaint, filing a complaint is a prerequisite condition for bringing the claims, whereas in case of a crime not subject to a complaint, filing a complaint is a cause for initiating an investigation.

2. Guarantee of the right of complaint and relatedness to basic rights

Article 246 of the Criminal Procedure Act, by stipulating that a public prosecution shall be instituted and executed by public prosecution, prohibits a prosecution by a private party and adopts the principle of state prosecution and the principle of prosecution exclusively by a public prosecutor. But it exceptionally allows quasi-prosecution procedures.

The constitutional guarantee of the crime victim's right to he heard at the proceedings of a trial under Article 27 Section 5 of the Constitution which prescribes that "a victim of a crime shall be entitled to make a statement during the proceedings of the trial of the case involved as under the conditions prescribed by law" is also based on the principle of state prosecution.

As such, under the legal system where the state agency exclusively holds the right to prosecute, it is required that the exercise of victim's right to make a complaint should be guaranteed and the complainant's rights should be extensively and broadly acknowledged, so that they may be sufficiently protected (see 11-1 KCCR 73, 79, 98Hun-Ma85, January 28, 1999).

Victim's right to make a criminal complaint for a crime that infringes upon his/her legal rights is the most basic right as a member of our society. Although such a right is not a basic right guaranteed by the Constitution, the right is regarded as a direct premise of the right to be heard at the trial proceedings. Therefore, a discussion as to whether the right of complaint is infringed should lead to a discussion as to whether the right to be heard at the trial proceedings, one of the basic rights guaranteed by the Constitution, is infringed.

C. Review of constitutionality of the Instant Provision

Article 11 Section 1 of the Constitution stipulates that "[a]ll citizens shall be equal before the law and there shall be no discrimination in political, economic, social or cultural life on account of sex, religion or social status."

The Instant Provision prohibits a person, who has a special relationship called "Bi-Sok," i.e. descendant, with the accused, from exercising the right to file complaints against a lineal ascendant of the person himself/herself or his/her spouse and the issue here is whether the Instant Provision which limits the right to file complaints due to the difference in status violates the principle of equality guaranteed by Article 11 Section 1 of the Constitution.

In general, for purposes of ascertaining violation of equality, the principle against arbitrariness is employed, but in those cases where the Constitution specially demands equality or where differential treatment causes a significant burden on the related fundamental rights of other individuals, the constitutional review shall be conducted using a strict standard of the principle of proportionality (11-2 KCCR 771, 787-789, 98Hun-Ma363, December 23, 1999; 11-2 KCCR 732, 749, 98Hun-Ba33, December 23, 1999; 12-2 KCCR, 167, 181, 97Hun-Ka12, August 31, 2000).

As the principle against arbitrariness as a standard of review only examines the existence of any reasonable ground that would legitimize discrimination, it is enough to find and confirm the actual difference between the subjects to be compared or legislative purposes (purposes to discriminate). Whereas strict scrutiny based on the principle of proportionality reviews the relationship between the discrimination and any reasons that legitimize such discrimination beyond the mere existence of legitimate reasons, in other words, the nature of difference and relative importance between the subjects to be compared or the appropriate balance between the gravity of legislative purposes (purposes to discriminate) and the degree of discrimination (KCCR 13-1, 386, 403, 2000Hun-Ma25, February 22, 2001).

D. Opinion of Constitutionality by Justice Lee, Kang-Kook, Justice Cho, Dae-Hyun and Justice Min, Hyeong-Ki, Justice Song, Doo-Hwan

1. Issue of the case and standard of review

(A) The victim's right of complaint is not a fundamental right under the Constitution but a mere legal right guaranteed by the Criminal Procedure Act. On the other hand, it becomes the prerequisite for citizen's exercising the right to be heard at the criminal proceedings under Article 27 Section 5 of the Constitution. In this regard, therefore, it is required to review whether the Instant Provision causes serious limitation in the exercise of the victim's right to be heard at the criminal proceedings.

(B) The victim's right to be heard at the criminal proceedings depends on initiation of prosecution (see 149 KCCG 451, 458, 2005Hun-Ma 764, February 26, 2009). In the case of a crime not subject to victim's complaint, as prosecution can be commenced regardless of filing of a complaint by the victim, the Instant Provision only causes indirect or actual restriction on the exercise of the victim's right to be heard at the criminal proceedings and therefore, it does not pertain to a case where the right to be heard at criminal proceedings is severely restrained.

On the other hand, in the case of crimes subject to victim's complaint, it is undeniable that due to the Instant Provision, a victim who is a descendent of a criminal cannot exercise his/her right to be heard at the criminal proceedings in principle, with only a few exceptions, and therefore, his/her right to be heard at the criminal proceedings is severely restrained.

However, even for some crimes among crimes subject to victim's complaint, certain special Acts {including Article 18 of the Act on Punishment of Sexual Assault and Protection of Victims (enacted as Act No.4702 on January 5, 1994; the provision is transferred to Article 19 of the Special Act on Punishment, etc. of Sex Crimes enacted as

Act No. 10258 on April 15, 2010) and Article 6 Section 2 of the Special Act on Punishment, etc. of Domestic Violence Crimes (enacted as Act No. 5436 on December 13, 1997)} allow a person to press charges against his/her lineal ascendant. Therefore, the Instant Provision prohibiting an alleged victim from filing a complaint against his/her lineal ascendant can be applied to only a small number of crimes such as 'Violation of Private Secrecy' (the Article 316 of Criminal Act) or 'Occupational Disclosure of Client or Patient(the Article 317 of Criminal Act).

Also, when a perpetrator who is a lineal ascendant of the victim is also the victim's legal representative, although the victim as a descendant of the perpetrator cannot directly file a complaint, victim's relatives may file a complaint on behalf of the victim (see Article 26 of the Criminal Procedure Act), and in most cases involving financial crime by lineal ascendants committed against their descendants, as the practice allowing special exception to crimes among relatives applies, actual benefits for filing a complaint become marginal.

Considering all these facts, the Instant Provision does not appear to severely restrict the victim's right to be heard at criminal proceedings regardless of whether a crime is subject to a victim's complaint or not. Therefore, it is enough for the Court to apply the principle against arbitrariness, which is a relaxed standard of review, and examine whether there are any reasonable grounds for such discrimination, in determining whether the principle of equality is violated by the Instant Provision.

2. Whether the discrimination is based upon reasonable grounds

As reviewed above, the victim's right of complaint is only a legal right under the criminal procedure, not a basic right guaranteed by the Constitution. Therefore, the legislature enjoys extensive legislative power to make related statutes, considering the nation's traditional judicial culture, morality and cultural tradition as well as the purpose to be pursued.

Also, systemically considering the related statutory provisions as a whole, the Instant Provision prohibiting an alleged victim from filing a complaint against his/her lineal ascendant is applied to only a few limited crimes whose seriousness in damages are relatively low because victims of domestic violence or sex crimes are excluded by stipulation of Special Acts as reviewed. Therefore, it is highly probable that legislation of a statutory provision prohibiting a descendant (Bi-Sok) from filing a complaint against his/her lineal ascendant falls in a category where the legislature has a wider range of legislative -formative power to pursue specific ethical or social purposes.

A lineal ascendant subject to the Instant Provision is a first-hand relationship formed by blood relationship and marriage, different from any other relationships formed by contracts, and is maintained by spiritual and moral values like understanding, love and commitment, not by interests or profits represented by efficiency and rationality. Within this area, the role of traditional morality and ethics, rather than that of law, as buttress of society can only be more emphasized and valued.

Law inevitably shares a certain common ground with morality, and at the bottom of our legal mindset, individualism affected by modern western ideals and Confusion tradition centered on community and blood relationship coexist.

Lineal ascendants exert themselves to provide for the emotional and physical upbringing of their descendants and also give protection, while descendants have the duty to share responsibility as family members, and to appreciate and respect ascendants. The essence of the relationship between lineal ascendants and descendants seems to be common in any society, but the discipline of such relationship is strongly affected by the nation's distinct cultural and moral traditions, which have been chosen and accumulated by the people of the nation and society, as well as universal values and ethics. In our society, parts of the Confucian tradition, which our country adopted and made part of our tradition over a long period of time, still remain as an innate part of our morality, despite adoption of modern western ideals.

1. Case on Prohibition of Filing a Complaint against Lineal Ascendants

In regulating relationships among blood relatives where realization of self-regulating ethics is emphasized, abstract and open-ended Confucian norms have played a more important role than detailed and specific statutory provisions, among which, respect for one's parents has been considered as the highest moral virtue above anything else. Thus, it is natural that a statute regulating relationship between lineal ascendant and descendant in our society accepts this 'Hyo' tradition, or the filial duty of children to take care of and respect one's parents.

In this regard, prohibiting a descendant from filing a complaint against his/her linear ascendant to deter such unethical behavior and to protect our traditional norms appears to be reasonable in its differential treatment.

Despite the prohibition, as other relatives still may file a complaint against the relevant lineal ascendant who is an alleged perpetrator on behalf of the victim, the lineal ascendant who commits a crime cannot absolutely evade punishment.

Also, the Instant Provision's purpose is to deter the unethical act of descendant by placing limitation on filing a complaint directly against his/her ascendant, not to discriminately protect lineal ascendants. Thus, though lineal ascendants including those who are not worthy of protection receive benefit as a result, it is not a special treatment provided by the statute but an incidental benefit that goes with constraining the descendant's unethical practice.

3. Sub-conclusion

For the foregoing reasons, the Instant Provision which prohibits a descendant from filing a complaint against his/her lineal ascendant is reasonable in its differential treatment, and therefore, it does not violate the principle of equality under Article 11 Section 1 of the Constitution.

E. Opinion of Unconstitutionality by Justice Lee, Kong-Hyun, Justice Kim, Hee-Ok, Justice Kim, Jong-Dae, Justice Lee, Dong-Heub and Justice Mok, Young-Joon

As we think that the Instant Provision which prohibits a descendant from filing a complaint against his/her lineal ascendant runs counter to the Constitution, in violation of the principle of equality, we hereby unfold our opinion.

1. Standard of review

The Instant Provision does not simply exclude or deprive a descendant who is a victim of crime of the mere legal right of filing a complaint, but causes serious restraint on the exercise of the right to be heard at criminal proceedings guaranteed by the Constitution as a basic right.

This serious restraint is clearly visible in crimes requiring victim's complaint for initiation of prosecution. It is true that among those crimes, the number of crimes subject to the Instant Provision has dramatically decreased since some special Acts, such as Article 18 of the Act on Punishment of Sexual Assault and Protection of Victims and Article 6 Section 2 of the Special Act on Punishment, etc. of Domestic Violence Crimes, have been enacted. But, if we simply decide that the problem of serious infringement on the basic right is resolved due to the enactment of the special Acts, it is nothing but acknowledging the premise that without the special Acts, general restriction on the right of complaint may become a serious infringement of basic rights. And the degree of seriousness in limitation on the right to be heard at criminal proceedings caused by a statutory provision that limits the right of complaint cannot be decided based on the broadness or narrowness of scope of crimes subject to the statutory provision or the severity of statutory punishment. Absolute deprivation of the right to file a complaint itself directly leads to a serious restriction on the right to be heard at criminal proceedings regardless of the scope and seriousness of crimes applicable.

Likewise, in cases of crimes not requiring victim's filing of charges for initiation of prosecution, a serious constraint on the victim's right to be heard can be incurred. Depending on other people such as relatives, rather than the victim himself / herself, to exercise the power to fight against the impairment of one's legal interest, does not conform to the contemporary legal philosophy where the individual has attained the status to exercise one's own rights, and brings about a serious restriction on the right to be heard.

Therefore, the Court should review this case applying a strict scrutiny standard.

2. Whether the principle of equality is violated

The Instant Provision aims to maintain the basic order in the family system founded upon the Confucian tradition and this legislative goal is legitimate. It is widely accepted that when a state takes the protection of culture or morality as a legislative purpose, it can encourage such protection to the fullest by providing material and systemic support. However, its way of restricting the basic right, or in other words, depriving certain victims of their right to file complaints in criminal proceedings to promote traditional morals, appears to be problematic in its proportionality between the purpose and the extent of such differential treatment.

While an ascendant-descendant relationship can be a factor to be considered in determining the gravity of a crime in terms of the nature of the crime and responsibility of the perpetrator, it shall not be a reason to deny the State's exercise of its power to punish criminals. Under the Criminal Procedure Act, filing a complaint can be either a prerequisite condition for bringing the claims or a cause for initiating an investigation, depending on the type of crimes and for those who file a complaint, many procedural protections are guaranteed. Therefore, regarding the Instant Provision's prohibiting a victim from filing a complaint against lineal ascendants of himself/herself or his/her

spouse only because the victim is a Bi-Sok (descendant), we cannot see a reasonable balance between the aim and means in having the differential treatment among victims of criminal offences, especially when the government renounces its power to criminally punish ascendants who do not deserve protection of the law, while neglecting its duty to protect descendants as criminal victims, going beyond its legislative purpose to maintain the basic order of family. It is more so in modern society because family nowadays is not considered as an authoritative institution centered on the head of family with other family members obeying him, but as a democratic relationship in which every member of the family is respected and esteemed as an individual with personality.

Even when a descendant is allowed to file a complaint against lineal ascendants, existence of facts constituting a crime does not necessarily lead to formal prosecution and trial. Since there are many other proceedings before the formal prosecution stage such as non-prosecution, suspension of prosecution or summary prosecution, a proper and case specific measure can be applied in consideration of detailed facts of the case, special relationship between lineal ascendant and descendant and the existence and degree of malice of the relevant ascendant, etc. The absolute deprivation of the victim's right to file a complaint without providing any possible measure even before formal prosecution simply because the victim is a descendant and the perpetrator is a lineal ascendant cannot be regarded to be the only and absolutely necessary measure to be taken to maintain the basic order of family system in dealing with a criminal case that may occur between lineal ascendant and descendant.

3. Sub-conclusion

Hence, the Instant Provision does not provide a proportionate means to achieve the objective of the differential treatment, in violation of the principle of equality.

V. Conclusion

Regarding the Instant Provision, four Justices issue the opinion of constitutionality and five Justices issue the opinion of unconstitutionality. Despite the opinion of unconstitutionality is a majority, it falls short of the quorum of six or more votes required for the decision of unconstitutionality. Therefore, we find that the Instant Provision does not violate the Constitution and hereby decide as the holding of the Court.

Justice Lee, Kang-Kook (Presiding Justice), Lee, Kong-Hyun, Cho, Dae-Hyun, Kim, Hee-Ok (unable to sign and seal due to retirement), Kim, Jong-Dae, Min, Hyeong-Ki, Lee, Dong-Heub, Mok, Young-Joon, Song, Doo-Hwan

2. Confiscation of Property Awarded for Pro-Japanese Collaboration During Japanese Occupation Case

[23-1(A) KCCR 276, 2008Hun-Ba141, 2009Hun-Ba14 · 19 · 36 · 247 · 352, 2010Hun-Ba91(consolidated), March 31, 2011]

Questions Presented

1. Whether Article 2, Item 1, Mok 1(revised by Act No. 7975 on September 22, 2006, hereinafter, the 'Definition Provision') of the Special Act to Redeem Pro-Japanese Collaborators' Property (hereinafter, the 'Special Act') which regards the person who conducted one of the acts described in Article 2, Item 6 through Item 9 of 'the Special Act on the Fact-Finding of Anti-National Activities under the Japanese Occupation' as a pro-Japanese collaborator whose property acquired in the Japanese colonial period (1910-1945) is subject to governmental confiscation, violates the rule of clarity (negative)

2. Whether the second sentence (revised by Act No. 7769 on December 29, 2005, hereinafter the 'Presumption Provision') of Article 2 Item 2 of the Special Act which presumes the property of the pro-Japanese collaborator acquired in the period from the outbreak of the Russo-Japanese war to August 15, 1945 as property acquired as a reward for pro-Japanese collaboration (hereinafter, the 'Pro-Japanese Collaborator's Property') infringes on the petitioners' rights of access to courts and is inconsistent with due process (negative)

3. Whether the text (revised by Act No. 7769 on December 29, 2005, hereinafter, the 'Confiscation Provision') of Article 3 Section 1 of the Special Act which allows the government to confiscate the Pro-Japanese Collaborator's Property with the time of confiscation retroactively applied to when the land was acquired or given as a gift, is against Article 13 Section 2 of the Constitution as a genuine retroactive legislation (negative)

4. Whether the Confiscation Provision infringes on the petitioners' property rights (negative)

5. Whether the Confiscation Provision is against the principle of equality (negative)

6. Whether the Confiscation Provision is inconsistent with the rule against guilt-by-association (negative)

Summary of Decisions

1. We do not consider the part of 'the person who conducted one of the acts described in Article 2, Item 6 through Item 9 of Special Act on the Fact-Finding of Anti-National Activities under the Japanese Occupation' of the Definition Provision as vague. Also, one can sufficiently grasp the meaning of a person 'actively engaged in the independence movement' as the person who was very enthusiastically and aggressively involved in the movement to win our nation's independence during the Japanese colonial period.

2. The Presumption Provision neither infringes on the right of access to courts nor violates due process of law for the following reasons: It is difficult for the state to prove whether a certain property is Pro-Japanese Collaborator's Property because the Korean government's effort to confiscate those properties is being made after quite a long time after the liberation from Japanese occupation. On the contrary, it is highly probable that the person who acquired those properties know the details about how they have come to own the properties. In addition, the Presumption Provision does not entirely shift the burden of proof to the Collaborator's side and a procedural safeguard, an administrative suit to rebut that presumption is available. Even in the case where disposition authorities or the courts do not easily accept the rebuttal, the legislature is not to be blamed for its abuse or deviation of legislative discretion in enacting the Presumption Provision, but the disposition authorities or the courts should be blamed for not fulfilling the aims of that Provision.

3. The Confiscation Provision amounts to a genuine retroactive legislation, but some retrospective law can be allowed when such law, as an exception, is justified because, for example, people could have expected such retroactive legislation. In this case, pro-Japanese

collaborators could reasonably have expected the retroactive confiscation of the property rewarded for collaboration with Japan considering the anti-national nature in the course of acquisition of such property and the preamble of the Constitution declaring to uphold the spirit of the Korean interim government established during the Japanese occupation. Furthermore, because confiscation of Pro-Japanese Collaborator's Property is a national task taken as a very exceptional measure in our history, the concern that retroactive legislations may become frequent with this Court's holding of constitutionality of this particular retroactive legislation can be fully removed. Therefore, the Confiscation Provision is retroactive law but is not against Article 13 Section 2 of the Constitution.

4. The Confiscation Provision pursues legitimate aims as it intends to restore the spirit of the nation and realize the constitutional ideal of the March 1 Independence Movement that resisted Japanese Imperialism. The Confiscation Provision is a proper means in achieving such legislative aims, because it would be much difficult to handle Pro-Japanese Collaborators' Property under the existing property law system including civil law. Among the various types of Pro-Japanese and anti-national activities defined under Special Act on the Fact-Finding of Anti-National Activities under the Japanese Occupation, the Confiscation Provision limits the types of activities subject to this provision to only four types which are serious and clear in their scope. Moreover, there are exceptions for the Pro-Japanese Collaborator who later actively engaged in the independence movement. In addition, a Pro-Japanese collaborator and his/her descendants can prevent confiscation by proving that the property at issue was not acquired as a reward of collaboration with Japan and there is a provision to protect a bona fide third party. Given the foregoing reasons, we find that the Confiscation Provision is not against the rule of least restrictive means and, considering the legitimacy of rectifying history and the value of true social integration, it strikes a balance among the interests related. Therefore, the Confiscation Provision does not infringe on the petitioners' property rights.

5. We do not find that the Confiscation Provision is against the principle of equality because the protection of Pro-Japanese Collaborator's Property is in itself against the sense of justice and the properties subject to the Confiscation Provision are limited to those which can be recognized as a serious matter clearly classified as Pro-Japanese Collaborator's Property.

6. The Confiscation Provision does not violate the rule against guilt-by-association, because the provision does not confiscate the descendant's property acquired by his or her own economic activities or inherited property other than those deemed Pro-Japanese Collaborator's Property just for the reason his or her ascendant was involved in pro-Japanese activities.

Concurring Opinion of Justice Kim, Jong-Dae

Insofar as the Court interprets Article 13 Section 2 of the Constitution, which prohibits the deprivation of citizens' property right by retrospective legislation, to allow citizens to be deprived of their property rights by retroactive legislation when there are special reasons, it would certainly be a creation of a constitutional provision. In my view, this is neither an appropriate construction of the Constitution nor consistent with the constitutional doctrine of separation of powers.

Nevertheless, given the spirit and the tradition in our Constitution as well as the backgrounds in its creation, property acquired as a reward of collaboration with Japan cannot be protected by the 'property right' provision of our Constitution, because the Constitution of this country was established through the fight against and by overcoming Japanese imperialism. However, the government shall abide by constitutional restraints in locating the Pro-Japanese Collaborator's Property and setting up the confiscation process of that property. In this case, the provisions at issue do not appear to be against that constitutional restraint.

Concurring Opinion of Justice Mok, Young-Joon

Examining the preamble of the Constitution requiring maintenance of the spirit of the Korean interim government established during Japanese occupation, and the crime of treason defined in the criminal code of the Daehan Empire (1897-1910), we should conclude that criminal nature was inherent in the acquisition of Pro-Japanese Collaborators' Property and that criminal nature has been persistent even up to now, as our country has failed to officially settle the past. Thus, the Confiscation Provision is a quasi retroactive legislation that has effect on ongoing facts or legal rights.

Dissenting Opinion of Justices of Lee, Dong-Heub and Mok, Young-Joon: Partial limited Unconstitutionality

Our modern system of land ownership was established in 1912 when the Japanese colonial government started to file up the land survey records. Thus, even land acquired before that land survey in 1912, and in no relation with pro-Japanese anti-national activities, is likely to be presumed as Pro-Japanese Collaborator's Property under the Presumption Provision. While no official public notice or registration of land ownership existed before 1912, the Pro-Japanese Collaborator has to provide evidence to prove that the land at issue was acquired before 1904 in order to rebut the presumption. But before the drawing up of land survey records, there were no method of public announcement of land ownership. Furthermore, facts that happened more than 100 years ago are very difficult to prove. As a result, it is most likely that even property unrelated to collaboration with Japan can be deprived under the Presumption Provision. Thus, it is unconstitutional as far as the part of 'acquired' of the Presumption Provision is interpreted to include property acquired before 1904 but recorded as acquired thereafter through the land survey of 1912.

Dissenting Opinion of Justices Lee, Kang-Kook and Cho, Dae-Hyun: Partial Unconstitutionality

Even if it is absolutely necessary for the punishment of Pro-

Japanese and anti-national activities and confiscation of the Pro-Japanese Collaborator's Property to be carried out, the means of punishment and confiscation should be compatible with the Constitution. The Confiscation Provision amounts to a deprivation of property right by retroactive legislation. However, Article 13, Section 2 of the Constitution, which was introduced to correct the history of repeated political and social retaliations enabled by retroactive legislations during the period from the April 19 Democratic Revolution in 1960 through the May 16 Military Coup in 1961, is an absolute prohibition permitting no exceptions. In the Instant case, the Confiscation Provision is retroactive legislation that deprives the petitioners' property rights with no constitutional basis, violating Article 13, Section 2 of the Constitution.

Parties

Petitioners

Min ○-Ki and sixty three others

Underlying Cases

Seoul Administrative Court 2008Ku-Hap9034 Revocation of Decision of Pro-Japanese Collaboration Property Confiscation (2008 Hun-Ba141)

Seoul Administrative Court 2008Ku-Hap31482 Revocation of Confiscation Disposition (2009Hun-Ba14)

Seoul Administrative Court 2008Ku-Hap43259 Revocation of Confiscation Decision (2009Hun-Ba19)

Seoul Administrative Court 2008Ku-Hap33914 Revocation of Confiscation Disposition (2009Hun-Ba36)

Seoul Administrative Court 2007Ku-Hap43648 Revocation of Decision of Pro-Japanese Collaboration Property Confiscation (2009 Hun-Ba247)

Seoul High Court 2009Nu7310 Revocation of Decision of Pro-Japanese Collaboration Property Confiscation (2009Hun-Ba352)
Seoul High Court 2009Nu12725 Confirmation of Invalidation of Decision of Pro-Japanese Collaboration Property Confiscation (2010 Hun-Ba91)

Holding

Article 2 Item 1 Mok 1 of the Special Act to Redeem Pro-Japanese Collaborators' Property (revised by Act No. 7975 on September 22, 2006), the second Paragraph of Item 2 and the main text of Article 3 Section 1 of the Special Act to Redeem Pro-Japanese Collaborators' (both revised by Act No. 7769 on December 29, 2005) are not against the Constitution.

Reasoning

I. Introduction of the Case and Subject Matter of Review

A. Introduction of the Case

1. 2008Hun-Ba141

(A) Deceased Min ○-Hui (1852. 05. 15. ~ 1935. 12. 31., hereinafter 'Min ○-Hui') who had been conferred the title of viscount by the Japanese colonial government in Korea on October 7, 1910 for his contribution to the Japanese annexation of Korea, received a fifty thousand won government bond as a royal gift on January 13, 1911, and was conferred a rank of Jong 4 on December 7, 1912, being promoted to a rank of Jeong 4 on December 27, 1919, a rank of Jong 3 around 1928 and a rank of Jeong 3 around the year of his death, respectively.

On June 20, 1918, Min ○-Hui was appointed as a member of the establishment committee of Chosun Siksan Bank which was established to support the economic policy of Japanese colonialism and he was

also appointed vice president of Chosun Education Association－an advisory body for the Japanese governor－general for the promotion of policy of Hwangkookshinminwha, a movement of allegiance to the Emperor of Japan. He was also a founding member of Chosunshilupkurakbu, an entrepreneurs' association established in order to integrate Korean people into Japanese colonialism, and later worked as its advisor. He also acted as advisor for Daejeongchinmokhoi, an institution for integration of Korean people into Japanese colonialism.

Min ○-Hui, for his pro-Japanese collaboration as described above, received Showadaereginyumjang, a commendation, on November 16, 1928, a silver cup on November 22, 1928, a pair of silver cups on October 1, 1935 and a gold cup around year of his death respectively.

(B) The titles of lands which were conferred to Min ○-Hui by the Japanese colonial government as referred to in attachment 2, thereafter have been transferred and registered to his descendants (petitioners #1 through #20 as referred to in attachment 1).

The Investigative Commission on Pro-Japanese Collaborators' Property (hereinafter, the "Commission"), on November 22, 2007, made a decision that Min ○-Hui is "A person who engaged in pro-Japanese and anti-national activities, whose property is subject to confiscation" articulated in Article 2, Item 1 of the Special Act to Redeem Pro-Japanese Collaborators' Property (hereinafter, the "Special Act") and that the land described above should be seized by the Korean government because the land is a Pro-Japanese Collaborator's Property as defined in Article 2, Item 2 of the Special Act.

(C) Against the decision of confiscation, Min ○-Hui's descendants, petitioners in this case, filed a suit (Seoul Administrative Court 2008 Ku-Hap 9034) to vacate the confiscation decision and thereafter, pending the suit, moved the court (Seoul Administrative Court 2008 A 2712) to request adjudication on the constitutionality of Article 2 through Article 5 of the Special Act, arguing these provisions are retroactive legislations in violation of Article 13 Section 3 and Article 23 Section 1 of the Constitution and therefore unconstitutional. When

the administrative court consequently denied that petitioners' request on October 14, 2008, the petitioners, on November 19, 2008, filed this constitutional complaint.

2. 2009Hun-Ba14

(A) Deceased Lee ○-Ro (1838. 12. 2. ~ 1923. 5. 1, hereinafter 'Lee ○-Ro') who was conferred title of baron by the Japanese colonial government in Korea on October 7, 1910 for his contribution to the Japanese annexation of Korea, attended the title-awarding ceremony held in the Japanese governor's house and received a citation from Yamakata, the chief commissioner of governmental affairs, who gave the citation on behalf of the Japanese emperor on February 22, 1911. He personally received a twenty five thousand won government bond as a royal gift on January 13, 1911, and, 'as a person who has made a contribution to the relationship of two countries' received a medal in commemoration of Japanese annexation of Korea on August 1, 1912. He was conferred a rank of Jong 4 on December 7, 1912, and was promoted to a rank of Jeong 4 on December 10, 1920.

As the Japanese government established ○○ Kongjinhui in order to make propaganda for the success of Japanese colonization, Lee ○-Ro, as special member, engaged in activities justifying the Japanese occupation of Chosun. Lee ○-Ro, for his aggressive pro-Japanese collaboration, received Dyshowdaerekinyumjang, a commendation, on November 10, 1915.

(B) Lee ○-Ro was conferred the title of land in ○○-ri, Oeseo-myeon, Gapyeong-gun, Gyeonggi-do (later, the name of administrative district of Oeseo-myeon was changed into Cheongpyeong-myeon). After the decease of Lee ○-Ro and Lee ○-Sae on May 1, 1923 and January 15, 1948 respectively, the title of the aforementioned land was inherited by Lee ○-Sul, father of petitioner Lee ○-Ho, as sole heir. The land has been divided into forest lands including one of San 26-1 located in the same Ri on November 22, 1965 which was divided into other forest lands including one of 240, 496㎡ located in the same Ri.

As for the forest land of 240, 496㎡, an ownership preservation

registration with Lee ○-Sul as title owner of the property was completed under 'the Special Act on Title Transfer of Forest Land' on October 16, 1970, and thereafter an ownership transfer registration with Lee ○-Ho as title owner of that property was completed under 'the Special Act on Title Transfer of Land' on October 30, 1979 based on the land purchase agreement entered into on May 15, 1969.

(C) After examining whether the land is Pro-Japanese Collaborator's Property as defined in Article 2 Item 2 of the Special Act, the Commission, on February 28, 2008, made a decision that the land shall be confiscated on the ground of being Pro-Japanese Collaborator's Property pursuant to Article 3 Section 1 of the Special Act as of the date of December 29, 2005, the effective date of the Special Act, with the time of confiscation retroactively applied to when the land was acquired.

(D) Against the decision of confiscation, Lee ○-Ho, one of the petitioners, filed a suit (Seoul Administrative Court 2008 Ku-Hap 31482) to vacate the confiscation decision and thereafter, pending the suit, moved the court (Seoul Administrative Court 2008 A 2528) to file with the Constitutional Court for adjudication on the constitutionality of Article 2 Section 2 and Article 3 Section 1 of the Special Act, arguing that such retroactive legislations violate Article 13 Section 3 and Article 23 Section 1 of the Constitution and therefore are unconstitutional. When the administrative court consequently rejected that petitioners' request on January 15, 2009, the petitioners, on January 18, 2009, filed this constitutional complaint.

3. 2009Hun-Ba19

(A) Deceased Min ○-Suk (1858. 12. 12. ~ 1940. 8. 6, hereinafter 'Min ○-Suk') who had been conferred the title of viscount by the Japanese colonial government on October 7, 1910 for his contribution to the Japanese annexation of Korea, was appointed as advisor of Jungchuwon of the Japanese Government-General of Korea on July 6, 1934 and the vice president of such institution on October 13, 1939. On May 18, 1912, during the Japanese occupation, he was conferred the title

of land, 2329 pyeong of grave yard located in 225 ○○-ri, Yeoju-eup, Yeoju-gun, Gyeonggi-do. After Min ○-Suk passed away on August 6, 1940, the title of land described above was inherited to his son, Min ○-Ki, and, then to his grandson, Min ○-Un on February 21, 1951.

The land was divided into the lands including grave yard 7,580㎡ located in either 225-1 or 225-2 through 5 ○○-ri, Yeoju-eup, Yeoju-gun, Gyeonggi-do after which the petitioners of this case, Min ○-Hong and Min □-Hong jointly inherited those lands from Min ○-Un. As for the grave yard 7,580㎡located in 225-1 ○○-ri, Yeoju-eup, Yeoju-gun, Gyeonggi-do, the ownership preservation registration with the name of those petitioners as title owner of the property was completed and thereafter, on December 10, 1993, was divided into the grave yard 969㎡ located in 225-1 ○○-ri, Yeoju-eup, Yeoju-gun, Gyeonggi-do and the grave yard 6,611㎡ located in 225-6 ○○-ri, Yeoju-eup, Yeoju-gun, Gyeonggi-do.

(B) After examining whether the land is Pro-Japanese Collaborator's Property as defined in Article 2 Item 2 of the Special Act, the Commission, on August 13, 2007, made a decision that the land shall be confiscated pursuant to Article 3 Section 1 of the Special Act on the ground of being Pro-Japanese Collaborator's Property as defined in Article 2 Item 2 of the Special Act, as of the date of December 29, 2005, the effective date of the Confiscation of Collaborators' Property Act, with the time of confiscation retroactively applied to when the land was acquired.

(C) Against the decision of confiscation, the petitioners Min ○-Hong and Min □-Hong, filed a suit (Seoul Administrative Court 2007 Ku-Hap 43259) with the Seoul Administrative Court to vacate that confiscation decision and thereafter, pending the suit, moved the court (Seoul Administrative Court 2008 A 2712) to file with the Constitutional Court for adjudication on the constitutionality of the Special Act, arguing that such retroactive legislations violates Article 13 Section 3 and Article 23 Section 1 of the Constitution and therefore is unconstitutional. When the administrative court consequently denied that petitioners' request on January 7, 2009, the petitioners, on February 5, 2009, filed this constitutional complaint.

4. 2009Hun-Ba36

(A) Deceased Lee ○-Chun (1873. 1. 18. ~ 1936. 1. 11., hereinafter 'Lee ○-Chun') who was appointed to the Director of Foreign Affairs Bureau of Eujeoungbu (later changed into the cabinet in 1907) collaborated with Japan for its annexation of Korea by handling overall management of foreign affairs and trade. Later on October 1, 1910, right after the Japanese annexation of Korea, he was appointed Chaneu of Jungchuwon of the Japanese Government-General of Korea, and then appointed to Chameu of Jungchuwon on April, 21, 1921 when Jungchuwon was reorganized and served the Japanese Government of Korea until April 26, 1924.

On September 19, 1911, during the Japanese occupation, he was conferred the title of 836㎡ of land located in 233 ○○-ri Opo-eup, Gwangju-si, Gyeonggi-do and the title of 2,963㎡ of grave yard located in 234-3 ○○-ri Opo-eup, Gwangju-si, Gyeonggi-do. Later on July 25, 1919, he was also conferred the title of 25/30 of 21,079㎡ of forest land located in San 67, ○○-ri Opo-eup, Gwangju-si, Gyeonggi-do. The ownership preservation registration with the name of Lee ○-Gu, one of the petitioners, as title owner of the properties described above was completed on June 28, 1985 and August 12, 1971 respectively. Thereafter, some portions of those properties were transferred to the heirs of Lee ○-Chun when those heirs and Lee ○-Gu accepted proposed adjustments of mediation in a suit filed for revocation of ownership transfer registration with regard to the aforementioned properties. After some of those heirs died, the properties were inherited by some of the petitioners and presently, five petitioners (petitioner #23 through petitioner #27 of the petitioners' list as referred in Appendix 1) including Lee ○-Gu jointly have ownership of the aforementioned properties in proportion to their respective share of the property.

(B) After examining whether the land is Pro-Japanese Collaborator's Property as defined in Article 2 Item 2 of the Special Act, the Commission, on May 23, 2008, made a decision the lands described in above paragraph shall be confiscated by the government on the

ground that those lands are Pro-Japanese Collaborator's Property as of the date of December 29, 2005, the effective date of the Special Act, with the time of confiscation retroactively applied to when the land was acquired.

(C) Against the decision of confiscation, the petitioners filed a suit (Seoul Administrative Court 2008 Ku-Hap 33914) to vacate that confiscation decision and thereafter, pending the suit, moved the court (Seoul Administrative Court 2008 A 3149) to file with the Constitutional Court for adjudication on the constitutionality of the Special Act, arguing that Articles including Article 2 Item 1 Mok Ka of the Special Act as retroactive legislations violate Article 13 Section 3 and Article 23 Section 1 of the Constitution and therefore are unconstitutional. When the administrative court consequently denied that petitioners' request on February 6, 2009, the petitioners, on March 3, 2009, filed this constitutional complaint.

5. 2009Hun-Ba247

(A) The fact that deceased Min ○-Hui was conferred the title of viscount by the Japanese colonial government in Korea on October 7, 1910 for his contribution to the Japanese annexation of Korea is the same as those described in the paragraph (1).

(B) Land #1 through #11 described in Appendix 2 were conferred to Min ○-Hui on October 30, 1917 according to the laws of the Japanese Government, after which ownership transfer registrations with the names of corresponding petitioners as title owners were completed, according to 'the Table 1 of ownership changes' of Appendix 3. Land #12 through #14 described in Appendix 2 were conferred to Min ○-Hui on October 1, 1911, and were transferred and registered with the names of corresponding petitioners as title owners by the same process.

(C) After examining whether those lands described in the above paragraph is Pro-Japanese Collaborator's Property as defined in Article 2 Item 2 of the Special Act, the Commission, on August 13, 2007,

made a decision the lands described in above paragraph shall be shall be confiscated by the government on the ground that those lands are Pro-Japanese Collaborator's Property as of the date of December 29, 2005, the effective date of the Special Act, with the time of confiscation retroactively applied to when the land was acquired.

(D) Against the decision of confiscation, the petitioners filed a suit (Seoul Administrative Court 2007 Ku-Hap 43648) to vacate that confiscation decision and thereafter, while the suit was pending, moved the court (Seoul Administrative Court 2008 A 554) to file with the Constitutional Court for adjudication on the constitutionality of the Special Act, asserting that Article 2 through Article 5 of the Special Act as retroactive legislations violate Article 13 Section 3 and Article 23 Section 1 of the Constitution and therefore are unconstitutional. When that administrative court consequently dismissed that petitioners' request on August 28, 2009, the petitioners, on September 24, 2009, filed this constitutional.

6. 2009Hun-Ba352

(A) Deceased Cho ○-Keun (1876. 4. 8. ~ 1938. 5. 15., hereinafter 'Cho ○-Keun') filled various government posts including a general in the Japanese army for 23 years until he was appointed to Chameu of Jungchuwon of the Japanese Government-General of Korea on June 3, 1933 for his aggressive contribution to the Japanese colonial rule and wartime aggression and worked there until his death on May 15, 1938. During the period, he took the lead in establishing the Chosun and Great Asia Association, a group of people advocating Hwangdo (doctrine justifying the Japanese invasion on Asian countries) in March of 1934 with the support of the Japanese Government and the Japanese military while actively participating in advocacy of Naesunyunghwa and Hwangminhwaundong (Japanese assimilation policies to integrate Korean people into Japanese colonial rule).

Cho ○-Keun, for his aggressive contribution to the Japanese colonial rule and invasion as described above, received a Showadaereginyumjang, a commendation, on August 1, 1912, a Dyshowdaereginyumjang on November

10, 1915, Hun 3rd level of Seobojang on April 28, 1920, a Daejeong year 2 through Daejeong year 9 of Jeonyukjongkunginyumjang, a memorial medal for discharge from military service, on November 1, 1920, Hun 2nd level of Seobojangon April 21, 1920 and a Showadaereginyumjang on October 1, 1935. On October 1, 1935, he also won commendation for his service as a governmental official on the 25th anniversary of the Japanese Occupation of Korea and, a same one on April 27, 1920. Since he was conferred rank of Jeong 5 on April 27, 1920 he was continuously promoted up to a rank of Jong 3 on September 28, 1931.

Cho ○-Keun was conferred the title of land - seventy-eight Jeong, two hundred thirty four thousand pyeong, and six Mubo, one hundred eighty pyeong of a forest land - located in 1 San ○○-ri, Uiwang-myeon, Suwon-gun, Gyeonggi-do (later, the address of the 773.752㎡ forest land at issue was changed into 1-1 San, ○○-dong, Uiwang-si). He also acquired 774㎡ land located in Yesan-gun, Oga-myeon, ○○-ri, Chungcheongnam-do on May 3, 1926, 1,326㎡ farmland located in 747of the same ri on July 15, 1915, 1,706㎡ forest land located in 770 of the same ri on July 15, 1915, 1,937㎡ farmland located in 771 of the same ri, on February 29, 1928. Ownership preservation registration for the lands described above with Cho ○-Keun as title owner of the property was completed between November 30, 1926 and February 29, 1928 and thereafter Cho ○-Hyeun, his son, inherited those lands upon his death on May 15, 1938. Later Cho ○-Moon, his grandson, inherited those lands after Cho ○-Hyeun's death on July 12, 1994.

(B) After examining whether those lands described in the above paragraph is Pro-Japanese Collaborator's Property as defined in Article 2 Item 2 of the Special Act, the Commission, on April 25, 2008, August 13, 2007, made a decision the lands described in above paragraph shall be shall be confiscated by the government on the ground that those lands are Pro-Japanese Collaborator's Property as of the date of December 29, 2005, the effective date of the Special Act, with the time of confiscation retroactively applied to when the land was acquired.

(C) Against the decision of confiscation, the petitioners including Cho ○-Moon filed a suit (Seoul Administrative Court 2008 Ku-Hap 29601) for vacation of that confiscation decision but the court denied it. In response, the petitioners filed an appeal (Seoul High Court 2009 Nu 7310) and thereafter, while the appeal was pending, moved the court (Seoul High Court 2009 A 269) to file with the Constitutional Court for adjudication on the constitutionality of the second paragraph of Article 2 Item 2 and Article 3 Section 1 of the Special Act, arguing that such retroactive legislations violate Article 13 Section 3 and Article 23 Section 1 of the Constitution and therefore are unconstitutional. When that High Court consequently denied that petitioners' request on October 20, 2009 (notice of such denial was delivered on October 29, 2009), the petitioners, on November 25, 2009, filed this constitutional complaint.

7. 2010Hun-Ba91

(A) Deceased Suh ○-Hun (1858. 3. 15. ~ 1943. 7. 31., hereinafter 'Suh ○-Hun'), for his collaboration with the Japan for its annexation of Korea, was appointed to Buchaneu of Jungchuwon of the Japanese Government-General of Korea on October 1, 1910 and later to Chameu of Jungchuwon on April 28, 1921 continuously holding the post until his death on July 31, 1943. Suh ○-Hun, for his aggressive contribution to the Japanese colonial rule and invasion, received various kind of commendations from Japanese Government of Korea: a Hangukginyumjangon August 1, 1912; a Dyshowdaereginyumjang on November 10, 1915; Hun 4rd level of Seobojang on June 27, 1922; Hun 3rd level of Seobojang on August 29, 1928; and Showadaereginyumjang on November 16, 1928; and a commendation for his service as a governmental official on the 25th anniversary of the Japanese Occupation of Korea. Since a rank of Jeong 7 was conferred on him on December 10, 1913, he was repeatedly promoted up to a rank of Jong 3 until November 2, 1928. Suh ○-Hun was conferred the title of forest land - three Dan, nine hundred pyeong and one Mubo, 30 pyeong located in 110 San, ○○-ri, Namsa-myeon, Yongin-gun, Gyeonggi-do (later this forest land was divided into 2,182㎡ forest land

located in 110-1 San, ○○-ri, Namsa-myeon, Cheoin-gu, Yongin-si). Thereafter, Suh ○-Won, the eldest son, inherited that land on July 31, 1943 and later Suh ○-Beom, his grandson, inherited that land on March 20, 1959. The ownership preservation registration with the name of Suh ○-Beom as title owner was completed on October 10, 1970 pursuant to 'the Special Act on Title Transfer of Forest Land' and thereafter an ownership transfer registration with the name of Sung ○-Pung, the petitioner, as owner of title of the land granted by will, was completed on November 8, 2000 after Suh ○-Beom died on May 26, 2000.

(B) After examining whether those lands described in the above paragraph is Pro-Japanese Collaborator's Property as defined in Article 2 Item 2 of the Special Act, the Commission, on July 9, 2008, made a decision the lands described in above paragraph shall be shall be confiscated by the government on the ground that those lands are Pro-Japanese Collaborator's Property as of the date of December 29, 2005, the effective date of the Special Act, with the time of confiscation retroactively applied to when the land was acquired.

(C) Against the decision of confiscation, the petitioner filed a suit (Seoul Administrative Court 2008 Ku-Hap 40806) to vacate that confiscation decision but the court denied it. In response, the petitioner filed an appeal (Seoul High Court 2009 Nu 12725) and thereafter, while the appeal was pending, moved the court (Seoul High Court 2009 A 339) to file with the Constitutional Court for adjudication on the constitutionality of the second paragraph of Article 2 Item 2 and Article 3 Section 1 of the Special Act, arguing such retroactive legislations violate Article 13 Section 3 and Article 23 Section 1 of the Constitution and therefore are unconstitutional. When the High Court consequently denied that petitioners' request on January 13, 2010 (notice of such denial was delivered on January 21, 2010), the petitioners, on February 17, 2010, filed this constitutional complaint.

B. Subject Matter of Review

1. 2008Hun-Ba141

Despite the fact that the petitioners assert that Article 2 through Article 5 of the Special Act is against the Constitution, given the facts of the case and contents of their constitutional complaint, it is appropriate to confine the subject matter of review to Article 2 Item 1 Mok 1, the second paragraph of Item 2, and the main text of Section 3 and Section 1 of the Special Act. Thus, the question presented to us is whether those provisions violate the Constitution.

2. 2009Hun-Ba14

Notwithstanding the petitioner contends that Article 2 Item 2 and Article 3 Section 1 of the Special Act are unconstitutional, the first paragraph of Article 2 Item 2 and the proviso of Article 3 Section 1 shall not be considered since those parts are neither argued for their unconstitutionality by the petitioner nor applicable to the facts of the case. The question presented to us, thus, shall be limited to whether the second paragraph of Article 2 Item 2 and the main text of Article 3 Section 1 of the Special Act violate the Constitution.

3. 2009Hun-Ba19

Even though the petitioners argue that the entire provisions of the Special Act including second paragraph of Article 2 Item 2 of that Act are against the Constitution, given the facts of the case and the entire contents of the petitioners' complaint, the subject matter of review shall be confined to the second paragraph of Article 2 Item 2 and the main text of Article 3 Section 1 of the Special Act. Therefore, the question presented to us is whether the second paragraph of Article 2 Item 2 and the main text of Article 3 Section 1 of the Special Act are against the Constitution.

4. 2009Hun-Ba36

The petitioners assert Article 2 Item 1 Mok 1, Article 2 Item 2 and Article 3 Section 1 of the Special Act are unconstitutional. However, it seems appropriate that the text of Article 2 Item 1 and the proviso of Article3 Section 1 of the Special Act protecting the bona fide 3rd parties should be excluded from the subject matters of review. Thus, the question presented to us is whether Article 2 Item 1 Mok 1, the second paragraph of Article 2 Item 2 and the main text of Article 3 Section 1 of the Special Act are unconstitutional.

5. 2009Hun-Ba247

Even though the petitioners argue that the entire text of Article 2 through Article 5 of the Confiscation Act is unconstitutional, based on the same grounds as referred in 2009Hun-Ba141, it appears reasonable to consider that the provisions subject to review should be limited to Article 2 Item 1 Mok 1, the second paragraph of Article 2 and the main text of Article 3 Section 1 of the Special Act. Thus, the question presented to us is whether those provisions are against the Constitution.

6. 2009Hun-Ba352

While the petitioners request us to consider whether the second paragraph of Article 2 Item 2 and Article 3 Section 1 of Special Act is unconstitutional, as we examine the foregoing cases, only the main text of Article 3 Section 1 rather than its entire text should be considered. Therefore, the provisions to be reviewed shall be confined to the second paragraph of Article 2 Item 2 and the main text of Article 3 Section 1 of the Special Act.

7. 2010Hun-Ba91

As the case above, the question presented to us is whether the second paragraph of Article 2 Item 2 and the main text of Article 3 Section 1 of the Special Act violate the Constitution.

8. Sub-conclusion

Therefore, the question presented to us is whether Article 2 Item 1 Mok 1 (hereinafter, the "Definition Provision"), the second paragraph of Article 2 Item 2 (hereinafter, the "Presumption Provision") and the main text of Article 3 Section 1 (hereinafter, the "Confiscation Provision") of the Special Act (hereinafter, collectively called "Instant Provisions") violate the Constitution. The Instant Provisions are as following:

[Provision at Issue]

The Special Act to Confiscate Pro-Japanese Collaborators' Property (revised by Act No. 7975 on September 22, 2006)

Article 2 (Definition) As used within this Act, except where otherwise specifically defined, or unless the context otherwise requires, the following terms, phrases, words and their derivations shall have the following meanings:

1. "Pro-Japanese collaborators whose property acquired in the Japanese colonial period (1910-1945) are subject to the confiscation" (hereinafter, the "Collaborator") are persons who fall into one of the followings:

1) The person who conducted one of the actions described in Article 2, Item 6 through Item 9 of 'the Special Act on the Investigation of the Actions against Korean People as pro-Japanese Collaboration During the Japanese Occupation' (Cham-ui, assist secretary of the ministry, in Item 9 includes Chan-ui and Bu Chan-ui, judge and assist judge): provided, however, that such person described above shall not be considered as the Collaborator in the cases where such person thereafter resisted or returned the title of nobility or actively engaged in the independence movement and becomes recognized as such by the decision of the Commission under Article 4 of this Act.

The Special Act to Confiscate Japanese Collaborators' Property (revised by Act No. 7769 on December 29, 2005)

Article 2 (Definition) As used within this Act, except where

otherwise specifically defined, or unless the context otherwise requires, the following terms, phrases, words and their derivations shall have the following meanings:

2. "The property of the Collaborator"(hereinafter, the "Collaborator's Property") means the property which belongs to one of followings: the property acquired by a person for his/her collaboration with Japan in the period from the outbreak of the Russo Japanese war - which was the beginning of Japanese invasion into Korea - to August 15, 1945; such property inherited; or such property given by will or as a gift while the person given that property knew that the property had been rewarded for such collaboration. In these cases, the property of the Collaborator acquired in the period from the outbreak of the Russo Japanese war to August 15, 1945 shall be assumed as the property acquired as a reward for pro-Japanese collaboration.

Article 3 (Confiscation of pro-Japanese Collaborator's property)

1) The title of the Collaborator's Property (also includes the Collaborator's Property used or occupied by a foreign embassy under the international treaties/agreements or occupied or administered by the State) shall be owned by the State if that title is acquired or given as a gift : provided, however, that the State shall not affect the rights on the Collaborator's Property of a bona fide third party when that third party acquires that rights on that property after paying fair compensation.

[Related Provisions]

(Intentionally omitted)

II. Arguments of Petitioners and Related Authorities

(Intentionally omitted)

[Related Case Laws]

(Intentionally omitted)

III. Review on Merit

A. Details of Confiscation Act Legislation

1. Act on Punishment of Anti-National Activities under the First Draft of the Constitution

(A) Enactment of Act on Punishment of Anti-National Activities

The most typical example of legislation for settlement of Japanese colonialism in our history is the Act on Punishment for Anti-national Activities (hereinafter, the "Anti-National Punishment Act"). The bill of the Anti-National Punishment Act based on Article 101 of the supplementary provisions of the Constitution passed the National Assembly on September 7, 1948 and was promulgated by Act No. 3 on September 22 of the same year. The entire text of the Anti-National Punishment Act is composed of thirty two Articles under which the Special Committee of Investigation of Anti-National Activities (hereinafter, the "Special Committee of Anti-National Investigation") investigates pro-Japanese and anti-national figures and sends them to the special public prosecutor's division to indict them for the decision of special panel of the court. The statute of limitation is two years from the date of promulgation of the Anti-National Punishment Act.

(B) Contents of Punishment of Anti-National Activities

The Anti-National Punishment Act prescribes the following: Any person who either aggressively collaborated with the Japanese government for its annexation of Korea or signed or conspired for the ratification of document or treaty violating Korea's sovereignty shall be sentenced to death or life imprisonment with forced labor and the entire or more than half of his/her property or inheritance shall be confiscated (Article 1); Any person who received an accolade from the Japanese government or was an Assembly member of the Japanese colonial government shall be sentenced to life imprisonment or

imprisonment with forced labor more than 5 years and the entire or more than half of his/ her property or inheritance shall be confiscated (Article 2); Any person who maliciously killed or persecuted the independence activists and/ or their family members shall be sentenced to death, life imprisonment or imprisonment with forced labor more than 5 years and the entire or part of his /her property or inheritance shall be confiscated (Article 3); Any person who received an accolade from the Japanese government or served as vice president, advisor or Chameu of Jungchuwon shall be sentenced to either imprisonment with forced labor not exceeding 10 years or suspension of his /her civil rights for no more than 15 years and his/ her entire or partial property may be confiscated (Article 4); and any person who served as a public official with the position of higher than the 3rd level of Godeunggwan or the 5th level of Hun or worked as a military police officer or secret police shall not be appointed to be a public officer prior to the expiration of statute of limitation of this Act (Article 5), etc.

(C) Implementation of the Anti-National Punishment Act

Since its first trial held on March 28, 1949, the special panel established pursuant to Article 19 of the Anti-National Punishment Act dealt with forty one cases: it sentenced one person to death penalty, one person to life imprisonment with forced labor, thirteen people to imprisonment with forced labor, eighteen persons to suspension of their civil rights; and delivered judgments making two persons exempted from incarceration and acquitting six persons. Two of the thirteen people sentenced to imprisonment with forced labor by the special penal were also sentenced the penalty of property confiscation.

However, the Anti-National Punishment Act was repealed by Act No. 176 on February 14, 1951 and cases pending at the time were regarded as being revoked on the effective date of the repeal. All judgments based on the repealed Act lost their effect from the date of the repeal pursuant to the supplementary provisions of the Act repealing the Anti-National Punishment Act.

2. Enactment of the Special Act

Many other countries with a history of experiencing colonial occupation, upon gaining independence, have aggressively investigated and punished those who collaborated with the foreign occupiers in order to recover the legitimacy of the newly established nation after independence and to promote social justice. On the contrary, in our country, not only was the number of cases dealt with under the Anti-National Punishment Act insignificant, but even judgments delivered by the special panel lost their effect, the settlement of past Japanese colonialism hardly effective. As social consensus was formed that the works for settlement of past Japanese colonialism had failed to achieve its purpose, a need to enact the Special Act visualized. Consequently, a draft bill of the Special Act confiscating the property of anti-national figures who aggressively collaborated with the Japanese colonial rule and committed terror and oppression on nationals, in order to realize justice and restore our national spirit, was proposed by 169 lawmakers from both sides of the 17th National Assembly on February 24, 2005, went through the review of the Legislation and Judiciary Committee on April 19, 2005 and a public hearing on June 17, 2005 and thereafter was passed by a vote of 155 in favor among attendees on December 8, 2005. The Special Act was proclaimed and enforced on December 29, 2005.

B. Review on the Instant Provisions

1. Structure of the Decision

We will examine the claims asserted by the petitioners as follows. Violation of the principle of clarity with respect to the Definition Provision; infringement on the petitioners' right to trial, due process and violation of principle of presumption of innocence with respect to the Presumption Provision; and, with respect to the Confiscation Provision, infringement on the petitioners' property rights for the reason of retroactivity, intrusion on the core content of the petitioners' property rights, violation of right to equality, violation of principle against creation of special social class, violation of the principle

against succession of the ancestor's title of nobility or accolade, violation of rule against guilt-by-association, infringement on the petitioners' right to trial and due process and violation of principle of double jeopardy.

2. Definition Provision

(A) Rule of Clarity

Notwithstanding that all statutory provisions restricting basic rights shall basically satisfy the requirement of the rule of clarity (10-1 KCCR 341, 95Hun-Ka16, April 30, 1998), the level of such requirement for each provision cannot be the same so that it may vary depending on the nature of the individual Statute or provision, uniqueness of each elements, backgrounds or circumstances of enactment. It is either impossible or substantially difficult to require legislation to arithmetically meet such requirement of the rule of clarity. Thus, it is inevitable that more or less general notions and terms will be used either in the Statute. Determination on whether the requirement of clarity is met shall be made by a decision whether a reasonable interpretation based on the legislative purpose of the provision at issue and its relationships with other regulations is possible. Even a statutory provision having vague connotations should not be deemed as a violation of the rule of clarity insofar as the contents of its text can be clarified by the judge's supplementary value judgment and such interpretation cannot be influenced by the personal preference of the person construing that provision (See 4 KCCR 78-79, 89Hun-Ka104, February 25, 1992; 17-2 KCCR 712, 721, 2004 Hun-Ba45, February 25, 1992).

(B) The Definition Provision, which defines a person who committed one of the acts described in Article 2 Item 6 through Item 9 (Chaneu and Buchaneu shall be included in the notion of Chameu defined in Item 9) of the Special Act on the Fact-Finding of Anti-National Activities under the Japanese Occupation as a "pro-Japanese collaborator," cannot be seen as vague. The petitioners, in particular, argue that the part of "person who aggressively participated in the

independence movement" of the proviso clause of the Definition Provision – a clause exempting a person who committed one of the acts above but who refused or returned the title of nobility or aggressively participated in the independence movement, with the decision of the Commission, from confiscation – is so vague that it violates the rule of clarity. However, the language of the "person who aggressively participated in the independence movement" has a literal meaning as the 'person who was enthusiastically and actively involved in the independence movement during the period of Japanese colonialism', and considering the structure of the provision and literal meaning, one can sufficiently figure out the meaning. Even if the proviso clause has vague connotations to some extent, this problem may be fully resolved when the proviso clause is construed upon the balanced understanding of other provisions as well as considering the legislative purpose of the clause and the enactment purpose of the Act. Thus, we do not find the language of the proviso clause not satisfying the requirement of clarity. Or at the very least, it appears that an ordinary person having a sound common sense and a general understanding of laws can generally figure out the meaning of the clause. Therefore, the Definition Provision does not violate the rule of clarity.

3. Presumption Provision

The Presumption Provision defines Pro-Japanese Collaborator's Property as property acquired by a person for his/her collaboration with Japan committed in the period from the outbreak of the Russo Japanese war to August 15, 1945, or such property inherited, or such property bequeathed or received as a gift with the knowledge that the property was a reward for such collaboration. Also, the Presumption Provision presumes the property of the pro-Japanese collaborator acquired during the period from the outbreak of the Russo- Japanese war to August 15, 1945 as property acquired as a reward for pro-Japanese collaboration. We will consider whether the Presumption Provision shifts the burden of proof onto either the pro-Japanese collaborators or their descendents (hereinafter, the 'Pro-Japanese Collaborators') and thus infringes on their right to trial and violates due process (notwithstanding the petitioners assert that the Presumption

Provision also violates the principle of presumption of innocence, we will not further review the issue because the existence of criminal guilt is irrelevant to the Presumption Provision).

(A) Burden of Proof and the Freedom of Legislative Policy-Making

The burden of proof, as a supplementary means, enables the judge to make a decision when the factual matters of a case are obscure, and the decision about who shall take the burden of proof belongs to an area where the legislature may exercise its the discretion in making that decision considering the pursuit of justice as the ideal of the judiciary, fair trial, the nature of issues disputed and access to relevant evidence (See, 19-2 KCCR 467, 177, 2005Hun-Ba96, October 25, 2007). Given this discretion of the legislature in its policy-making with respect to the burden of proof, our decision whether the Presumption Provision is unconstitutional depends on whether such discretion has been abused or deviated.

(B) Review of the Instant Case

(1) The Presumption Provision confiscating the properties conferred to pro-Japanese Collaborators for their collaboration with the colonial rule of the Japanese Empire and anti-national activities is intended to realize justice, restore our national spirit and to embody the constitutional ideal of the March First Independence Movement that resisted Japanese imperialism.

It seems highly probable that a person was in alliance with the Japanese imperialists if the person performed pro-Japanese and anti-national activities during Japanese occupation by either being part of the institutions established for colonial rule or being appointed to one of high-ranking government posts above Godeungmoongwan. In general, these positions play a significant role in being conferred property for contribution to Japanese colonialism in Korea and thus it is highly possible that the property acquired by that person while in the above-mentioned positions is Pro-Japanese Collaborator's Property. Moreover, because the Russo Japanese war was an aggressive war started by

Japan for control over the Korean peninsula the result of which was our downfall to a Japanese colony, the legislature appears to have been reasonable when it set out the outbreak of the Russo Japanese war as the time when the Pro-Japanese Collaborator's Property started to be formed.

(2) The Korean government's effort to confiscate Pro-Japanese Collaborator's Properties, as a settling of the past, is being made after quite a long time after the liberation from Japanese occupation, during which, lots of materials on real estate ownership disappeared due to the outbreak of the Korean War. Given the specific historical events which shaped the way our nation is today such as historical reality of our people and social situation, we are much convinced about the necessity of the Presumption Provision. In other words, while it is difficult for the state to prove whether a certain property was acquired in return for collaboration with Japanese colonialism, it is highly probable that the person who acquired those properties or the descendents secure the relevant materials or know the details about how they have come to own the properties. As such, it cannot be strikingly unfair to make the acquirers or the descendants bear the burden of proving the circumstances that led to the acquisition of property.

(3) In brief, while there is a considerable need for a Presumption Provision, the scope of burden of proof born by the side of pro-Japanese collaborators pursuant to the Presumption Provision is not excessive for the following reasons:

Firstly, according to the Presumption Provision, it is the Commission that has to prove the fact that the person at issue is a pro-Japanese Collaborator and the property at issue was acquired during the period from the outbreak of the Russo Japanese war to August 15, 1945. Thus, the Presumption Provision does not entirely shift the burden of proof to the Collaborator's side.

Secondly, as we mentioned before, the Presumption Provision merely presumes the property of the pro-Japanese collaborator acquired during

a certain period in which violation of national sovereignty leading to Japanese rule was decided, namely, from the outbreak of the Russo Japanese war to August 15, 1945 as property acquired as a reward for pro-Japanese collaboration. Thus, even though presumed as such, the pro-Japanese collaborator can rebut the presumption at any time by proving that the property at issue was not the reward of pro-Japanese collaboration. By a normative standard, the presumption cannot be concluded final or irreversible in the course of sorting out the content and the scope of the Pro-Japanese Collaborators' Property.

(4) Moreover, it is quite practicable to implement the Presumption Provision harmoniously in compliance with all constitutional values, and the Commission actually appears to reasonably limit the scope of the property subject to the Presumption Provision, thus reducing the possibility of violating basic rights due to excessive application of the Presumption Provision. For example, the Commission excluded property acquired prior to the date one was appointed to Chameu of Jungchuwon from being subject to the Presumption Provision, even though the person had consecutively filled various government posts such as Dochamsa or Gunchamsa before that (so that there may be sufficient reason to regard the property acquired in this period as collaboration property). As for property of the person who was promoted to Cameu of Jungchuwon, property acquired when the person held a lower position was excluded from being subject to the Presumption Provision. Consequently, in many cases where property appeared to satisfy the requirements of the Presumption Provision, the Commission revoked the decision for initiating an investigation when it found through close examination that pro-Japanese collaboration could not be established (as of March 5, 2010, except for the cases under investigation, only 2,078 cases out of total 5,572 cases decided to be investigated were finally either determined to be confiscated or recognized as Pro-Japanese Collaborator's Property, while in 2,818 cases initiation of investigation was revoked). This shows that the Presumption Provision in its implementation has been reasonably applied under the Commission's rational interpretation.

(5) Even when a Pro-Japanese Collaborator's Property is not rebutted at the Commission stage and is decided to be confiscated, a remedial appeal- an administrative suit- against the confiscation decision is possible so that judicial correction is also sufficiently guaranteed. Even in the case where disposition authorities or the courts do not easily accept the rebuttal, so that the presumption is in fact regarded as final, we have to consider this as a consequence of those courts or disposition authorities not properly implementing the intent of the legislative setting forth the provision at issue to only have the legal effect of 'presumption.' It will surely be an excessive restriction on the legislative power if we, as a resolution of this problem, declare either that the legislature's exercise of its discretion in enacting the Presumption Provision is beyond its limit and abusive or that the statute at issue is unconstitutional. It does not comply with the principle of separation of powers for us to consider the enactment of a statute to be unconstitutional just because the implementation of that statute is not right or has errors. We do not agree with the assertion that the Presumption Provision is unconstitutional for the reason that it actually functions as a conclusive provision because that assertion is the same as the argument that this Court shall declare any statute unconstitutional whenever its implementation has faults.

(6) As we can identify from precedents of settling past colonialism of countries that experienced invasion and ensuing colonial rule of foreign countries including Nazi Germany and thereafter won independence, a lot of such legislations set forth provisions punishing the collaborators who committed anti-national activities and confiscating their property regardless whether it was acquired as a reward for their collaboration. This provided a sense of social justice that a collaborator's property or property acquired as a reward of collaboration should never be protected, and furthermore, sent a strong warning to future generations that even though a collaborators' property was partly acquired by their own genuine economic activities, such economic benefit shall not be enjoyed in a national order established by the community they betrayed.

In comparison, in the instant case, while the Presumption Provision shifts some portion of the burden of proof on the property owners in the form of presumption, the provision aims to limit the properties to be confiscated to those acquired as a reward for pro-Japanese collaboration by sufficiently guaranteeing the opportunity to rebut the presumption. Thus, the provision at issue appears reasonable and moderate compared with other countries' statutory provisions confiscating collaborators' property regardless whether it was acquired as a reward for their collaboration.

(7) Furthermore, given the legitimacy of settling past colonialism, the realization of social justice and true social integration, we shall give more weight to the public interests pursued by the Presumption Provision – promotion of justice, restoration of national spirit and constitutional ideal of the March First Independence Movement – than to the disadvantages shouldered by the collaborators.

(C) Sub-Conclusion

Comprehensively considering the forgoing reasons, the necessity of the enactment of the Presumption Provision is considerable high while the burden of proof placed on the side of pro-Japanese collaborators is not excessive. Hence, we do not find the legislature violated the petitioners' right to trial or due process by misusing or abusing its discretion, just for the reason the pro-Japanese collaborators partially bear the burden of proof.

4. Confiscation Provision

(A) Whether the rule against retroactive legislation is violated

(1) Nature of the issue presented

Pro-Japanese Collaborator's Properties, notwithstanding the fact they were acquired as a reward for pro-Japanese collaboration, were certainly conferred pursuant to the relevant property laws of those days.

Therefore the enactment of a statute confiscating those properties amounts to a genuine retroactive legislation. Based on their consideration that the confiscation of pro-Japanese collaborators' properties might be disputed, the drafters of the first Constitution of Korea set forth Article 101 of the supplementary provision so that those properties could be properly confiscated through retroactive legislation. However, the present Constitution of Korea does not have such provision and rather Article 13 Section 2 states that "No person shall be deprived of ··· property rights by means of retroactive legislation." Thus the issue presented to us is whether the nature of the Confiscation Provision at issue as a genuine retroactive legislation complies with Article 13 Section 2 of the Constitution.

(2) Whether the Confiscation Provision violates the rule against retroactive legislation

A) Retroactive Legislation: General

Retroactive legislations can be divided into two: the first one takes its effect on the matter of fact or law already finalized; and the second one takes its effect on the matter of fact or law which is still pending. The latter, in principle, is permissible but in balancing between the public interests requiring retroactivity and the need for protection of confidence in law, the standpoint of protecting confidence limits the discretion of the legislature. In contrast, unless exceptional circumstances exist, the former shall not be permitted under the Constitution because government by the rule of law ensures public confidence in law and stability of the law. However, even in this instance, retroactive legislation may be permitted if: the people could have expected such retroactive legislation; the confidence in law to be protected is not so great due to uncertainty or confusion of legal status; the loss and damage on the parties are either nonexistent or nominal; the public interest justifying retroactive legislation is such a great one that it precedes the necessity of public confidence in law (See, 8-1 KCCR 51, 88, 96Hun-Ka2, February 16, 1996; 11-2 KCCR 175, 193-194, 97Hun-Ba76, July 22, 1999)

B) Review of the Instant Case

1) Preamble to the present Constitution explicitly sets forth that "we, the people of Korea, proud of a resplendent history and traditions dating from time immemorial, shall uphold the cause of the Provisional Republic of Korea Government born of the March First Independence Movement of 1919 and ....." Here, the spirit of 'the March First Independence Movement of 1919' as a historical and ideological basis of our Constitution is one criterion for the construction of the Constitution or other laws (See, 13-1 KCCR 676, 693, 99Hun-Ma2, March 21, 2001). The part of 'uphold the cause of the Provisional Republic of Korea Government born of the March First Independence Movement of 1919' of the preamble means that the existence of our present nation was based on the contributions and sacrifices of the independence activists against Japanese imperialism (See, 17-1 KCCR 1016, 1020, 2004Hun-Ma859, June 30, 2005) and furthermore, the spirit of the Provisional Republic of Korea Government denouncing Japanese colonial rule and pursuing our nation's independence is the foundation for the present Constitution.

Therefore, we find that it is our people's constitutional responsibility to restore national spirit, promote justice and pursue social integration by settling the period Japanese occupation through fact-finding of pro-Japanese collaborators' activities and publicly confiscating property acquired as a reward for those activities.

2) In addition, retroactive confiscation of Pro-Japanese Collaborators' Property is deemed to be the exceptional case where retroactive legislations could have been expected and the damage on stability of law can be tolerated under the spirit of our Constitution for the following reasons:

First, Pro-Japanese Collaborators' Property is property acquired for anti-national, pro-Japanese activities justifying their invasion and suppressing anti-Japanese independence movement in collaboration with Japanese imperialists that forcefully oppressed and illegally ruled our nation in violation of international law. Thus, from the perspective of

pro-Japanese collaborators, they could have sufficiently expected that, given the anti-national characteristics of their acquisition of property, that it might not be possible for them to preserve such Collaborator's Property and pass it down to their descendants when thereafter our people gained independence from Japanese colonialism and established a nation inheriting national legitimacy.

Secondly, as we describe above, it is a value inherited in all of our Constitutions since the first draft and also our people's constitutional responsibility to restore national spirit, promote justice and realize the constitutional ideal of the March First Independence Movement against the Japanese imperialists by confiscating the Collaborator's Property. If so, the people as constituent power and as those who have been governed by the Constitution, settling of the Japanese colonial past including the confiscation of Collaborator's Property is a so called 'latent possibility' which could be converted into reality at any time.

Thirdly, due to the activities of pro-Japanese collaborators approving Ulsa treaty entered into between Japan and Korea for Japanese colonization, our ancestors not only lost the sovereignty of our nation but also suffered all sorts of hardships including being drafted into the Japanese military or being forced to serve the Japanese army as comfort women. They were also either deprived of or violated on their basic rights including the protection of life and body for reason of claiming self-determination or resisting the unjust rule of Japanese imperialism. However, a large portion of those sufferings have still not been relieved to this day when over half a century has passed after liberation from Japan. In addition, as we saw above, it is hard to say that the settling of the Japanese colonial past under the Anti-National Punishment Act has been effective. Thus, continuously has been raised to this day is a social demand that a strict historical and legal evaluation of pro-Japanese collaborators' anti-national activities be made so that social justice can be done. In other words, we can say that the task of settling of Japanese occupation, in particular the task of dealing with the property acquired as a reward of pro-Japanese collaboration remains a significant problem for our society. If so, given all the aforementioned discussions made in our society, one

could have sufficiently expected that the confiscation of Collaborator's Property would become a serious issue resulting in the requirement of governmental confiscation of that property.

3) Meanwhile, the main reason for prohibiting retroactive legislation is to prevent people from losing confidence in law or suffering infringement of rights when matters of the past are arbitrarily regulated by law enacted by men in power thereafter even though those matters could have been be handled through legislation generally regulating those matters before they became an issue. However, as for most legislation on settling the past, general regulations prior to the date the matter became an issue are not probable. In the same vein, in a lot of legislations for correcting the past, retroactive legislations have been allowed.

For example, Article 101 of the supplementary provision of the first draft of our Constitution stipulated that 'the National Assembly drafting this Constitution may enact a special Act for the punishment of vicious anti-national acts committed prior to August 15, 1945 and thereafter the Anti-National Punishment Act was enacted in order to set forth severe punishment and confiscation of property against the persons who aggressively collaborated with the Japanese government for the Japanese annexation of Korea, the persons who signed or conspired for a treaty or a document invading our nation's sovereignty. In France which was occupied by Germany in the Second World War, the persons who served in the collaborationist Vichy government and pro-Nazi collaborators were retroactively punished.

4) Colonial rule and pillage by world powers that swept the human society in the last century was the product of rampant imperialism and fascism. Thus, the common efforts to settle such past made after overcoming colonial rule was a product of self-reflection of human history of civilization that punished collaboration and following of imperialism and fascism so that community could be protected and that fault and sufferings would not be repeated. The resolution and the introspection alert against the repetition of the same history in our community.

Therefore, the matter of confiscating Collaborator's Property as a device of settling our Japanese colonial past, given its historical context, is a national task taken as a very exceptional measure in our history, so that the concern that retroactive legislations may become frequent with this Court's holding of constitutionality of this particular retroactive legislation can be fully removed.

(3) Sub-conclusion

The Confiscation Provision, thus, amounts to a retroactive legislation but an exceptional case where people could sufficiently have expected such retroactive legislation. Furthermore, whereas the loss of confidence in law by the retroactive legislation is insignificant, the importance of public interest achieved by implementing the provision is so overwhelming that retroactive legislation is permissible. Therefore, we cannot conclude that the Confiscation Provision is unconstitutional only for the reason that it is retroactive legislation.

(B) Whether petitioners' property rights are infringed

(1) Legitimacy of legislative intent and appropriateness of the means

As mentioned above, the legislative intent of the Confiscation Provision is legitimate because, confiscation by the government of property of pro-Japanese collaborators acquired as a reward for their collaboration with the Japanese occupation and oppression on our people, intends to restore the national spirit, promote justice and realize the constitutional ideal of the March First Independence Movement against Japanese imperialism.

According to the existing property law including civil law, even those properties acquired as a reward for pro-Japanese collaboration may be protected as legitimate properties in our legal system so that the collaborators and their descendants may enjoy riches and honors for generations. This, however, is evidently contradictory to the existing Constitution declaring we uphold the spirit of the March First Independence Movement of 1919. In such case, if we rely solely on the interpretation and application of relevant provisions such as those

of civil law, handling of Collaborators' Property based on social justice and national spirit would face difficulties. Thus, there is a strong need to take special measures to prevent pro-Japanese collaborators and their descendants from taking benefit of those properties. The Confiscation Provision, which allows the government to expropriate those properties so that it can be used for persons recognized for their distinguished service for the independence of our nation (Article 30 of the Act on the Honorable Treatment of Persons of Distinguished Services to Independence), is a proper means to achieve the afore-mentioned legislative intents.

(2) Whether the instant provisions are least restrictive

A) When we examine the overall aspects of the Definition Provision and the Confiscation Provision, Pro-Japanese Collaborators' Property subject to confiscation through the Confiscation Provision is limited to the property of persons who committed one of the four activities described as a serious and clear collaboration among activities defined as pro-Japanese collaboration by the 'the Special Act on the Fact-Finding of Anti-National Activities under the Japanese Occupation' (hereinafter, 'the Anti-National Act'). These are the following: Signing, approving or conspiring any treaty invading the sovereignty of our nation such as Treaty for Japanese annexation of Korea or Ulsa Treaty (Article 2 Item 6 of the Anti-National Act); committing acts such as receiving the title of nobility 'for the contribution to Japanese annexation of Korea' or 'substantively supporting the Japanese Rule' (Article 2 Item 7 of the Anti-National Act); serving as a member of either the House of Peers or the House of Representatives of the Parliament of Japanese Imperialists (Article 2 Item 8 of the Anti-National Act); or serving as vice-president, advisor or Chamei of Jungchuwon of the Japanese Government-General of Korea (Article 2 Item 9 of the Anti-National Act). Furthermore, the provision at issue sets forth an exception where a person described above shall not be considered as a pro-Japanese collaborator in instances where such person thereafter resisted or returned the title of nobility or aggressively participated in the independence movement.

B) As aforementioned, while the Presumption Provision presumes that the property of the pro-Japanese collaborator acquired during the period from the outbreak of the Russo Japanese war to August 15, 1945 shall be presumed as Pro-Japanese Collaborators' Property, the collaborators' side can rebut the presumption anytime by proving that the property at issue was not acquired as an award for pro-Japanese collaboration.

C) In addition, the Special Act has a provision protecting a bona fide 3rd party who enters into a contract for the transaction of the Pro-Japanese Collaborators' Property and thus minimizes the harm on stability of law. Meanwhile, the Supreme Court made a decision where 'the 3rd party' prescribed in the proviso of Article 3 Section 1 of the Special Act includes not only the person who acquired the Pro-Japanese Collaborators' Property prior to the effective date of the Special Act but also a person who acquired that property after the effective date of that Act (See. 2008 Du 13491 delivered on November 13, 2008, the Supreme Court). Through construction of the Act as seen in this case law, the possibility of damaging the stability of law is likely to be reduced further.

D) While the wounds of Koreans compulsorily drafted into the military or forced to become comfort women inflicted by the cruel Japanese colonial rule continue to remain in our society, the claims for property redemption filed by the descendants of the Pro-Japanese Collaborators have persisted. Whereas most of the victims from Japanese occupation have died or been aged enough to either be ignored in our society or forced to become a neglected minority, the descendants of the Pro-Japanese Collaborators who regained the confiscated property through lawsuits, resold it in exchange for a huge amount of money and fled to foreign countries. Hence, the legislation of the Confiscation Provision appears to be the minimum means necessary to achieve the legislative intent of the Special Act which ultimately pursues social integration by forfeiting Pro-Japanese Collaborator's Property retroactively, realizing social justice and rectifying past injustices.

For the foregoing reasons, we do not find that the Confiscation Provision excessively and unnecessarily restricts property rights guaranteed by the Constitution.

(3) Proportionality of Legal Interests Concerned

Given the legitimacy of settling the past and the value of true social integration, the importance of the public interest the Confiscation Provision is seeking, restoring the national spirit and realizing the constitutional ideal of the March First Independence Movement, is enormous. Even though the petitioners' property rights may be restricted, the level of such restriction cannot be regarded to be severe considering the historic legitimacy of confiscation of the Pro-Japanese Collaborators' Property, reasonableness in limiting the property subject to confiscation and protection of the bona fide 3rd party. Thus, it is difficult to consider that the Confiscation Provision does not strike the balance of interests, therefore the Confiscation Provision is cannot be deemed in violation of proportionality between interests.

(4) Sub-conclusion

Therefore, we do not find that the Confiscation Provision infringes on the right to property. Moreover, the petitioners' claim that their rights to pursue happiness are violated has no merit.

Meanwhile, the petitioners assert that the Confiscation Provision violates the essential content of their property rights because it offers no compensation while depriving ownership. However, considering the legislative purpose of the Special Act which is realizing the constitutional ideal of the March First Independence Movement and social justice by forfeiting Pro-Japanese Collaborator's Property, we find that confiscation with no compensation rather complies with the constitutional ideal so long as that confiscation is not inconsistent with the rule against excessive restriction. Thus, we do not agree with the petitioners' assertion.

(C) Whether the principle of equality is violated

(1) Here, we examine whether the Confiscation Provision differently treats the petitioners based on their social status without any reasonable grounds.

A) The standard of review we apply to decide whether the right to equality is violated shall vary depending on the level of legislative policy-making power allowed. In the instances where either the Constitution particularly requires equality or the basic right relevant is severely restricted due to a discriminatory treatment, the legislative policy-making power shall be reduced and thus a strict standard of review must be applied (See. 98Hun-Ma363 delivered on December 23, 1999, 11-2 KCCR 770, 787).

Prohibition of discrimination based on social status is prescribed in the second sentence of Article 11 Section 1 of the Constitution and focuses on the ban on discrimination without any reasonable ground. However, that sentence does not require an absolute prohibition of different treatment in the instances stipulated in the sentence so that the legislative policy-making power is limited (See. KCCG 170, 2106, 2110, 2006Hun-Ma328, November 25, 2010). If so, the fact that the petitioners' status as descendents of pro-Japanese collaborators amounts to social status of the second sentence of Article 11 Section 1 of the Constitution does not make it into a case the Constitution particularly requires equality. Moreover, as reviewed below, governmental confiscation of Pro-Japanese Collaborators' Property is not a case where the prohibition of guilt-by-association is to be applied and there being no constitutional provision requiring those descendants to be equally treated in particular, we cannot find that the different treatment of those descendants warrants the application of a strict standard in reviewing whether the right to equality is violated.

In addition, the Confiscation Provision does not make all property of those descendants subject to confiscation but only the property which was acquired as a reward for their ascendants' pro-Japanese collaboration and thereafter inherited. If so, the Confiscation Provision

does not belong to the circumstances where the basic right is severely restricted, and thus it does not warrant the application of a strict standard in reviewing whether the right to equality is violated.

Therefore, a relaxed standard of review shall be applied for the decision whether the differential treatment of the petitioners under the Confiscation Provision violates the petitioners' rights to equality.

B) As we acknowledged above, the Confiscation Provision is intended to realize social justice and restore our national spirit; with regard to the Collaborators' Property, it is contradictory to the idea of justice to ensure such property be possessed by either the pro-Japanese collaborators or their descendants; the properties subject to governmental confiscation are limited to only those of persons who committed one of the four activities described as a serious and clear collaboration among activities defined as pro-Japanese collaboration by the Anti-National Act: it is provided, that such person described above shall not be considered as a pro-Japanese collaborator in the cases where he/she thereafter resisted or returned the title of nobility or actively engaged in the independence movement; there is a provision protecting a bona fide 3rd party who has entered a contract for the transaction of those property. Given all the above grounds, even though the Confiscation Provision treats Collaborators' Property differently from the other property by subjecting it to confiscation, that treatment has reasonable grounds. Thus, it is difficult to conclude that the Confiscation Provision is arbitrary discrimination in violation of the principle of equality.

(2) Meanwhile, the petitioners contend that the Confiscation Provision is a dispositional statute and thus it is unconstitutional. The Constitution, however, does not have a provision particularly classifying a statute as a dispositional one applicable either to the individuals or to each incident nor has a provision expressly prohibiting the enactment of such dispositional statute. Thus, the sole fact that a particular provision is a statute applicable to either the individuals or each incident does not automatically make such provision unconstitutional

(See. 8-1 KCCR 51, 69, 96Hun-Ka2, February 16, 1996; 13-1 KCCR 367, 375, 99Hun-Ma613, February 22, 2001).

Therefore, the petitioners' contention that the Confiscation Provision is a dispositional statute and thus it is unconstitutional does not have merit. Furthermore, the Instant Provisions is to be generally applied and thus it is hard for us to consider such provisions as dispositional statutes. Therefore, we do not accept the petitioners' contention.

(D) Whether the rule against guilt-by-association is violated

Article 13 Section 3 of the Constitution provides that "no citizen shall suffer unfavorable treatment on account of an act not of his or her own doing but committed by a relative." This provision shall be applied to 'only instances where a disfavored treatment is made only based on the fact that the person committing an act at issue is his or her relative even though the act actually has nothing to do with that person' (See. 17-2 KCCR 785, 792, 2005Hun-Ma19, December 22, 2005).

In the instant case, the Collaborator's Property defined as property subject to governmental expropriation under the Confiscation Provision is limited to property acquired by a person for his/her collaboration with Japanese Imperialism or such property inherited or such property bequeathed or donated with the knowledge that it is Pro-Japanese Collaborators' Property. Thus, so long as property other than the Collaborator's Property, such as property acquired by the descendant by his/her economic activities or inherited property but not belonging to Collaborator's Property defined above, is not confiscated, governmental expropriation of the Collaborator's Property shall not be deemed as one of the instances where a disfavored treatment is made only based on the fact that the person committing an act at issue is his or her relative even though such act actually has nothing to do with the person whose property is confiscated. We, therefore, do not find that the Confiscation Provision is in violation of the rule against guilt -by-association stipulated by Article 13 Section 3 of the Constitution.

(E) Review on other arguments

(1) The petitioners contend that the Confiscation Provision creates a privileged class and recognizes the inheritance of awarded honors and decorations, both prohibited by the Constitution. On the contrary, the 'privileged class' of Article 11 Section 2 means a social class and its disapproval of inheritance of awarded honors and decorations means the denial of privileges derived from such awarded honors and decorations. Thus, it is difficult to conclude that governmental confiscation of the Collaborator's Property amounts to the creation of a social class or the recognition of inheritance of awarded honors and decorations.

(2) The petitioners also make an assertion that, even though governmental confiscation of the property under the Confiscation Provision is so similar to criminal confiscation that it amounts to 'punishment' of Article 12 Section 1 of the Constitution, no judicial procedure is provided, infringing on their rights to access to court guaranteed by Article 27 Section 1 of the Constitution and violating due process prescribed in the second paragraph of Article 12 Section 1. However, a procedure to rebut the decision of the Commission is provided under Article 21 and 23 of the Confiscation Act; procedural safeguards, filing an administrative suit or requesting of administrative review, are available; and the Commission's decision of governmental confiscation is only an administrative disposition not a confiscation as a punishment of criminal penalty under the Criminal Act – confiscation of 'a thing which is not the property of a person other than the criminal, or which was acquired by a person other than the criminal with the knowledge of its nature after commission of the crime may be confiscated if it is a thing which has been used or was sought to be used in the commission of a crime, a thing produced by or acquired by means of criminal conduct or a thing received in exchange for a thing mentioned above'. Therefore this does not require further review.

(3) The petitioners also argue that because the Anti-National Punishment Act was enforced in the past, the enactment and execution

of the Confiscation Act is against the principle of double jeopardy. We, however, find that the principle of double jeopardy shall be applied to criminal punishment but that governmental confiscation under the Instant Provisions does not belong to criminal punishment. Therefore, the petitioners' argument has no merit.

IV. Conclusion

For the foregoing reasons, we find that the Instant Provisions do not violate the Constitution and hereby decide as the holding of the Court. All Justices joined this opinion, except for the concurring opinions of Justice Kim, Jong-Dae (Part V) and Justice Mok, Young-Joon (Part VI) with respect to the Confiscation Provision; opinion of partial limited unconstitutionality of Justice Lee, Dong-Heub and Justice Mok, Young-Joon (Part VII) with respect to the Presumption Provision; opinion of partial limited unconstitutionality of Justice Lee, Kang-Kook and Justice Cho, Dae-Hyun (Part VIII) with respect to the Confiscation Provision.

V. Concurring Opinion of Justice Kim, Jong-Dae

I join the majority opinion that the Instant Provisions do not infringe on the petitioners' property rights but I would like to write separately to reiterate my view that the Collaborator's Property shall not be property protected by the Constitution.

A. Critique on the Majority Opinion

1. The Constitution guarantees the right to property as a basic right. The right to property may be restrained but only in compliance with the principle of proportionality (Article 37 Section 2 of the Constitution), and expropriation, use or restriction of property for public necessity shall not be made unless it is prescribed by law and, in such instance, just compensation thereof shall be paid (Article 23 Section 3 of the Constitution). Furthermore, no person shall be deprived of his or her property right by means of retroactive legislation (Article 13 Section 2 of the Constitution). Thus, once recognized as a property

right guaranteed by the Constitution, it shall be protected by the Constitution to the same extent as stated above.

2. In particular, given that the framers of the Constitution, in drafting Article 13 Section 2, did not employ any exception at all, the prohibition of retroactive legislation depriving a property right should be a value to be consistently and uniformly pursued with no exceptions. Thus, insofar as the Court interprets Article 13 Section 2 of the Constitution, which prohibits the deprivation of citizens' property right by retrospective legislation, to allow citizens to be deprived of their property rights by retroactive legislation when there are special reasons, it would certainly be a creation of a constitutional provision. This is neither an appropriate construction of the Constitution nor consistent with the constitutional doctrine of separation of powers because the Court would be creating a constitutional content contrary to the existing Constitution, in deviation of the only power delegated by the people which is to interpret the Constitution.

This is the most basic reason that I do not agree with the Court's opinion: The analysis of the Court's opinion which considers the Collaborators' Property as constitutionally protected property, but finding deprivation of such property by retroactive legislation not in violation of the Constitution, hardly overcomes logical contradiction. In order to overcome the logical contradiction, the majority relied on the approach that an expropriation of property by a genuine retroactive legislation may be allowed in very exceptional cases. In my view, however, this approach is nothing but a creation or an enactment of constitutional content rather than an interpretation of the Constitution, which violates the principle of separation of powers.

B. Constitutional Nature of Collaborator's Property

1. In the history of discourse on basic rights, the concept of inherent right, the right innately vested in human beings before the establishment of nations, was largely recognized. Nevertheless, these days, with modern constitutionalism generally adopted by most of the countries in the world, the decision on which basic rights should

be constitutionally protected should be made according to the constitutional norms of each country. Property stipulated in the Constitution means property protected by 'our Constitution' and thus, the decision whether the Collaborator's Property is a constitutionally protected right to property requires us to firstly examine either the stand of the Constitution toward the Collaborator's Property or the relations between the Collaborator's Property and the Constitution.

2. It is common knowledge that the Constitution of the Republic of Korea was established upon our people's fight against and restoration over Japanese Imperialism. During the 36 years of colonial occupation since the Ulsa Treaty of 1905, our people persistently and fiercely carried on the independence movement. While it is undeniable that the Allied Forces played a role in defeating Japanese imperialists, the national capabilities and results displayed by the independence movement, into which a large number of our ancestors devoted themselves by sacrificing their lives and security, also played a crucial role in achieving independence.

Thus, the Constitution of the Republic of Korea is a product of history gained through the endeavors and noble sacrifice of our people who endured the period of brutal Japanese occupation. Accordingly, the first draft of the Constitution, in its preamble, explicitly declared that it upholds the cause of the Provisional Republic of Korea Government born of the March First Independence Movement of 1919. This movement was historically the largest national movement that resisted the Japanese imperialist occupation and declared independence, which resulted in the establishment of the Provisional Republic of Korea Government so that, thereafter, our people were able to systematically launch the national liberation movement. For the stated reasons, the fact that our Constitution provides that it upholds the cause of the Provisional Republic of Korea Government born of the March First Independence Movement of 1919 is a public declaration that the foundation of the Constitution is the spirit of self-determination and national liberation of the Provisional Republic of Korea Government which endeavored to overcome the Japanese imperialist occupation and pursued independence.

Given the spirit and tradition of the Constitution as well as the backgrounds in its establishment, property acquired as a reward of pro-Japanese collaboration and anti-national activities shall not be protected by the Constitution. The Collaborator's Property no doubt is 'property' of value to the pro-Japanese collaborators, but it shall not be protected by the 'property right' provision of our Constitution, a product of the fight against restoration over Japanese imperialism. Rather, it is fair to say that the Collaborator's Property is one that should to be settled by the Constitution because it was acquired as a reward for the contribution to the continuance and reinforcement of Japanese Imperialism and for oppression on our ancestors' devotion for the liberation of our people, which resulted in the blockade and delay of the establishment of the Constitution.

3. The first draft of the Constitution, in Article 15, prescribed that 'the property right is constitutionally protected but its content and limit shall be decided by statutes enacted by the legislature,' while Article 101 of the supplementary provisions of the Constitution provided that 'the National Assembly enacting this first draft of the Constitution may enact a special Act in order to punish a person for his / her vicious anti-national acts committed prior to August 15, 1945.' Thus, it can be concluded that the first draft of the Constitution recognized a property right as a constitutionally protected right but at the same time allowed a special Act to be enacted for dealing with the affairs and properties of pro-Japanese collaborators. In my view, given the basic spirit of the first draft of the Constitution explicitly stipulating that it upholds the independence spirit proclaimed all around the world through the March First Independence Movement of 1919 and the Provisional Republic of Korea Government, we must consider that the framers resolved the onerous problem of dealing with Pro-Japanese Collaborators' Property, by including the Collaborator's Property into Article 101 of the supplementary provisions of the Constitution rather than Article 15 of the right to property. To sum up, the Collaborator's Property is the property which the first draft of the Constitution saw as one not to be constitutionally protected.

In addition, even though the Constitution later amended does not retain such supplementary provision as the first draft of the Constitution with respect to Collaborator's Property, it is quite possible for the legislature to enact a statute confiscating the Collaboration Property unless there exists a normative standard that the problem of Collaborator's Property has been completed not to require additional efforts. This is because it is hard to say that the hostility toward the Collaborators' Properties since the framers drafted our Constitution has discontinued or changed, for later amended Constitutions have upheld the founding principle of the nation and spirit of the first Constitution, which were the ideological bases of the independence movement amid the fight against Japanese Imperialism.

Therefore, if a property acquired as a reward for pro-Japanese collaboration is intolerable to be protected by the Constitution due to its strong anti-national nature, the legislature may enact an exceptional legislation even under the amended Constitution.

The descendants who inherited the Collaborator's Property may assert that protection of such property is required based on values such as security of transactions and the principle of protection of confidence in law. The interest in preserving these values, however, cannot weigh more than maintaining the value and historical significance of the founding spirit of the new independent nation. I believe we should regard the nature of anti-nationality of original acquirers deeply rooted in the Collaborator's Property is inherited also when their descendants inherit such property, so long as the ownership is transferred with no payment of money and not by a causative act recognized by government.

C. Constitutional restrictions on governmental confiscation of the Collaborator's Property

However, the government shall abide by constitutional restraints in locating the Pro-Japanese Collaborator's Property and setting up the confiscation process thereof. Not every property of the pro-Japanese collaborator may be subject to confiscation under a special act, just for the reason it belongs to such collaborator. Taking account of the

founding spirit of our nation and the first draft of the Constitution, the scope of Pro-Japanese Collaborators' Property has to be classified on the basis of fair and impartial criteria. Thus the Court, when reviewing whether the confiscation of the Collaborator's Property is constitutional, must examine whether the selection and confiscation process are reasonable, fair and justifiable and, to this extent, the remedy for the owners of such property is guaranteed through constitutional review.

D. Conclusion

In conclusion, the Instant Provisions are not against the Constitution because they are intended to confiscate Collaborator's Property which is not subject to protection as a constitutional right to property and hence it is not necessary for the Court to review whether the principle of proportionality is violated. It is sufficient for the Court to consider whether the properties subject to confiscation under the Instant Provisions belong to Pro-Japanese Collaborators' Property that warrant governmental confiscation. From this standpoint, the Instant Provisions do not appear to be against that constitutional restraint.

The Instant Provisions are closely related to the foundation and legal tradition of our nation, which requires that the Court take an approach beyond the existing theory of general civil law. The foundation and legal tradition of our nation are inherent themes of the Constitution and thus the Court may reach a proper conclusion only when its logic is premised on the underlying themes and backgrounds of the Constitution itself.

VI. Concurring Opinion of Justice Mok, Young-Joon

I agree with the majority that both the Definition Provision and the Confiscation Provision do not violate the Constitution but I write separately to reiterate a different basis for the conclusion with respect to the Confiscation Provision from that of the Court Opinion.

A. Critique on the Court Opinion

The Court Opinion finds that the Confiscation Provision amounts to a genuine retroactive legislation, but that some retrospective law can be allowed when such law, as an exception, is justified because, for example, people could have expected such retroactive legislation and whereas the loss of confidence in law by the retroactive legislation is insignificant, the importance of public interest achieved by implementing the provision is so overwhelming that retroactive legislation is permissible. This analysis is based on the case laws of the Constitutional Court that retroactive legislation may be permitted if: the people could have expected such retroactive legislation; the confidence in law to be protected is not so great due to uncertainty or confusion of legal status; the loss and damage on the parties are either nonexistent or nominal; the public interest justifying retroactive legislation is such a great one that it precedes the necessity of public confidence in law (See, 8-1 KCCR 51, 88, 96Hun-Ka2, February 16, 1996; 11-2 KCCR 175, 193-194, 97Hun-Ba76, July 22, 1999).

The framers of the Constitution, out of concern that the confiscation of Pro-Japanese Collaborators' Properties might be disputed, added Article 101 to the supplementary provisions of the first draft of the Constitution so that those properties could be properly confiscated through retroactive legislation. The current Constitution, however, has no such provision and Article 13 Section 2 of the Constitution which provides that "… no person shall be deprived of property rights by means of retroactive legislation" declares all retroactive legislation depriving a property right shall be forbidden whatever the reasons may be.

Thus, regardless of whether the deprivation of property by a retroactive legislation is desirable in a democratic country, the Court shall not be allowed to construe that in exceptional cases retroactive legislation depriving a property right is permitted, because this, exceeding the authority of the Court, amounts to a change of content in the Constitution. I, therefore, believe that the Court Opinion is not justified and that the case laws described above shall not be complied to.

B. Nature of the Confiscation Provision

As the Collaborator's Property was acquired as a reward for contribution to Japanese Imperialism and inherited thereafter, notwithstanding the fact it was lawfully acquired, the decision whether, normatively, Collaborator's Property should be conclusively protected by the Constitution as a property right should be made upon consideration of comprehensive circumstances such as the ideal of our Constitution and the situations at the time of the acquisition.

The preamble of the current Constitution provides that 'we, the people of Korea, proud of a resplendent history and traditions from time immemorial, should uphold the cause of the Provisional Republic of Korea Government born of the March First Independence Movement of 1919' which means that the existence of our present nation was based on the contributions and sacrifices of the independence activists against Japanese imperialism and furthermore, the spirit of the Provisional Republic of Korea Government denouncing the Japanese colonial rule and pursuing our nation's independence is a foundation for the present Constitution. Thus, property acquired as an award for the denial of our people and contribution to the Japanese occupation of Korea in violation of the spirit of the Provisional Republic of Korea Government contains anti-social standards.

In addition, the criminal code of the Daehan Empire (1897-1910), promulgated in 29 April, 1905, sets out crimes including treason (Article 190 through 192), rebellion (Article 195), treason resorting to foreign power and destruction of national sovereignty (Article 200). Even though such criminal code was abolished by Item 11 of Regulations of the Japanese Government General of Korea on March 18, 1912, the abolition only means a prohibition of its application on account of the illegal occupation by Japanese Imperialism, the normative effect of which has implicitly remained. Accordingly, the collaborations and anti-national activities of pro-Japanese collaborators amounts to a crime of treason and thus their properties acquired as a reward for such collaboration should be regarded to be associated with serious criminality.

Likewise, we should conclude that the criminality or anti-nationality was inherent in the Collaborators' Property at the time of acquisition and that criminality has persisted even up to now, as our country has failed to officially settle the past, unlike other countries with similar experiences. Thus, we cannot say that the facts and legal rights pertaining to settling ownership of Collaborators' Property have finalized. Conclusively, the Confiscation Provision, which prescribes confiscation of Collaborators' Property under certain requirements, is not a genuine retroactive legislation but a quasi-retroactive legislation effective on ongoing facts or legal rights.

C. Whether the Confiscation Provision is unconstitutional

While quasi-retroactive legislation is basically allowed by our Constitution, such legislation must comply with the constitutional restriction requiring that public interest in having a retroactive legislation has to be more important than the interest in protecting confidence in law. In the instant case, as we examined above, the great public interest that justifies the Confiscation Provision is far more important than the interest in protecting the confidence in law.

Therefore, I do not find that the principle of protection of confidence in law required by the Constitution is violated by the Confiscation Provision and hence cannot be deemed unconstitutional just for being quasi-retroactive legislation.

D. Sub-Conclusion

For the stated reasons, I would conclude that the Confiscation Provision is a quasi-retrospective legislation not in violation of the Constitution.

VII. Opinion of Justices of Lee, Dong-Heub and Mok, Young-Joon: Partial limited Unconstitutionality

We do not agree with the majority and thus would like to reiterate as following the reasons that the Presumption Provision is unconstitutional as far as the part of 'acquired' of the Presumption Provision is interpreted

to include property acquired before 1904 but recorded as acquired thereafter through the land survey of 1912.

A. System of land ownership survey

Our modern system of land ownership was established when the Japanese colonial government started to file up the land survey records, which thereafter was approved as the cause of original acquisition by the Republic of Korea and inherited by the current system of the Constitution. In other words, once the survey was finalized under Article 15 of the Chosun Land- Survey Regulations (Item 2 of Regulation on August 13, 1912) for the owners of lands and under Act 8 of the Chosun Forest-Survey Regulations (Item 5 of Regulation on May 1, 1918) for the owners of forests, the titles of those lands and forests were granted as originally acquired (64 Da 1508 delivered on November 30, 1965, the Supreme Court; 83 DaKa 1152 delivered on January 24, 1984, the Supreme Court).

Meanwhile, the above survey was a process where, during the conduct of land readjustment plan by Japanese Imperialism, Korean people were required to register land already owned by them. This means the lands or forests acquired before the land survey were recorded as acquired after 1912 or 1918, regardless of the actual time of acquisition. Thus, the survey merely shows ownership of lands at the time of that survey conducted in 1912 or 1918, but by no means offers accurate evidence of when that land was actually acquired.

B. Problem of the Presumption Provision

The Presumption Provision provides that 'the property that shall be assumed as the property acquired as a reward for pro-Japanese collaboration is the property acquired by that collaborator in the period from the outbreak of the Russo Japanese war to August 15, 1945.' Thus, presumption is made when acquisition occurred during the period from the outbreak of the Russo Japanese war to August 15, 1945. As a result, even land acquired before that land survey in 1912, and in no relation with pro-Japanese anti-national activities, is

likely to be presumed as Pro-Japanese Collaborator's Property under the Presumption Provision. For example, the land that had been owned for hundreds of years even prior to 1904 can be presumed as acquired at the time of that survey to be Collaborator's Property.

In response to this assertion, the majority argue that the collaborators may avoid confiscation by rebutting that presumption by proving that the property at issue was not acquired as a reward for pro-Japanese collaboration. However, this ignores the reality of court proceedings because, in order to avoid confiscation, the collaborator has to prove that the property at issue was actually acquired prior to 1904. But the modern system of land ownership was established when the Japanese colonial government started to file up the land survey records, which means that there was no public notice of land ownerships before the land survey. Thus, it is almost impossible for those collaborators to meet the burden of proof in order to rebut the presumption of Collaborator's Property because: it is unlikely that there exists any document or witness for proving facts that occurred 60 or 100 years ago; even if there are, it would be difficult to use as effective evidence because either the document would have been severely destroyed or the witness would have not have clear memories; it is not easy to rebut that presumption only with other circumstantial evidence, such as the fact that a grave yard of ancestors was located in the land or that the address written in the booklet of family tree is the same one of the land at issue. As a result, it is quite probable that the pro-Japanese collaborators or their heirs will be deprived of their properties that are totally unrelated to the Collaborator's Property.

C. Sub-conclusion

Insofar as the part of 'acquired' of the Presumption Provision is interpreted to include 'property acquired through the land survey of 1912,' resulting in the confiscation of property unrelated to Collaborators' Property, the Presumption Provision is in violation of the principle of least restrictiveness and does not strike the balance between the interests concerned, violating the rule against excessive

restriction and infringing on the property right of the pro-Japanese collaborators or their heirs, and thus is unconstitutional.

For the foregoing reasons, the Presumption Provision is unconstitutional as far as the part of 'acquired' of the Presumption Provision is interpreted to include property acquired through the land survey.

VIII. Opinion of Justices Lee, Kang-Kook and Cho, Dae-Hyun: Partial Unconstitutionality

We find that the Confiscation Provision violates Article 13 Section 2 of the Constitution prohibiting the deprivation of property right by retroactive legislation and thus write separately to reiterate the basis of the opinion.

A. Necessity of confiscation of the Collaborator's Property

The Collaborator's Property defined under the Confiscation Act is property acquired by a person for his/her collaboration with Japan committed in the period from the outbreak of the Russo Japanese war to August 15, 1945, or such property inherited, or such property bequeathed or received as a gift with the knowledge that the property was a reward for such collaboration.

Meanwhile, given that the Republic of Korea, in the preamble of the Constitution, declares that it upholds the cause of the Provisional Republic of Korea Government born of the March First Independence Movement of 1919, it is necessary for social integrity that we punish the group of persons who collaborated with Japanese imperialism and confiscate Collaboration Property so that we can settle the past and restore national spirit.

B. Nevertheless, even though that historical, social and ideological need has never been greater, the aforementioned task shall be conducted in a way in compliance with the Constitution, the supreme law in our nation.

C. The majority concluded that the Confiscation Provision amounts

to a genuine retroactive legislation, but as the preamble of the Constitution declares that it upholds the cause of the Provisional Republic of Korea Government born of the March First Independence Movement of 1919, there is a constitutional obligation to settle the Japanese colonial past. Also this is an exceptional case where people could have expected such retroactive legislation and whereas the loss of confidence in law by the retroactive legislation is insignificant, the importance of public interest achieved by implementing the provision is so overwhelming that retroactive legislation is permissible. Thereby it concluded that the Confiscation Provision is not unconstitutional just for the reason that it is retroactive legislation.

D. However, the Confiscation Provision is in violation of the express text of Article 13 Section 2 of the Constitution because it amounts to a deprivation of property by genuine retroactive legislation.

1. First of all, through the history of our Constitution even prior to its first draft, there has been a common and universal recognition that a separate constitutional basis must be required for punishment, deprivation of property right and restraint on voting right by retroactive legislation, because these violate the basic rights protection by the Constitution or general principle of law.

Therefore, even though statutes to punish pro-Japanese collaborators, confiscate Pro-Japanese Collaborators' Property and restrict their citizen's right were enacted and executed during the period of first draft of the Constitution, that was possible because Article 101 of the supplementary provisions of the first draft of the Constitution which provided that "the legislature enacting this Constitution may enact the special Act to punish vicious anti-national activities committed before August 15, 1945."

In addition, the supplementary provision of the Constitution fourthly revised on November 29, 1960 provided that "a special statute can be enacted for: the punishment of those who committed either election fraud, corruption or wrongful act such as killing and inflicting injuries against people resisting such election fraud or corruption with regard

to the election of President and Vice-president held on March 15, 1960; the restriction on citizen's right against those who committed distinguishable anti-democratic acts prior to April 26, 1960 by using his/her position; administrative or criminal disposition against those who accumulated property prior to April 26, 1960 in wrongful ways by using his/her position or power." Based on this provision, the legislature confiscated wrongfully accumulated properties by enacting special acts including the Special Act on Treatment of Illegally Accumulated Property.

2. Thereafter, for the first time in the history of our Constitution, provisions expressly prohibiting the restraint of voting rights or deprivation of property by retroactive legislation were set out: the Article 11 Section 1 of the Constitution fifthly revised on December 26, 1962 provided the rule against retroactive punishment; and Section 2 of the same Article prescribed that "no citizen shall be restricted on his or her voting right or deprived of his or her property right by retroactive legislation."

The reason for the newly added provisions was the determination of the constituent power to absolutely prevent voting right restriction or property deprivation by retroactive legislation in the future, to correct wrongful aspects of our history of constitutional government in which political or social retaliation had been ceaselessly repeated by way of retroactive legislation restricting or depriving the basic rights of citizens, especially voting rights and property rights in the period from the April 19 Democratic Revolution in 1960 through the May 16 Military Coup in 1961.

These provisions, thereafter, have constantly remained in our Constitution almost the same with slight changes in the location and language expression.

3. For the forgoing reasons, Article 13 Section 2 of the Constitution is a direct statement of prohibition declaring that voting right restriction or property deprivation by retroactive legislation shall not be allowed under any circumstances. The constitutional significance of the provision,

thus, is a declaration of a constitutional prohibition that even though voting rights and property rights, if necessary, may generally be restricted by statutes under Article 37 Section 2 of the Constitution, such restriction or deprivation by retroactive legislation is constitutionally prohibited pursuant to Article 13 Section 2 of the Constitution.

Hence, it is a clear violation of that constitutional provision to confiscate property by retroactive legislation even though it is Pro-Japanese Collaborators' Property acquired by pro-Japanese collaboration and anti-national activities.

4. The majority, based on case laws including 96Hun-ka2(1996. 2. 16) which reasoned that a restraint on basic rights by retroactive legislation may be allowed in exceptional cases, argue that the Confiscation Provision would also amount to such exceptional circumstances and thus is not against the Constitution. However, given factors such as Article 13 Section 2 and its relevant legislative history, voting right restriction or property deprivation by retroactive legislation is expressly prohibited by the Constitution itself, absent a special provision of the Constitution such as a supplementary provision, such restriction or deprivation by retroactive legislation is not allowed. Thus, under the current Constitution where there is no special provision of the Constitution such as a supplementary provision, even though the Confiscation Provision is for settling or arranging a historically exceptional circumstance, we cannot help saying that it is a violation of the Constitution as far as it is a property deprivation by retroactive legislation. In our view, if the Court, as the majority opinion, construes the current Constitution to allow a property deprivation by retroactive legislation in exceptional circumstances, it amounts to an actual revision or distortion of constitutional provision, which goes far beyond the scope of constitutional interpretation.

5. In conclusion, governmental confiscation of Collaboration Property will not be possible until a separate constitutional ground is provided likewise: Article 101 of the supplementary provisions of the first draft of the Constitution enabled the Special Act on Anti-National Punishment to be enacted; and the supplementary provision of the

Constitution fourthly revised on November 29, 1960 enabled the Special Act on Treatment of Illegally Accumulated Property to be enacted.

6. Furthermore, we examine another part of the majority's opinion asserting that, given that the Republic of Korea, in the preamble of the Constitution, declares that it upholds the cause of the Provisional Republic of Korea Government born of the March First Independence Movement of 1919, it is a constitutional obligation to settle the past and restore national spirit by confiscating Pro-Japanese Collaborators' Property. Reasoning of this assertion is not clear but, if the tenor is that legal effects of basic ideologies or principles explicitly prescribed in the preamble of the Constitution is superior to that of Article 13 Section 2 of the Constitution and thus retroactive deprivation of the Collaboration Property can be allowed by the founding principles of the preamble, despite Article 13 Section 2 of the Constitution, this is unreasonable.

Of course, the part in the preamble "upholds the cause of the Provisional Republic of Korea Government born of the March First Independence Movement of 1919," that declares the founding principles may constitute a criterion for constitutional or statutory interpretation. But basically, founding ideology or basic principles cannot help being specified and constitutionally realized by individual provisions of the main text of the Constitution. Hence, we believe the Court, in its interpretation of individual provisions of the Constitution, should not construe a provision contrary to its text by insisting on historical or ideological significance of founding ideology or basic principles declared in the preamble of the Constitution.

Therefore, the majority's interpretation of Article 13 Section 2 in contrast to the text by way of giving priority to the part "upholds the cause of the Provisional Republic of Korea Government born of the March First Independence Movement of 1919," in the preamble, is putting the cart before the horse.

Moreover, if we look at the language of that preamble itself, it is not interpreted as connoting that Collaboration Property must be

confiscated without fail even by retroactive legislation not allowed by the Constitution.

E. Sub-conclusion

For the reasons above stated, the Court should declare that the Confiscation Provision constitutes a property deprivation by retroactive legislation violating Article 13 Section 2 of the Constitution and thus is unconstitutional.

Justice Lee, Kang-Kook (Presiding Justice), Lee, Kong-Hyun (unable to sign and seal due to retirement), Cho, Dae-Hyun, Kim, Hee-Ok (unable to sign and seal due to retirement), Kim, Jong-Dae, Min, Hyeong-Ki, Lee, Dong-Heub, Mok, Young-Joon, Song, Doo-Hwan

[Appendix 1] list of names of petitioner: *intentionally omitted*

[Appendix 2] list of lands and forests: *intentionally omitted*

[Appendix 3] list of backgrounds of acquisition and ownership changes: *intentionally omitted*

3. Constitutionality of the Police Action Blocking Passage to Seoul Plaza

[23-1(B) KCCR 457, 2009Hun-Ma406, June 30, 2011]

Questions Presented

1. Whether the action of the Chief of the National Policy Agency on June 3, 2009 that totally blocked passage to Seoul Plaza with police buses (hereinafter "the passage blockade") restricted the complainants' freedom of residence and right to move at will (negative)

2. Whether the passage blockade violated the principle against excessive restriction and infringed on the complainants' general freedom of action (positive).

Summary of Decision

1. Freedom of residence and the right to move at will are fundamental rights to ensure individuals' free exercise of choosing and changing location of places closely related to their daily life that amount to a place of residence or stay. In this case, Seoul Plaza does not constitute a place of residence or stay that plays a central role in the complainants' daily life. Entering and traveling on Seoul Plaza cannot be viewed as an activity of shaping their life around the place. Therefore, we cannot conclude that the passage blockade restricted the complainants' freedom of residence or right to move at will.

2. The passage blockade is a sweeping, broad and extreme measure that bans all potential assemblies and even forbids the passage of the general public through Seoul Plaza. Thus, it can only be justifiably relied on as a last resort when there is imminent, clear and grave danger that cannot be prevented by granting conditional permission or by ordering termination or dispersal of assembly on an individual basis. The facts in this case show that many people gathered around

Seoul Plaza to commemorate the death of former President Roh, Moo-Hyun and that some citizens had committed unlawful violent activities near Seoul Plaza. However, these circumstances did not amount to an imminent and clear danger of the breakout of an illegal, violent rally or protest that could justify the police's continued passage blockade that lasted until four days after the violence had occurred. Thus, the passage blockade was hardly the minimum measure necessitated by the circumstances. Even assuming that a preventive measure was necessary to completely and entirely stop assemblies, an outright ban on entry to Seoul Plaza inhibited even ordinary citizens from passing by or using it for recreational or cultural activities. Therefore, a less restrictive measure or method that would substantially achieve the purpose should have been considered. For example, the police could have made a few entrances that allow controlled entry to Seoul Plaza or lifted the restriction during certain hours of the day when the occurrence of a large-scale, illegal, violent rally is unlikely or in the mornings when there is much traffic of people on the street near Seoul Plaza. Without such considerations and by completely blocking passage of every citizen, the passage blockade failed to satisfy the principle of least restriction.

Moreover, while the public interest in protecting citizens' life, body and property against large-scale illegal, violent rallies and protests is important, the existence of such public interest and its actual effect appears somewhat hypothetical and abstract given the circumstances in this case. It also appears that a less restrictive alternative could substantially have achieved such public interest. In this regard, we cannot conclude that the public interest was greater than the substantive and actual disadvantage to ordinary citizens. The passage blockade thus failed to achieve balance of legal interests.

Therefore, the passage blockade violated the principle against excessive restriction and thereby infringed on the complainants' general freedom of action.

Concurring Opinion by Justice Kim Jong-Dae and Justice Song Doo-Whan

The "riot" under Article 5 Section 2 of the Act on the Performance of Duties by Police Officers (hereinafter "Police Officers' Duties Act") should be interpreted to mean "a situation where a large number of people assemble and engage in violent attack, assault or activity of damaging property that disturbs peace and tranquility in the area." In addition, "urgency" under Article 6 Section 1 of the same Act should mean "an exigent situation where the immediacy of harm from a criminal act leaves no other means but to instantly stop the concerned act." No facts in this case indicate that there was a "riot" or "urgency" around Seoul Plaza on June 3, 2009 when the Chief of the National Policy Agency imposed the passage blockade on the complainants. Therefore, these provisions could not be invoked as a legal basis to instigate the passage blockade.

Moreover, Article 3 of the Police Act and Article 2 of the Police Officers' Duties Act, which respectively provide the duties of the police and the scope of the duties of police officers, do not provide a legal basis to instigate the passage blockade, because they cannot be treated as "general enabling provisions," which would provide a basis to restrict or deprive citizens' fundamental rights. The reasons are as follows. First, when the Constitution requires the freedom and rights of citizens to be restricted by "Act," the Act refers to operative statutory provisions applicable to individual and specific cases and does not include organizational statutory provisions. Second, treating the provisions as general enabling provisions would in effect override the legislative intent by judicial interpretation; the legislature, by specifying the requirements and limitations of police action under each individual enabling provision, intended to impose strict conditions for the invocation of police authority. Moreover, applying exceptions only to the police, when other laws related to duties and responsibilities of governmental agency are not interpreted as provisions enabling restriction of fundamental rights, would substantively dismantle the principle of administration by the rule of law. Finally, even if we were to decide

that the provisions above fall under general enabling provisions, they would still be held unconstitutional as the principle of clarity would be violated and thus cannot provide a constitutional legal basis for the passage blockade.

Therefore, the passage blockade by the Chief of the National Policy Agency was taken without legal authority. It thus violated the principle of statutory reservation and infringed on the complainants' general freedom of action.

Dissenting Opinion by Justice Lee, Dong-Heub and Justice Park, Han-Chul

Article 3 of the Police Act and Article 2 of the Police Officers' Duties Act, which stipulate as a duty of the police the duty "to maintain public peace and order," are indeed general enabling provisions that provide the legal basis to instigate police action, because timely and effective exercise of police authority is necessary in reality and also because potential abuse that may arise from treating the provisions as general provisions can be regulated by customary principles or control of the courts. Therefore, the passage blockade based on the above provisions cannot be deemed a violation of the principle of statutory reservation.

At that time, there were many small-sized memorial rallies not only at Deoksugung where the citizens' memorial altar was set up, but also near Seoul Plaza, which is located close to important government agencies. Had a massive number of people gathered at Seoul Plaza, it could have developed into illegal, violent rallies or protests, causing substantial disorder and harm to society. The passage blockade was to prevent such danger and to protect citizens' life, body and property and thus cannot be deemed a clearly unreasonable use of government power. Moreover, the passage blockade was merely a temporary measure applied in a limited place, namely Seoul Plaza, to restrict its general use. It neither blocked the detour path nor prevented recreational activities in other places. Additionally, there was no possibility that the scope of such restriction would be expanded in the future. These circumstances indicate that the passage blockade did not

amount to an excessive restriction. Had rallies been permitted on a conditional or individual basis as suggested in the majority opinion, an exclusive use by rally participants would have been led, resulting in restriction on citizens' general freedom of action in a similar vein. Had a few entrances been made to let in individuals or allow recreational uses, it would have opened the possibility that people intending to hold illegal rally secure the use of Seoul Plaza by deceiving their purpose, thereby failing the purpose of such police action. Further, permitting entrance during certain hours of the day was an unrealistic alternative at that time when there was constant threat of large-scale, illegal, and violent rally. Therefore, it is inapposite to conclude that the principle of least restriction was violated by treating these as less restrictive alternatives. In addition, the passage blockade meets the balance of legal interests because the inconvenience of being temporarily prevented from using Seoul Plaza for recreational activities or passing across is not greater than the public interest in protecting citizens' life, body and property against illegal, violent rallies.

Because the passage blockade cannot be considered an infringement on the complainants' general freedom of action, this constitutional complaint should be denied.

Parties

Complainants
Min ○-Hee and eight others
Represented by Attorney Park Joo-Min (Hankyul Law Firm)

Respondent
Chief of the National Policy Agency

Holding

The respondent's passage blockade on Seoul Plaza by surrounding it with police buses, on 3 June, 2009, thereby restricting the complainants from passing through it, infringed the complainants' general freedom of action and thus is unconstitutional.

Reasoning

I. Background of the Case and Subject Matter of Review

A. Background of the Case

1. On May 23, 2009 when former President Roh Moo-Hyun passed away, a memorial altar was set up in front of Daehanmoon of Deoksugung Palace which is located near Seoul Plaza. In response, the respondent blocked entries to Seoul Plaza by putting up a so called 'vehicle-wall' with police buses completely surrounding Seoul Plaza in order to prevent people visiting the memorial altar from holding illegal, violent rallies or protests in the Plaza.

2. The complainants, who are citizens of Seoul Metropolitan City, were prevented from passing across Seoul Plaza on June 3, 2009 because of the vehicle-wall made of police buses around Seoul Plaza. Subsequently, they filed this constitutional complaint on July 21, 2009 seeking a decision of unconstitutionality of such police action, arguing that the passage blockade infringed on their freedom of residence and right to move at will, right to use public assets and right to general freedom of action.

B. Subject Matter of Review

The subject matter of review in this case is whether the respondent's action on June 3, 2009 which prevented the complainants from passing across Seoul Plaza by surrounding it with police buses (hereinafter "the passage blockade") violated the complainants' fundamental rights.

[Related Provisions]

(Intentionally Omitted)

II. Arguments of Complainants and Respondent

(Intentionally Omitted)

III. Review on Justiciability

A. Infringement on Fundamental Rights

It is established that the Commemoration Committee of Citizens for former President Roh, Moo-Hyun was denied use of Seoul Plaza when the Mayor of Seoul Metropolitan City delayed decision on the Committee's application for a permit past the requested date of use. However, the Mayor's de facto disapproval was limited to the use of Seoul Plaza for the purpose of the funeral ceremony and was not extended to prohibition of ordinary citizens unrelated to the above applicant from passing by or using it for recreational activities. Therefore, the denial of the use of Seoul Plaza to the complainants was not resulted from the Mayor's disapproval; rather, the denial resulted from the passage blockade. Thus, we find the possibility of infringement on fundamental rights in the passage blockade.

B. Exhaustion of Other Remedies

The passage blockade may be disputed at an administrative court because it constitutes an actual exercise of power as a direct administrative compulsion, which creates a state required for its administrative purpose by using its force directly over the body or property of another. However, the respondent removed the police buses that had surrounded Seoul Plaza and lifted the passage blockade the next day after the complainants were stopped from entering Seoul Plaza. The situation made it unlikely that the complainants would get relief from administrative dispute procedure because the court

was likely to find that the lawsuit would be lacking litigiousness. If we were to compel exhaustion of prior remedial procedures in such situation, it would only require unnecessary detours. Thus, the complainants' request for a constitutional adjudication in this case without first exhausting administrative dispute procedures should be permitted as an exception to the requirement of exhaustion.

C. Justiciable Interest

As the respondent removed the police buses that had surrounded Seoul Plaza on June 4, 2009 and lifted the passage blockade, no further infringement on the complainants' fundamental rights has since occurred. Thus, even if this Court accepts the request for adjudication here, it may not offer the complainants personal relief of their rights.

The function of constitutional complaints, however, is not limited to personal relief of rights (subjective relief) but includes the protection of constitutional order (objective relief). When the same type of infringement may repeatedly occur in the future and the necessity to protect and maintain the constitutional order requires constitutional elaboration, we must recognize the merit in the request for constitutional adjudication (22-1(B) KCCR 621, 633, 2009Hun-Ma257, June 24, 2010). Moreover, the responses of the respondent to this complaint and the fact that after the barricade on June 4, 2009 was removed, the passage to Seoul Plaza was again blocked by surrounding police buses around June 27, 2009 against potential assemblies indicate that it is likely the same type of actions would repeat in the future. Therefore, the issue in this case, whether the respondent's passage blockade which restricted movement of people by blockading Seoul Plaza can be constitutionally justified for the reason to prevent illegal, violent rallies, is so essential that it requires constitutional elaboration in order to uphold and maintain the constitutional order. Hence, the request for constitutional adjudication in this case has justiciable interest.

IV. Review on Merits

A. Relevant Basic Rights

1. Freedom of residence and right to move at will

Freedom of residence and the right to move at will mean the freedom to decide a place for residence or stay without government interference. They ensure the freedom of individuals to shape their own life and promote the development of personality in every aspect of life including political, economic, social and cultural aspects (16-2(B) KCCR 86, 95, 2003Hun-Ka18, October 28, 2004). Bearing such meaning and functions, and being premised upon the consideration that free exercise of will in choosing and changing the base of living is essential for personality development and economic activities of citizens, freedom of residence and the right to move at will denote the fundamental rights that protect individuals' free exercise of choosing and changing their locus of life, i.e., a place that is closely related to their daily life amounting to a place of residence or stay. The protection, however, does not cover an act of choosing and changing transitory places that do not amount to the base of living.

Here, Seoul Plaza cannot be deemed a locus of life for the complainants. Moreover, their acts of entering and moving around on Seoul Plaza do not constitute an act of shaping their lives around the place. Thus, the complainants' freedom to enter and travel on Seoul Plaza does not fall within the protected area covered by the freedom of residence and right to move at will under the Constitution. Therefore, we cannot conclude that the passage blockade restricted the complainants' freedom of residence or right to move at will.

2. Right to use public property

The complainants contend that the right to use public property is a claim-right that falls under the right to pursue happiness. Here, the right to use public property refers to the right to claim use of public property against the government when certain requirements are met.

However, the right to pursue happiness under Article 10 of the Constitution has the characteristic as a liberty right in a broad meaning such that it ensures citizens engage in activities in pursuit of happiness free from government interference (19-1 KCCR 276, 286, 2004Hun-Ma207, March 29, 2007). In contrast, the right to use public property, as the complainants argue themselves, is a right of claim, and such a right cannot fall under the right to pursue happiness that is a broad liberty right.

3. General freedom of action

The right to pursue happiness under Article 10 of the Constitution includes as an articulated form of the right, the right to general freedom of action. This right includes not only the right to act (positive right) but also the right not to act (negative right), giving it the characteristic as a broad liberty right (15-2(B) KCCR 185, 199, 2002Hun-Ma518, October 30, 2003).

Where a public property designated for public use is used for its intended purpose, people should be able to engage in such general or ordinary use without seeking permission by administrative authority. In that accord, the former "Ordinance on the Use and Management of Seoul Plaza" required permission only when a particular use restricts the free use of many ordinary citizens (Article 2 Section 1 of the Ordinance). Thus, the Ordinance granted without any restriction an individual's use of Seoul Plaza for general passage or recreational or cultural activities. Such use of a place open to the public is protected under the meaning of general freedom of action. The respondent in this case, however, prevented the complainants from engaging in such use by the passage blockade. Therefore, whether the complainant's general freedom of action was infringed upon is at issue.

B. Infringement on General Freedom of Action

1. Upon the death of former President Roh, Moo-Hyun on May 23, 2009, a memorial altar was set up at Deoksugung Daehanmun, which is located across Seoul Plaza. Many people came to the altar to

mourn and gathered around to commemorate the deceased. Because some people believed that the then on-going prosecutorial investigation against the former President was the cause of his the death, instances had occurred where people had skirmishes with police officers who were controlling passage of the area at that time.

The respondent blocked the passage of citizens to Seoul Plaza immediately after the death of former President Roh, Moo-Hyun by setting up a blockade with police buses surrounding Seoul Plaza. Except for one day, May 29, 2009, on which he removed the police buses and allowed entry to Seoul Plaza for the public funeral ceremony, the respondent completely blocked the entry or passage of citizens on Seoul Plaza until it lifted the passage blockade during the morning of June 4, 2009.

2. The chance was not small that people who gathered around the memorial alter before Daehanmun to commemorate former President Roh, Moo-Hyun on and around May 23, 2009 would start a rally or protest. Therefore, if the passage blockade was made to protect citizens' life, liberty and property based on the determination that it was highly likely such rally or protest would turn into an illegal, violent one, the purpose of taking the action may be justified. The appropriateness of the means may also be found because in such case the passage blockade may have served as a means to achieve the purpose of preventing such unlawful and violent rallies.

3. However, even when illegal, violent rallies and protests are likely to occur, the preventive measure must be one within the scope of necessary minimum measures. When we reflect on the constitutional significance freedom of speech bears in a democratic country, less restrictive measures on the freedom of assembly, such as conditional allowance of assembly, should be considered first. Only when it is determined that such measure cannot achieve the public interest, prohibition and dispersal of assembly may become an option. In this case, however, the passage blockade was a sweeping, broad and extreme measure such that it was not limited to prohibiting individual assembly; rather, it banned all potential assemblies that could be held

in Seoul Plaza. Moreover, it prohibited the passage of the complainants, who are ordinary citizens, on Seoul Plaza. Such measure should be relied on only as a last resort when there is imminent, clear and grave danger that cannot be prevented by granting conditional permission or by ordering termination or dispersal of assembly on an individual basis.

Therefore, the mere fact that many people had gathered around Seoul Plaza to commemorate former President Roh, Moo-Hyun before the passage blockade was taken does not lead to a conclusion that people were about to engage in illegal and violent rallies or protests that could not be controlled by conditional permission or individual ban. It is true that some college students and other citizens had engaged in unlawful violent activities in the afternoon of May 30, 2009, occupying a road near Seoul Plaza, throwing rocks at and banging on the police buses, intruding into the buses and attacking police officers. Even so, however, there was no other episode afterwards that could be considered as an illegal, violent rally or protest. Hence, we cannot say that an imminent and clear danger remained in existence on June 3, 2009, four days after the incident of violence when the complainants were denied entry to Seoul Plaza, to justify the continued passage blockade.

Therefore, such a broad and complete restriction as the passage blockade cannot be deemed a minimum measure necessitated by the circumstances at that time.

4. Even assuming that a preventive measure was necessary to completely and entirely prevent assemblies because an imminent and grave danger existed that a rally and protest, which would invariably and directly threat public peace and order, would occur, the respondent must have foreseen that an outright ban on entry to Seoul Plaza would prevent even the use of other ordinary citizens, who did not intend to participate in unlawful violent rallies, for passage or recreational or cultural activities. Therefore, the respondent should have considered other means or method that did not cause excessive restriction as follows.

First, in terms of location, it was possible to make a few entrances and allow controlled entry, instead of completely blocking Seoul Plaza by surrounding it with police buses as in the passage blockade at issue. It would have prevented large-scale rallies, while allowing the passage of individual citizens and their recreational activities. Additionally, in terms of the time and circumstances, it could have lifted the restriction and allowed the passage of pedestrians during certain hours of the day when the occurrence of a large-scale illegal, violent rally was unlikely or in the mornings when there was much traffic of people on the street near Seoul Plaza (June 3, 2009 was a weekday), considering the size of mourners who gathered around Seoul Plaza.

As such, a less restrictive means existed that would still have achieved the purpose of maintaining pubic peace and order. The passage blockade nevertheless completely restricted movement of all citizens by the passage blockade without such consideration. It thereby failed to satisfy the principle of least restriction.

5. Further, while the public interest in protecting citizens' life, body and property against large-scale illegal, violent rallies and protests is important, the existence of such public interest and its actual effect appears somewhat hypothetical and abstract given the circumstances around Seoul Plaza at that time. It also appears that a less restrictive alternative could substantially have achieved such public interest. Therefore, we cannot conclude that the public interest protected by the passage blockade was greater than the actual and existing disadvantage to ordinary citizens who were prevented from passing through Seoul Plaza or engaging in recreational or cultural activities there. It thus failed to achieve balance of legal interests.

6. Therefore, we conclude that the passage blockade violated the principle against excessive restriction and thereby infringed on the complainants' general freedom of action.

V. Conclusion

The respondent's passage blockade was an infringement on the complainants' general freedom of action and thus should be voided as unconstitutional. However, the passage blockade is already terminated and no further infringement on fundamental rights currently occurs. Therefore, instead of voiding the action, we declare its unconstitutionality and hereby decide as the holding of the Court. All Justices joined this opinion except for Justices Lee, Dong-Heub and Park, Han-Chul, who wrote a dissenting opinion as below (Part VII). Justices Kim, Jong-Dae and Song, Doo-Hwan wrote a concurring opinion as below (Part VI).

VI. Concurring Opinion of Justice Kim, Jong-Dae and Justice Song, Doo-Hwan

While we agree that the passage blockade violated the rule against excessive restriction, we think it is unconstitutional, more fundamentally, because of a violation of the principle of statutory reservation under the Constitution.

A. The principle of statutory reservation is a principle under the Constitution (Article 37 Section 2 of the Constitution) that provides that "[t]he freedoms and rights of citizens may be restricted by Act when necessary for national security, the maintenance of law and order or for public welfare; however, even when such restriction is imposed, no essential aspect of the freedom or right shall be violated." This requires any government action that restricts fundamental rights of citizens have a statutory ground for the action.

Therefore, we first need to review whether the passage blockade has a statutory basis.

B. Whether Article 5 Section 2 and Article 6 Section 1 of the Police Officers' Duties Act Provide a Statutory basis

We shall first consider whether Article 5 Section 2 and Article 6 Section of the Police Officers' Duties Act provide a statutory ground for the passage blockade, as the respondent contends.

1. Article 5 Section 2 of the Police Officers' Duties Act provides that "[the chief of a police agency] may restrict or prohibit access or passage to ··· important facilities of the State (such as the police agency and arsenal)" when it is "necessary for carrying out (a counter-espionage operation or) suppression of riot." Article 6 Section 1 of the same Act provides, "[i]f a police officer finds that a criminal act is about to be committed at the presence of the police officer, he ··· may stop such action when an urgent measure is needed···"

2. The provisions above are special enabling provisions that grant the power of immediate administrative compulsion. Because an immediate administrative compulsion is only allowed in exceptional cases where there is no other way to achieve the intended administrative purpose, we must apply strict interpretation as to the requirements for the invocation of such action.

Under such interpretation rule, the "riot" under Article 5 Section 2 of the Police Officers' Duties Act should be interpreted to mean "a situation where a large number of people assemble and engage in violent attack, assault or activity of damaging property that disturb peace and tranquility in the area." In addition, the "urgen[cy]" under Article 6 Section 1 of the same Act should mean "an exigent situation where the immediacy of harm from a criminal act leaves no other means but to instantly stop the concerned act."

3. There were indeed sporadic conflicts between citizens and police officers near Seoul Plaza around May 23, 2009, right after the death of former President Roh, Moo-Hyun. There was a skirmish around May 30, 2009 between protestors and the police, in which the protestors, intending to hold People's Rally, occupied a road near Seoul Plaza and damaged the police buses. Nevertheless, the degree of conflicts did not amount to the level that was likely to disturb the peace and tranquility in the area. Moreover, there was no clash between protesters and the police at least on June 3, 2009, at the time that the respondent made the passage blockade against the complainants.

Therefore, Article 4 Section 2 of the Police Officers' Duties Act,

which requires existence of a "riot" as a precondition, cannot be a statutory basis for the passage blockade.

4. Further, the mere facts that people gathered around Seoul Plaza to commemorate former President Roh, Moo-Hyun, as discussed above in the Court's opinion regarding violation of the principle against excessive restriction, and that a skirmish had occurred between protestors and the police as also discussed above, do not make us conclude that there was "an exigent situation where crime was about to occur" at the time concerned in this case when about four days had lapsed since the episode of conflict.

Therefore, Article 6 Section 1 of the Police Officers' Duties Act, which requires as a precondition the urgency of situation where crime is likely to occur, cannot be a statutory ground for the passage blockade.

C. Whether Article 3 of the Police Act and Article 2 of the Police Officers' Duties Act Provide Statutory Basis

Because the respondent argues that the passage blockade was to carry out the police duties stipulated by Article 3 of the Police Act and Article 2 of the Police Officers' Duties Act, we review whether the concerned provisions are so called "general enabling provisions" that provide a legal basis for the passage blockade.

1. Article 3 of the Police Act (Duties of National Police) provides that "[t]he duties of the national police shall be to protect the lives, bodies and property of people, to prevent, suppress and investigate crimes, to collect information on public security, to control traffic and to otherwise maintain public peace and order." Article 2 of the Police Officers' Duties Act (Scope of Duties) provides that "[t]he police officer shall carry out the following duties: 1. To prevent, suppress and investigate crimes; ··· 4. To control traffic and prevent danger and injury; and, 5. To otherwise maintain public peace and order."

2. The provisions above stipulate the duties of the police and the scope of the duties of police officers. In other words, Article 3 of the

Police Act lays out a brief summary of the purposes of establishing the police as a national organization and its duties corresponding to the purposes. Article 2 of the Police Officers' Duties Act sets general limitation on the scope of duties for police officers as a qualification before it imposes duties on them.

The provisions above of such characteristics and contents cannot constitute so called "general enabling provisions" to serve as a basis to actually limit or deprive fundamental rights of citizens.

(A) Our Constitution requires that any restriction on freedoms and rights of citizens must be grounded upon "Act." The "Act" here does not include organizational regulations that generally set out matters such as purpose of establishment, status, responsibilities and scope of duties; rather, it refers to provisions that work as operative laws applicable to individual or specific cases.

Therefore, the provisions of such characteristic as organizational regulations that set out the responsibilities of the police as an organization and the duties of police officers cannot be treated as a substantive law that provides a basis for the police to actually curtail fundamental rights of citizens.

(B) If the provisions above were to be interpreted as general enabling provisions that may be invoked as a basis for restrictions on an individual or a specific fundamental right, it would be against the legislative intent behind the drafting of individual enabling provisions in detail about police operations as to their conditions and limitations.

In other words, Article 3 of the Police Officers' Duties Act and the subsequent provisions set strict requirements as to conditions and limitations on each police operation such as stop and questioning or protective custody. Clearly, all of these police operations are predicated upon the purpose of carrying out the responsibilities and duties of the police to protect lives, bodies and property of citizens, to prevent, suppress and investigate, and to maintain public peace and order. The effect would then be to make duplicates of the general enabling

provisions. Moreover, such interpretation may even allow an unlawful police operation that fails to satisfy the conditions set out under the individual enabling provisions, to be justified as a lawful operation under the general enabling provisions.

Granting the police such a broad authority to invoke actions would in effect override the legislative intent by judicial interpretation, when the legislature, by drafting each individual enabling provision in detail, intended to impose strict conditions for the invocation of police authority.

(C) Furthermore, while numerous examples exist in other statutes concerning organization of national agency that have provisions on the scope of duties and responsibilities, no cases are found where those provisions on the scope of duties and responsibilities are used as a basis for restriction of concrete basic rights.

For example, Article 4 of the Prosecutors' Office Act (Duties of Prosecutors) stipulates 'matters necessary for criminal investigation' (Article 4 Section 1 Item 1 of the same Act), nobody takes it to be interpreted as 'it provides a legal basis for prosecutors to do whatever necessary for criminal investigation.' Notwithstanding the provision in the Prosecutors' Office Act, a strict interpretation applies that any compulsory investigation by prosecutors must only be performed in compliance with the procedures under the Criminal Procedure Act.

If a prosecutor obtains evidence by compulsory investigation in violation of or in a way not recognized under the Criminal Procedure Act, the evidence is deemed 'illegally' obtained evidence and its evidentiary effect is denied. This is because the provision of the Prosecutors' Office Act is not considered a general enabling provision for restriction on fundamental rights.

We should not dismantle the principle of administration by the rule of law by nevertheless making an unparalleled exception for Article 3 of the Police Act and relying on the concept of so called 'general enabling provision.'

(D) Even if we were to conclude that Article 3 of the Police Act

and Article 2 of the Police Officers' Duties Act fall under general enabling provisions, they would still be held unconstitutional as the principle of clarity would be violated. In any event, in no way can they provide a constitutional legal basis.

To take the view that the provisions above are general enabling provisions would mean that we would accept those provisions as a provision indicating 'police officers may take necessary actions to maintain public peace and order.' In that case, the provision would make it completely unpredictable what a police officer could actually do under what circumstances; thus, it would violate the principle of clarity and be found unconstitutional.

D. Sub-conclusion

The respondent's passage blockade did not have a legal basis. Therefore, the passage blockade was (in addition to the violation of the principle against excessive restriction, more fundamentally) in violation of the principle of statutory reservation and thereby infringed on the complainants' freedom of general action.

VII. Dissenting Opinion of Justice Lee, Dong-Heub and Justice Park, Han-Chul

Unlike the majority opinion, we think that the passage blockade cannot be deemed an unconstitutional exercise of government power and thus the request for adjudication by the complainants should be denied. Accordingly, we set forth below our dissenting opinion.

A. Whether the Principle of Statutory Reservation is Violated

1. The basic rights of citizens may be restricted if necessary for national security, maintenance of order or public welfare under Article 37 Section 2 of the Constitution. The means of restriction, however, must satisfy that it be directed by statute. Also, the degree of restriction must not violate the essence of the basic right and be limited to the least necessary level. The principle of statutory reservation here as to restrictions on basic rights is what calls for 'regulation backed by

statute,' and hence although it may not be required to be in the form of a statute, restriction must have a legal basis (23-1(A) KCCR 157, 167, 2009Hun-Ma209, February 24, 2011).

Accordingly, governmental power exercised to restrict the complainants' freedom to have undisturbed passage and recreational activities in Seoul Plaza, as in the passage blockade at issue, must have a legal basis, and this question must be decided before we consider whether the passage blockade was in violation of the principle against excessive restriction. Thus, it can hardly be explained why the majority opinion, while failing to render an explicit holding as to whether the governmental exercise of power in the passage blockade had its legal basis, proceeded to consider violation of the principle against excessive restriction.

2. First, the passage blockade does not constitute a restriction of entry or passage to important government facilities to suppress riot under Article 5 Section 2 of the Police Officers' Duties Act. Moreover, it cannot be deemed to be a warning for prevention of crime or a suppression of attempted criminal acts. Thus, these provisions cannot be a legal basis for the passage blockade.

However, the passage blockade was a restriction on citizens' free use of public property for the purpose of maintaining public peace and order and may find its legal basis in Article 3 of the Police Act and Article 2 of the Police Officers' Duties Act. Article 3 of the Police Act, under the subject of "Duties of National Police," sets out that "[t]he duties of the national police shall be to protect the lives, bodies and property of people, to prevent, suppress and investigate crimes, to collect information on public security, to control traffic and to otherwise maintain public peace and order." Article 2 of the Police Officers' Duties Act, under the subject of "Scope of Duties," provides a list of police officers' duties from Item 1 through Item 5. Among the enumerated duties, Item 5 prescribes the duty of a police officer to "otherwise maintain public peace and order." These provisions concern responsibilities of the police and duties of police officers and, as such, may be interpreted as general enabling provisions that prescribe as a duty of the police "otherwise maintain[ing] public peace and order."

Regarding whether such general enabling provisions serve as a legal basis on which the police authority can be invoked, sufficient factors indicate that they do: it is impossible in terms of legislative technique to thoroughly stipulate all the conditions and effects of invoking police authority in the form of individual enabling provisions; considering that a sudden, unpredicted situation can always occur depending on social and economic circumstances, we cannot deny the practical necessity for general enabling provisions that make timely and efficient exercise of police authority possible; general enabling provisions work as a supplement to individual provisions, being limitedly applied when individual enabling provision is absent, and the chance of general enabling provisions being abused is not great because sufficient principles are established under customary law regarding exercise of police authority, including the principle of passive police involvement, the principle of police as public servant, the principle of proportionality in use of police authority, the principle of police responsibility, and the principle of police equality; and even if an overbroad interpretation or abuse of power based on such interpretation might occur, the courts may sufficiently restrain such abuse. These indicate that general enabling provisions can make a legal basis for invoking police authority. Although Article 3 of the Police Act and Article 2 of the Police Officers' Duties Act use a rather abstract concept, "maintaining public peace and order," the respondent, who holds the power to exercise police authority, has sufficient capacity to discern its meaning based on all the matters concerned. Therefore, the mere fact that the statutes fail to lay out concrete, detailed conditions for invocation of police authority does not render them ambiguous to be used as a qualifying norm against the holder of public authority or to necessarily result in excessive restrictions.

3. Therefore, Article 3 of the Police Act and Article 2 of the Police Officers Act are not provisions merely stipulating the duties and responsibilities of the police; rather, they function as a legal basis for exercise of police authority when there is no pertinent individual enabling provision. These provisions provided the basis for the passage blockade for maintenance of public peace and order, and the action therefore cannot be deemed a violation of the principle of statutory reservation.

B. Whether Basic Rights are Infringed

1. Relevant basic right

Article 10 of the Constitution, in its first sentence, protects the right to pursue happiness, stating "[a]ll citizens shall be assured of human dignity and worth and have the right to pursue happiness." The right includes the general freedom of action as a concrete form thereof, because everyone must be guaranteed to freely form their own opinions and have a self-directed life based on the opinions (3 KCCR 268, 275, 89Hun-Ma204, June 3, 1991).

The right at issue in this case, that is, the right to freely use Seoul Plaza for ordinary passage or for recreational or cultural activities, falls within the protected area under the general freedom of action derived from Article 10 of the Constitution. Therefore, we need to see whether the passage blockade exceeded the boundary of permissible restrictions on the basic right and thereby infringed on the complainants' general freedom of action.

2. Standard of review

The decision on whether or not to exercise police authority is in principle under the police's discretion, and in determining whether the maintenance of public peace and order or some other reason requires an exercise of police authority, the necessity to protect citizen's life and liberty, prevent crimes and maintain public peace and order must be reasonably considered. Unless such determination is found to be substantially arbitrary, therefore, the respondent's judgment as to the exercise of police authority must be respected as a general rule. Especially, in a case like this where, rather than basic rights such as freedom of expression, which has particular importance in democratic country, or bodily freedom that may be seriously interfered, the primary issue concerns general freedom of action in the context of general use of public property that inevitably arises when restricting the use of public property, a more relaxed standard of review should be applied than the principle of proportionality.

3. Infringement on the general freedom of action

(A) As acknowledged in the majority opinion, the passage blockade was made in a situation where people were frenzied about commemorating and were holding several small-sized rallies near Seoul Plaza. It was thus intended to prevent any potential danger that a massive number of people, if gathered in Seoul Plaza at the same time, might develop into illegal, violent rallies or protests, and thereby aimed to protect citizens' life, body and property. Seoul Plaza, to which the passage of the complainants were blocked, is located near Ducksugung where the memorial altar was set up and not far from important public facilities including Cheongwadae, Central Government Complex, and the Embassy of the United States. Moreover, the specific characteristic of the location as an open place in the hub area with a large traffic of people makes it more likely that any incident of illegal rally or violence in Seoul Plaza would have great impact on the ordinary people as well as public facilities, causing disorder and danger. Considering that a skirmish in fact took place between the police and some citizens in the course of setting up the memorial altar and that illegal, violent rallies or protests were very likely at the time considering political instability and anti-governmental public sentiment upon the death of former President Roh, Moo-Hyun, the action that restricted the complainants from passing through Seoul Plaza for the purpose of preventing such incidents from happening cannot be considered a clearly unreasonable exercise of government authority.

(B) The passage blockade was not a complete ban of all passages or cultural and recreational activities in Seoul Plaza against the complainants; rather, it merely restricted general use in a limited area, namely Seoul Plaza which carries distinctiveness in its location, during the limited time close to the memorial period for the former President. The complainants, although they may have been more or less inconvenienced, were able not only to use other temporary passage ways or detour path but also to find other open places for their recreational activities. Thus, no circumstances indicate that the scope

of limitation as to place and time in the passage blockade was excessively broad or had potential to turn into an unconstrained restriction.

The majority opinion contends that the passage blockade, by not only prohibiting all rallies in Seoul Plaza but also banning passage through Seoul Plaza against the complainants when other less restrictive means exist, violated the principle against excessive restriction. However, in case that a conditional or individual permission of rally leads to the exclusive use of the Plaza by rally participants, the restriction that would follow upon the general freedom of action of ordinary citizens not participating in rallies in relation to their passage and recreational activities in Seoul Plaza, may not be less than that of the passage blockade. Further, at the time that the passage blockade was imposed, there was a high likelihood that a rally, even if permission was granted conditionally or individually, would turn into illegal, violent rallies or protests and put the life and body of ordinary citizens at risk of danger. Therefore, we cannot agree with the majority's contention that such means are less restrictive and that thus a violation of the principle against excessive restriction has occurred.

In addition, the majority opinion maintains that, even if there was a need for the passage blockade, the complainants' general freedom of action could have been less restricted by leaving several entrances open, instead of completely blockading Seoul Plaza by surrounding it with police buses, and allowing individual citizens to pass or have recreational activities in Seoul Plaza under the police's control, or by lifting the restriction during certain hours of the day when a large-scale rally is unlikely to occur or in the mornings when there is much traffic of people on the street. However, the purpose of barricading Seoul Plaza with the buses was to prevent illegal entry of people who intended to hold illegal rallies, as well as any potential physical conflicts between citizens and the police that could have happened during the course. If the means of leaving some entrances open and allowing individuals' passage or recreational activities had been adopted as argued in the majority opinion, it would have been necessary to verify the purpose of entry to the Plaza of individuals one by one in

order to differentiate between those who intended to pass or have recreational activities and those who intended to hold illegal rallies. Such verification of one's real intention is, however, realistically impossible and does not prevent the possibility of people entering into Seoul Plaza by lying about their purpose. Hence, the original purpose of the exercise of police authority to prevent illegal, violent rallies or protests and thereby to protect the life and body of citizens cannot be achieved by such means. Further, because there was a constant threat that large-scale illegal, violent rallies would occur at the time that the passage blockade was applied, the argument for partial permission of passage during certain hours such as mornings of weekdays does not pose as a realistic alternative either. Therefore, it is inapposite to conclude that the passage blockade violates the principle of least restriction by recognizing those means as less restrictive.

(C) The disadvantage to the complainants the passage blockade caused was a mere inconvenience that they could not enjoy the general use of the Plaza including recreational activities during a certain period of time in a specific place, Seoul Plaza, or that they had to take detours because they could not pass across the Plaza. Such disadvantage cannot be deemed significantly greater than the public interest in protecting citizens' life, body and property from any potential illegal, violent rallies. The passage blockade thus meets the balance of legal interests. Therefore, in our view, the passage blockade did not violate the complainants' general freedom of action.

C. Sub-conclusion

In conclusion, the passage blockade cannot be held to be in violation of the principle of statutory reservation because it was an exercise of governmental authority based on Article 3 of the Police Act and Article 2 of the Police Officers' Duties Act. Nor does it constitute an unconstitutional exercise of governmental authority for its unreasonableness or excessiveness that infringes on the complainants' general freedom of action, because it was a mere restriction on

citizens' general use of a specific public asset during a limited period of time, after considering the totality of circumstances including the distinctiveness of Seoul Plaza in terms of location and the particular situation present at that time. Therefore, the instant constitutional complaint should be denied.

Justice Lee, Kang-Kook (Presiding Justice), Cho, Dae-Hyun, Kim, Jong-Dae, Min, Hyeong-Ki, Lee, Dong-Heub, Mok, Young-Joon, Song, Doo-Hwan, Park, Han-Chul, Lee, Jung-Mi

4. Case on the Disclosure of Others' Conversation Illegally Obtained Under the Protection of Communications Secrets Act

[23-2(A) KCCR 286, 2009Hun-Ba42, August 30, 2011]

Questions Presented

1. Whether the part of 'the substances of conversations' of Article 16 Section 1 Item 2 of the Protection of Communications Secrets Act that punishes any person who has disclosed or leaked the substance of conversations he/she has learned from recording or eavesdropping undisclosed conversations between other individuals (hereinafter the "Instant Provision") infringes upon the freedom of expression of the discloser in violation of the rule against excessive restriction (negative)

2. Whether the Instant Provision violates the principle of proportionality between punishment and responsibility (negative)

3. Whether the Instant Provision violates the principle of equality (negative)

Summary of Decisions

1. The Instant Provision that punishes a person who has disclosed contents of illegally obtained conversations of others may be enforced to appropriately protect the freedom of expression of the violator by applying the general provision of circumstances precluding wrongfulness of Article 20 (Justifiable Act) of the Criminal Act. Therefore, the absence of a special provision of circumstances precluding wrongfulness, as stipulated in criminal defamation, cannot be deemed to be in violation of the principle of proportionality in restricting the basic rights.

2. The disclosure of the illegally obtained conversations would severely invade the privacy of conversations, depending on manner, time, scope of disclosure, as much as the act of illegally obtaining contents of conversations. Therefore, the punishment the Instant Provision imposes is not excessive beyond the reasonable degree to achieve its

purpose, even if the Instant Provision imposes the same statutory punishment on the person who has disclosed or leaked the substances of illegally obtained conversations he/she has learned of, as the person who has illegally acquired undisclosed substances of conversations of others, and even if it does not provide optional pecuniary punishment.

3. The Instant Provision intends to protect privacy through the protection of the secrecy of private conversations, regardless of damages of defamation. Therefore, the nature of the Instant Provision that prohibits the disclosure of conversations is not identical enough to the nature of criminal defamation to warrant a comparison between them. Even if they are comparable, the necessity of punishment through the Instant Provision is different from the one of criminal defamation in that the conduct punished by the Instant Provision is disclosing illegally obtained conversations, which invades the privacy of conversations between individuals in private space. Therefore, it would be not unreasonable discrimination compared to criminal defamation, to omit the special provision of circumstances precluding wrongfulness for the person who disclosed conversations.

Opinion of Limited Unconstitutionality of Justice Lee, Kang-Kook

The Instant Provision does not provide the special provision of circumstances precluding wrongfulness for the disclosure of information that was generated through illegal wiretapping, but legally obtained, even if the information is true and the disclosure is solely for the public interest. It would be unconstitutional to the extent that the Instant Provision excessively protects the right of secrecy of communications whereas it neglectfully protects or abandons the freedom of expression, among the two conflicting basic rights. The unconstitutional part would be removed by the construction of limited unconstitutionality. Therefore, the Instant Provision is unconstitutional to the extent that it is applied where the information, which is true, that was generated through illegal wiretapping, but legally obtained without any wrongfulness, has been disclosed or leaked solely for the public interest.

Parties

Complainant
Roh ○-Chan
Representative: Attorney Park Gab-Ju and one other

Underlying Case
Seoul Central District Court 2007Go-Dan2378 the violation of the Protection of Communications Secrets Act, defamation

Holding

The part of 'the substances of conversations' of Article 16 Section 1 Item 2 of the Protection of Communications Secrets Act (revised by Act No. 6546 on December 29, 2001) does not violate the Constitution.

Reasoning

I. Introduction of the Case and Subject Matter of Review

A. Introduction of the Case

1. The complainant, through an unknown channel, obtained the so-called 'X-File of Agency for National Security Planning' that recorded a conversation between Lee ○-Soo, then chief secretary to the chairman of ○○ Group, and Hong ○-Hyun, then chairman of ○○ Media Network, wiretapped by the agents of the National Security Planning on September 1997. The complainant, a member of the National Assembly, published the substances of the conversation in a press release at the National Assembly Member's Office Building on August 18, 2005 and posted them on the Internet, and subsequently was indicted on charges of violating the Protection of Communications

Secret Act that prohibits the disclosure of undisclosed conversations of others, learned through ways not stipulated by the Act.

2. While being tried at the Seoul Central District Court, the complainant filed a motion to request for a constitutional review on Article 16 Section 1 Item 2 of the Protection of Communications Secret Act, which was dismissed by the court that also found him guilty on February 9, 2009. The complainant filed this constitutional complaint on March 10, 2009.

B. Subject Matter of Review

Despite the complaint that requests constitutional review on the entire provision of Article 16 Section 1 Item 2 of the Protection of Communications Secret Act (revised by Act No. 6546 on December 29, 2001, hereinafter, the 'PCSA'), the issue should be limited to whether the part of 'the substances of conversations' of Article 16 Section 1 Item 2 of the Act (hereinafter, the 'Instant Provision') is unconstitutional, because the complainant was prosecuted on charges of the violation of the PCSA that prohibits the disclosure of confidential conversations of others, learned through procedures not stipulated in Article 3 of the PCSA. The provision at issue and relevant provisions are as follows:

[Provision at Issue]

The Protection of Communications Secret Act (revised by Act No. 6546 on December 29, 2001)

Article 16 (Penal Provisions)

(1) Any person falling under any of the following subparagraphs shall be punished by imprisonment with prison labor for not more than 10 years or by suspension of qualification for not more than 5 years:

1. A person who has censored any mail, wiretapped any telecommunications or recorded or eavesdropped on any conversations between other individuals in violation of the provisions of Article 3; or

2. A person who has disclosed or leaked the substances of communications or conversations he/she has learned in a manner referred to in subparagraph 1.

[Related Provisions]

(Intentionally omitted)

II. Arguments of the Complainant and the Court's Reasoning for Denying Motion to Request for a Constitutional Review

(Intentionally omitted)

III. Review on the Merit

A. Substances of the Instant Provision

Article 3 Section 1 of the PCSA states no person shall censor any mail, wiretap any telecommunications, provide the communication confirmation data, record or listen to conversations between others that are not made public, without following the provision under the PCSA, the Criminal Procedure Act and the Military Court Act. Article 16 Section 1 Item 1 of the PCSA punishes a person who has censored any mail, wiretapped any telecommunications or recorded or eavesdropped any conversations between other individuals in violation of the provisions of Article 3 (hereinafter, "illegal wiretapping or recording") and Article 16 Section 1 Item 2 of the PCSA punishes a person who has disclosed or leaked the substances of communications or conversations he/she has learned through acts stipulated in Item 1. These offenses are separated, but governed by the same statutory punishment (imprisonment for not more than 10 years and suspension of qualification for not more than 5 years). With regard to the interpretation of Article 16 Section 1 Item 2 of the PCSA, the Supreme Court decided that even when the person disclosing the substances of a conversation has not been involved in the illegal wiretapping or recording, merely obtaining the substances of

communications or conversations through a different channel, PCSA is violated all the same if that person was aware of the illegal wiretapping or recording (the Supreme Court, 2009Do14442, May 13, 2011). In addition, Article 16 Section 1 of the PCSA does not allow any exception or circumstance precluding wrongfulness for the act of disclosure or divulgement of substances of conversations learned from illegal wiretapping or recording.

In addition to punishing the act of illegal wiretapping or recording, disclosing or leaking illegally obtained substances of conversations is independently punished for the protection of secrecy of communications in the consideration that unless the disclosure or divulgement of illegally obtained substances of conversations or communications is prohibited, motivation for illegal wiretapping or recording would remain and illegal wiretapping or recording could not be effectively curtailed.

B. Freedom of Expression

1. Standard of Constitutional Review

The complainant alleges that his freedom of expression is violated because the Instant Provision does not grant any exemption despite significant public interests justifying the disclosure of illegally obtained substances of conversations of others.

Article 18 of the Constitution states that "[t]he privacy of correspondence of no citizen shall be infringed," guaranteeing the freedom of communication as a basic right with protection of the secrecy of communication as the core. The protection of freedom of communication as a basic right is intended to protect the communication of individuals in private sectors, as part of privacy (13-1 KCCR 652, 658, 2000Hun-Ba25, March 21, 2001). The Instant Provision which punishes a person who discloses substances of conversations of others which has been acquired by illegal wiretapping or recording, despite not being involved in the illegal acquirement, but

only obtaining the substance of conversations of others through different routes, is intended to protect the secrecy of communication under Article 18 of the Constitution.

However, the Instant Provision punishes a person who discloses substances of conversations one has learned from illegal procedures, thereby restricting the freedom of expression of the person who wishes to disclose substances of the conversations. Although certain illegally acquired conversations may need to be disclosed for the public interest, such as forming of public opinion in a democratic country, the Instant Provision prohibits the disclosure of such conversations, which restricts the freedom of expression of a person who has disclosed or tries to disclose the conversations. Therefore, the Instant Provision results in a collision between two basic rights, namely the secrecy of communication of dialogists and freedom of expression of the discloser.

The collision between two basic rights demands a balancing point where the function and effects of two colliding basic rights are fully respected, in order to maintain unity of the Constitution. Accordingly, the Instant Provision should be reviewed under the principle against excessive restriction, and examine whether the purpose of the Instant Provision is legitimate and whether the means to achieve the legislative purpose is appropriate or balanced between the restricted freedom of expression and protection of confidential conversations (3 KCCR 518, 528-529, 89Hun-Ma165, September 16, 1991).

2. Legitimacy of Legislative Purpose and Appropriateness of Means

The Instant Provision that punishes a person who disclosed substances of conversations of others obtained through illegal wiretapping or recording, intends to protect the confidence of conversations between individuals, which is guaranteed by Article 18 of the Constitution, the legislative purpose of which is legitimate. The means employed by the Instant Provision which punishes a person who disclosed or leaked the substances of confidential conversations of others is also appropriate to achieve the legislative purpose.

3. Principle of Proportionality in Restricting Basic Rights

(A) The reason the Instant Provision punishes a person who discloses the substances of confidential conversations of others acquired by illegal manners, regardless of the manner he/she obtained the substances of the conversations, is because the manner of acquiring the substances of conversations does not alter the fact that the secrecy of conversations has been invaded by the disclosure of its substances. Confidential conversations of others, which are illegally wiretapped or recorded, may be disclosed when they have not been disclosed at all or when they have been disclosed to certain individuals but has remained confidential to the public. In any case, the degree of the invasion of privacy depends on the manner and time of divulgement and the scope of disclosed substances, regardless of whether the disclosing person has engaged in illegal wiretapping or recording of conversations or whether he/she has learned it from the person who illegally wiretapped or recorded the conversations. Even though a disclosing party was not engaged in illegal wiretapping or recording, the degree of invasion of privacy of conversations and the necessity of punishment would be significant if confidential conversation of individuals not open to the public is disclosed through the press or other highly diffusive media.

(B) The Instant Provision does not grant any provision of circumstances precluding wrongfulness that would justify any disclosure for significant public interests, in prohibiting disclosure of substances of conversations by a person who learned the substances of conversations of others which has been illegal wiretapped or recorded. Nonetheless, the general provision of circumstances precluding wrongfulness stipulated by the Criminal Act would be applicable in such case. Article 20 (Justifiable Act) of the Criminal Act states that an 'act which does not violate social customs and rules' shall not be punishable: The requirements of a justifiable act are legitimacy of motivation or intent of the act, appropriateness of means or manner of the act, balance between the interests of protection and interests of infringement, emergency, and exhaustion that no alternative is available except the act (see Supreme Court September 26, 2003, 2003Do3000).

Therefore, an act of disclosure of others' conversations that were obtained from illegal wiretapping or recording would not be punishable if the act satisfies the requirements of an 'act which does not violate social customs and rules' of Article 20 of the Criminal Act, which are, the conversation is disclosed for significant public interests that justify its purpose; a person who disclosed the conversation is not engaged in illegal wiretapping, recording or other illegal methods to obtain the substances of the conversation; and public interests of disclosing the conversation are more significant than the infringed private interests. The court that applies the Instant Provision to individual cases should determine the scope and manner of regulation by balancing the interests and values of freedom of expression and the interests and values of the secrecy of conversation, and after comprehensively considering the process of acquiring the conversation, purpose and proceeding of the disclosure, the substances of the disclosed conversation and manner of disclosure, finally should decide whether the disclosure of the conversation violates social customs and rules.

The Instant Provision that punishes a person who has disclosed illegally obtained conversations of others may be enforced to appropriately protect the freedom of expression of the violator by applying the general provision of circumstances precluding wrongfulness of Article 20 (Justifiable Act) of the Criminal Act. Therefore, the absence of a special provision of circumstances precluding wrongfulness, as stipulated in criminal defamation, cannot be deemed to be in violation of the principle of proportionality in restricting the basic rights.

(C) A problem may arise if the court interprets the requirements of the justifiable acts of the Article 20 of the Criminal Act in an extremely narrow way in applying the Instant Provision to an individual case – for instance, justifying the purpose of the disclosure of the conversation in exceptional cases, such as when the conversation of others directly and immediately endangers highly significant public interests like life and body of the public – freedom of expression of the disclosing party may be excessively restricted.

Nonetheless, this would be a problem whether the application of the general provision of circumstances precluding wrongfulness of Article 20 of the Criminal Act to a specific case by the court is appropriate, or a problem of correction within a judicial procedure when the court's decision excessively restricts the freedom of expression of the disclosing party. Thus it is irrelevant as to whether the Instant Provision excessively restricts the freedom of expression.

(D) The development of wiretapping equipments and technologies, followed by the recent progress on information and communication technologies, has increased the possibility that secrecy of private communications may be invaded by illegal wiretapping or recording by the state agencies or a private party. It would be a substantial threat to the confidence of private communications if a personal conversation that should remain confidential is illegally wiretapped or recorded and when the illegally wiretapped or recorded conversation is disclosed by a third party. On the other hand, while the Instant Provision that punishes a person who disclosed or diverged the substances of conversations that have been illegally obtained for the protection of secrecy of confidential conversations tends to restrict the freedom of expression of the disclosing party, the restriction on the freedom of expression by the Instant Provision cannot be deemed more substantial than the secrecy of confidential conversation protected by the Instant Provision, especially considering the fact that disclosure for significant public interests is not punishable under the general provision of circumstances precluding wrongfulness of the Criminal Act.

Therefore, the Instant Provision does not lose the balance of colliding legal interests between the secrecy of confidential conversation and freedom of expression of the disclosing party.

4. Summary

The Instant Provision does not violate the freedom of expression guaranteed by Article 21 Section 1 of the Constitution.

C. The Principle of Proportionality between Punishment and Responsibility

The statutory punishments stated in the Instant Provision are imprisonment and suspension of qualification, excluding pecuniary punishment. An issue is raised whether the Instant Provision violates the principle of proportionality of punishment and responsibility.

1. The types and scope of the statutory punishment, that is, how to punish what kind of crimes, require the comprehensive consideration of our history and culture, circumstances at the time of legislation, values or legal sense of the public and criminal policy of preventing the crime, which should be determined by the legislature and is an area requiring broad discretion of legislation. Therefore, we have held that statutory punishment should not be concluded unconstitutional unless the statutory punishment is too harsh or cruel in comparison to the nature of crime and responsibility, thus losing balance in the criminal punishment system, or when the statutory punishment is excessively beyond the necessary level to achieve the purpose and efficacy of the criminal punishment, clearly in violation of the principle of equality and principle of proportionality of the Constitution (7-1 KCCR 539, 547, 93Hun-Ba40, April 20, 1995).

2. The Instant Provision imposes the same statutory punishment (imprisonment less than 10 years and suspension of qualification less than 5 years) on the person who has disclosed or leaked the substances of illegally obtained conversations he/she has learned of, as the person who has illegally acquired the undisclosed substances of conversations of others. The reason for this is because the disclosure of illegally obtained conversations would severely invade the privacy of conversations, depending on manner, time, scope of the disclosure, as much as the act of illegally obtaining contents of conversations. Considering the gravity of damages, nature of crime, protected interests, our history and culture, values and legal sense of the people, and crime survey and criminal policy of preventing the crime, the punishment the Instant Provision imposes is not excessive beyond the reasonable degree to achieve its purpose, even if the Instant Provision

imposes the same statutory punishment on the person who has disclosed or leaked the substances of illegally obtained conversations he/she has learned of, as the person who has illegally acquired undisclosed substances of conversations of others, and even if it does not provide optional pecuniary punishment.

Meanwhile, despite the Instant Provision imposes both imprisonment less than 10 years and suspension of qualification less than 5 years as the statutory punishment, the judge may impose a minimum sentence of imprisonment and suspension of qualification because the lowest limit of each punishment is not stipulated and also may suspend the execution of imprisonment or suspend sentence of both imprisonment and suspension of qualification. Therefore, the statutory punishment of the Instant Provision is not excessively high for the sentencing of punishment corresponding to the responsibility of the crime.

3. The complainant alleges that it violates the principle of equality to impose the same punishment for disclosure of illegally obtained substances of conversations of others when the disclosed substances are true and was disclosed for substantial public interests with justifiable reasons.

Nevertheless, if disclosing of others' conversations that are illegally obtained was for substantial public interests with justifiable reasons, it would not be punishable for precluding illegality. Even if the entire illegality is not precluded, the judge would consider it in imposing the sentence. Besides, the legislature is not obliged to separately provide statutory punishment, in accordance with whether there is any justifiable reason or not. Therefore, we reject the complainant's argument.

D. Principle of Equality

The complainant argues whereas criminal defamation for the public interests is not punishable under Article 319 of the Criminal Act, a person who disclosed illegally obtained conversations for the substantial public interests is punished because the Instant Provision does

not grant the special provision to preclude wrongfulness, which is unreasonable discrimination against the principle of equality.

However, whereas the essence of criminal defamation (Article 307 of the Criminal Act) is protecting the honor of a person and protection of privacy in the course of punishing defamation is only incidental, the Instant Provision intends to protect privacy through the protection of the secrecy of private conversations, regardless of damages of defamation. Therefore, the nature of the Instant Provision that prohibits the disclosure of conversations is not identical enough to the nature of criminal defamation to warrant a comparison between them.

Even if they are comparable, the necessity of punishment through the Instant Provision is different from the one of criminal defamation in that the conduct punished by the Instant Provision is disclosing illegally obtained conversations, which invades the privacy of conversations between individuals in private space. Therefore, it would be not unreasonable discrimination compared to criminal defamation, to omit the special provision of circumstances precluding wrongfulness for the person who disclosed conversations.

IV. Conclusion

Therefore, we find that the Instant Provision does not violate the Constitution in a unanimous opinion of participating Justices, except the opinion of limited unconstitutionality by Justice Lee, Kang-Kook (part V).

V. Opinion of Limited Unconstitutionality by Justice Lee, Kang-Kook

I am of the opinion that the Instant Provision violates the Constitution as far as it is applied where a person who legally obtained the substances of a conversation acquired by procedures stipulated in Article 16 Item 1 of the PCSA discloses or leaks substances of the conversation, which is true, solely for the public interest. My reasoning is as follows.

A. Freedom of Expression and Freedom of Communication

1. Freedom of Expression

Freedom of expression, including freedom of speech and press guaranteed by Article 21 of the Constitution has traditionally been the freedom to express ideas or opinions and to spread them, and is the indispensable basic right to maintain the dignity and value and pursue happiness as a human being and to realize sovereignty of the people by forming and maintaining of democratic politic orders (14-1 KCCR 251, 265, 2001Hun-Ka27, April 25, 2002).

In a democratic country, freedom of expression is an institutional apparatus to guarantee the participatory right of the people and is regarded as a superior basic right, which especially should be guaranteed when the expression corresponds to the truth and regards the public interests.

2. Right to Privacy and Freedom of Communication

Article 17 of the Constitution declares that "[t]he privacy of no citizen shall be infringed," and guarantees the substances of private life in order to secure human dignity and the right to pursue happiness. In addition, Article 18 of the Constitution stipulates the freedom of communication whose essential substance is the protection of the secrecy of communication. The protection of freedom of communication as a basic right intends to provide the means to protect private life or privacy, by guaranteeing private communication between individuals, as part of privacy. It further intends to promote amicable exchange of opinions and information among members of society. Therefore, freedom of communication is significant from every perspective of modern society, including politics, economics, society, and culture.

3. Collision of Basic Rights

The Instant Provision that punishes a person who disclosed or divulged substances of conversations of others he/she learned of,

which was obtained by illegal wiretapping or recording, intends to protect the secrecy of privacy and freedom and secrecy of communication (hereinafter, "secrecy of communication"), which on the other hand restricts the freedom of expression of a person who discloses the substances of communications or conversations, resulting in the collision of basic rights. In the case of collision of basic rights, we need to seek a harmonizing of norms so that the functions and effects of colliding basic rights can be asserted to the fullest degree, instead of hasty balancing of legal interests or abstract balancing of values which result in choosing one of the basic rights and discarding the other, in the name of maintaining unity of the Constitution.

B. Application of the Instant Provision

1. Summary of Court Opinion

The Instant Provision intends to protect secrecy of private conversations between individuals, which is guaranteed by the Constitution. Because a disclosing act regulated by the Instant Provision may be not punishable if it satisfies the requirements of justifiable acts of Article 20 of the Criminal Act, the freedom of expression may be exercised within that scope. In addition, the necessity to punish a disclosing act of illegally obtained conversations that invades the secrecy of private conversations is stronger than that of defamation, so that it is not unreasonable discrimination even though the Instant Provision does not grant any circumstance precluding wrongfulness.

I will explore circumstances precluding wrongfulness from the perspective of application of Article 20 of the Criminal Act and defamation as follows.

2. Relation between the Instant Provision and Article 20 and Article 310 of the Criminal Act

Even when the Instant Provision is violated, it would not be punishable if the act satisfies the requirements of justifiable acts under Article 20 of the Criminal Act. Nevertheless, the court has interpreted and applied Article 20 of the Criminal Act in a narrow and strict

way, especially in the case of collision of basic rights such as freedom of expression (as seen in this underlying case, whereas the appellate court decided the disclosing act of the complainant with regard to the wiretapped conversations is justified under Article 20 of the Criminal Act, the Supreme Court remanded the appellate court's decision, reasoning that the principle of justifiable act was misapplied), so that it is difficult to avoid punishment.

The legislature enacted criminal defamation to protect the honor of an individual, but also considering that freedom of expression, which may be in collision with defamation, is a substantial means to realize sovereignty of the people in a liberal democratic country, enacted Article 310 of the Criminal Act, in addition to Article 20, so that defamation in the course of disclosing true facts for the public interest is not punishable. This legislative purpose is also confirmed by the proviso of Article 251 of the Public Official Education Act (hereinafter, "POEA"). Accordingly, Article 310 of the Criminal Act and a proviso of Article 251 of the POEA intend to correspond to the constitutional demand for proportionate and harmonious guarantee of colliding basic rights, namely honor of individuals and freedom of expression, by balancing and comparing them.

3. Norm-Consistent Interpretation of the Instant Provision

(A) The interpretation of the Instant Provision demands the balancing of legal interests or interpretation consistent with norms in that the protection of secrecy of communications is in conflict with the freedom of expression. Nevertheless, the protection of secrecy of communications can be broadly regarded as in the area of privacy. If the secrecy of communications was invaded solely for the public interest and if the fact is true, the reasoning of Article 310 of the Criminal Act that seeks to compare and adjust the collision between the secrecy of communications and freedom of expression in defamation to protect honor of individuals would be applicable. In other words, as defamation grants special circumstances precluding wrongfulness in order to harmoniously guarantee both honor of an individual and freedom of expression, the Instant Provision that causes collision between secrecy

of communications and freedom of expression have no reason to deny special circumstances precluding wrongfulness by interpretation.

(B) The core of freedom of expression that is a key element of democracy in recent years is the freedom of criticism, and fair criticism is an indispensable element for the development of society.

Therefore, even if the disclosed information was generated by illegal wiretapping or recording, if it is obtained without involving any illegality, the contents of which is true and gratifies the public interest, it should be subject to public discussion that forms democracy, not prevented from being disclosed. If free commentary or discussion on information worthy of public debate is totally blocked because of illegality of generating process of the information such as wiretapping or recording, without considering subsequent circumstances, freedom of expression would be intimidated, resulting in the retreat of representational democracy by hindering the formation and conveyance of public opinions.

(C) Naturally there may be concern that the allowance of special circumstances precluding wrongfulness for the disclosure of illegally recorded communications might encourage illegal wiretapping or recording. Nevertheless, the disclosure of information should not be completely prohibited without any exception just because the disclosed information is the fruit of the poisonous tree that was obtained by illegal wiretapping or recording. The legislative purpose to prevent illegal wiretapping or recording should be achieved by the rigorous punishment for the illegal wiretapping or recording. The mere concern for encouraging illegal wiretapping or recording should not prevent the constitutional and social responsibility of the press that pursues the truth and the public interest (The U.S. Supreme Court also expressed the same stance). Further, strict interpretation and application of circumstances precluding wrongfulness lessens the danger of encouraging illegal wiretapping or recording. First, in the process of obtaining the illegally wiretapped or recorded information, illegal methods such as incitement of illegal wiretapping/recording or purchase of illegally wiretapped/recorded resources must not be involved. Next, there has

to be certain assurance of the truth of the disclosed information and public interests should be the sole purpose of the disclosure. The phrase 'solely for the public interest' does not include perfunctory public interests that actually pursue private interests and where the main purpose is for the private interest, both cases the disclosure of which would be punishable. We should refer the practices of the court that hardly allow the establishment of the circumstances precluding wrongfulness of Article 310 of the Criminal Act.

(D) The Instant Provision does not provide the special provision of circumstances precluding wrongfulness for the disclosure of information that was generated through illegal wiretapping, but legally obtained, even if the information is true and the disclosure is solely for the public interest. This leads to the result it excessively protects the right of secrecy of communications whereas it neglectfully protects or abandons the freedom of expression, among the two conflicting basic rights. The Instant Provision is unconstitutional to this extent, unconstitutional part of which would be removed by the construction of limited unconstitutionality.

C. Sub-Conclusion

Therefore, the Instant Provision is unconstitutional to the extent that it is applied where the information, which is true, that was generated through illegal wiretapping, but legally obtained without any wrongfulness, has been disclosed or leaked solely for the public interest.

Justice Lee, Kang-Kook (Presiding Justice), Kim, Jong-Dae, Min, Hyeong-Ki, Lee, Dong-Heub, Mok, Young-Joon, Song, Doo-Hwan, Park, Han-Chul, Lee, Jung-Mi

5. *Challenge against the Act of Omission Involving Article 3 of "Agreement on the Settlement of Problem concerning Property and Claims and the Economic Cooperation between the Republic of Korea and Japan"*

[23-2(A) KCCR 366, 2006Hun-Ma788, August 30, 2011]

Questions Presented

Whether it is constitutional for the respondent to have failed to resolve, under Article 3 of the "Agreement on the Settlement of Problem concerning Property and Claims and the Economic Cooperation between the Republic of Korea and Japan (hereinafter "the Agreement")," the dispute over interpretation as to whether the complainants' rights to claim damages in the capacity of comfort women against Japan have been extinguished by Article 2 Section 1 of the Agreement (positive)

Summary of Decisions

According to the Preamble, Article 2 Section 2, and Article 10 of the Constitution and Article 3 of the Agreement, the respondent's duty to pursue dispute settlement procedures under Article 3 of the Agreement stems from the constitutional request to assist and safeguard the people who had their dignity and value seriously compromised by Japan's organized, continuous unlawful acts in their filing of claims against Japan. As the fundamental rights of the complainants may be significantly undermined if the respondent fails to fulfill its duty to proceed with dispute resolution, the respondent's obligation to act in this case originates from the Constitution and is stipulated in law.

In particular, although not in direct infringement of the fundamental rights of comfort women victims, the Korean government is nevertheless liable for causing disruption in settling the payment of claims by Japan and in restoring the victims' dignity and value in that it signed

the Agreement without clarifying details of the claims and employing a comprehensive concept of "all claims." Taking note of such responsibility on the part of the Korean government, it is hard to deny that the government has the specific duty to pursue elimination of the disrupted state in settlement of claims.

Whether this omission to act by the respondent to initiate dispute settlement procedures infringes on the complainants' fundamental rights and is therefore unconstitutional will depend on whether such act stays within the scope of a government institution's legitimate leeway consistent with its duty to protect people's rights, which is determined through overall consideration of the significance of fundamental rights concerned, urgency of the risk of rights violation, effectiveness as a remedy of rights and whether undertaking the dispute settlement procedure runs counter to the genuine interest of the nation.

In fact, the claims of comfort women victims against far-reaching anti-humanitarian crimes committed by Japan are part of the property rights guaranteed by the Constitution. And the payment of claims would imply post-facto recovery of dignity, value and personal liberty of those whose rights had been ruthlessly and constantly violated. In this sense, preventing the settlement of claims would not just be confined to the issue of constitutional property rights but would also directly concern the violation of dignity and value as human beings. Hence the resulting infringement of fundamental rights would be of great implication. At the same time, the victims of comfort women are all aged, which means, if there is an additional delay in time, it may be permanently impossible to do justice to history and recover the victims' dignity and value as human beings through settlement of claims. Therefore, considering that the victims' claims serve as an urgent remedy for violation of fundamental rights and given the background and circumstances of signing the Agreement as well as domestic and foreign developments, it is not so unlikely that this case may result in an effective judicial remedy.

With all the aforementioned factors taken into account, pursuing dispute settlement under Article 3 of the Agreement would be the

only rightful exercise of power consistent with the state's responsibility to protect fundamental rights of citizens. As the failure of the respondent to intervene has resulted in serious violation of fundamental rights, the omission to act is in violation of the Constitution.

Supplementary Opinion of Justice Cho, Dae-Hyun

In addition to the court opinion, the Republic of Korea has to declare that it will fully compensate for the damages for which the complainants no longer have claims against Japan under the Agreement.

Dissenting Opinion of Justice Lee, Kang-Kook, Justice Min, Hyeong-Ki, Justice Lee, Dong-Heub

In order for a constitutional complaint challenging the omission of an administrative authority to be justiciable, the Constitution should serve as a source from which to derive the public power's duty to act. The duty to take action is derived from three sources, namely, the text of the Constitution, interpretation of the Constitution, and provisions of statutes.

Firstly, the state's duty to guarantee the fundamental rights of citizens as provided in Article 10 of the Constitution and the state's duty to protect citizens residing abroad as prescribed by Article 2 Section 2 of the Constitution, as well as the Preamble of the Constitution, proclaim nothing more than the general and abstract duty of the state toward the public or the basic order of national values, and therefore the provisions in themselves do not stipulate a duty of concrete action toward the citizens. And this is also an established precedent of the Court.

Second, the Agreement simply enforces the obligations between Japan and the Republic of Korea as parties to the pact, and so the "Korean government's duty to act on behalf of the complainants" cannot be derived from Article 3 of the Agreement, which does not stipulate any "mandatory" actions either. Furthermore, the Court has set a precedent in its prior case that the settlement through diplomatic channels and referral to arbitration provided in the Agreement falls

within the scope of diplomatic discretion of the Korean government (98Hun-Ma206, Mar. 30, 2000), but the majority opinion of this case eventually leads to a decision contrary to the precedent.

The "settlement through diplomatic channels" as provided in Article 3 of the Agreement falls within the area of highly political actions where objective standards can rarely be applied to legal judgments on by whom, how, to what extent, and how far the diplomatic resolution is carried out. In this context, although such an area involving diplomatic resolution is subject to judicial review of the Court, it is to be admitted that judicial restraint is also required.

Indeed, it is all of our common and sincere hope that every possible state action is taken in light of the urgent need for remedy of fundamental rights of the complainants who had been mobilized as comfort women against their will by Japan and had their dignity and value completely stripped off. Yet, diplomatic settlement cannot be forced upon the respondent beyond the permissible boundary of the Constitution and laws and constitutional interpretation of jurisprudence thereof. This boundary is a constitutional limit that has to be observed by the Constitutional Court in accordance with the principle of separation of powers.

Parties

Complainant
Lee, O-Soo et al.
Legal representative: Attorney Cha, Ji-Hoon et al.

Respondent
Minister of Foreign Affairs and Trade
Legal representative: Yoon & Yang LLC's Attorney Kim, Eong-Sik et al.

Holding

It is unconstitutional that the respondent has failed to resolve, under Article 3 of the Agreement, the dispute over interpretation of whether the damage claims filed by the complainants, in the capacity of comfort women, against Japan have been extinguished by Article 2 Section 1 of the Agreement.

Reasoning

I. Overview of Case and Subject Matter of Review

A. Case Overview

1. The complainants are "victims known as comfort women" who were forced into sexual slavery by the Japanese military. The respondent is a government agency that carries out and supervises foreign and trade policies, engages in international relations, administers treaties and international agreements, protects and supports overseas Korean nationals, establishes policies for overseas Koreans, as well as studies and analyzes international affairs.

2. The Republic of Korea signed the Agreement on the Settlement of Problem concerning Property and Claims and the Economic Cooperation between the Republic of Korea and Japan (Treaty No. 172, hereinafter "the Agreement") with Japan on June 22, 1965.

3. The complainants have stated that, as to whether the damage claims they hold against Japan as comfort women have been extinguished by Article 2 Section 1 of the Agreement, Japan refuses to provide them with compensation on grounds that the claims have expired by the aforementioned provision, while the Korean government does not believe that the claims issue has been settled by the Agreement, which represents a dispute between the Korean and Japanese governments over the interpretation of the Agreement. On July 5, 2006, the complainants filed this constitutional complaint

challenging the constitutionality of the respondent's omission to act, arguing that the respondent is not fulfilling its duty to take action to resolve the interpretation dispute as stipulated by Article 3 of the Agreement.

B. Subject Matter of Review

In this case, the subject matter of review is whether the complainants' fundamental rights have been violated by the respondent, who failed to act under Article 3 of the Agreement in resolving the Korean-Japanese dispute over interpreting whether the complainants' damage claims as comfort women against Japan have been terminated by Article 2 Section 1 of the Agreement.

The text of the Agreement is as follows:

Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Cooperation Between Japan and the Republic of Korea (Treaty No. 172, signed on June 22, 1965, effective from Dec. 18, 1965)

Japan and the Republic of Korea,
Desiring to settle the problem concerning property of the two countries and their nationals and claims between the two countries and their nationals; and
Desiring to promote the economic cooperation between the two countries;
Have agreed as follows:

Article I
1. To the Republic of Korea Japan shall:
(a) Supply the products of Japan and the services of the Japanese people, the total value of which will be so much in yen as shall be equivalent to three hundred million United States dollars ($300,000,000) at present computed at one hundred and eight billion yen (¥108,000,000,000), in grants on a non-repayable basis within the

period of ten years from the date of the entry into force of the present Agreement. The supply of such products and services in each year shall be limited to such amount in yen as shall be equivalent to thirty million United States dollars ($30,000,000) at present computed at ten billion eight hundred million yen (¥10,800,000,000); in case the supply of any one year falls short of the said amount, the remainder shall be added to the amounts of the supplies for the next and subsequent years. However, the ceiling on the amount of the supply for any one year can be raised by agreement between the Governments of the Contracting Parties.

(b) Extend long-term and low-interest loans up to such amount in yen as shall be equivalent to two hundred million United States dollars ($200,000,000) at present computed at seventy-two billion yen (¥72,000,000,000), which the Government of the Republic of Korea may request and which shall be used for the procurement by the Republic of Korea of the products of Japan and the services of the Japanese people necessary in implementing the projects to be determined in accordance with arrangements to be concluded under the provisions of paragraph 3 of the present Article, within the period of ten years from the date of the entry into force of the present Agreement. Such loans shall be extended by the Overseas Economic Cooperation Fund of Japan, and the Government of Japan shall take necessary measures in order that the said Fund will be able to secure the necessary funds for implementing the loans evenly each year.

The above-mentioned supply and loans should be such that will be conducive to the economic development of the Republic of Korea.

2. The Governments of the Contracting Parties shall establish, as an organ of consultation between the two Governments with powers to recommend on matters concerning the implementation of the provisions of the present Article, a Joint Committee composed of representatives of the two Governments.

3. The Governments of the Contracting Parties shall conclude necessary arrangements for the implementation of the provisions of the present Article.

Article II

1. The Contracting Parties confirm that the problem concerning property, rights and interests of the two Contracting Parties and their nationals (including juridical persons) and concerning claims between the Contracting Parties and their nationals, including those provided for in Article IV, paragraph (a) of the Treaty of Peace with Japan signed at the city of San Francisco on September 8, 1951, is settled completely and finally.

2. The provisions of the present Article shall not affect the following (excluding those subject to the special measures which the respective Contracting Parties have taken by the date of the signing of the present Agreement):

(a) Property, rights and interests of those nationals of either Contracting Party who have ever resided in the other country in the period between August 15, 1947 and the date of the signing of the present Agreement;

(b) Property, rights and interests of either Contracting Party and its nationals, which have been acquired or have come within the jurisdiction of the other Contracting Party in the course of normal contacts on or after August 19, 1945.

3. Subject to the provisions of paragraph 2, no contention shall be made with respect to the measures on property, rights and interests of either Contracting Party and its nationals which are within the jurisdiction of the other Contracting Party on the date of the signing of the present Agreement, or with respect to any claims of either Contracting Party and its nationals against the other Contracting Party and its nationals arising from the causes which occurred on or before the said date.

Article III

1. Any dispute between the Contracting Parties concerning the interpretation and implementation of the present Agreement shall be settled, first of all, through diplomatic channels.

2. Any dispute which fails to be settled under the provision of paragraph 1 shall be referred for decision to an arbitration board composed of three arbitrators, one to be appointed by the Government

of each Contracting Party within a period of thirty days from the date of receipt by the Government of either Contracting Party from the Government of the other of a note requesting arbitration of the dispute, and the third arbitrator to be appointed by the government of a third country agreed upon within such further period by the two arbitrators, provided that the third arbitrator shall not be a national of either Contracting Party.

3. If, within the period respectively referred to, the Government of either Contracting Party fails to appoint an arbitrator, or the third arbitrator or a third country is not agreed upon, the arbitration board shall be composed of the two arbitrators to be designated by each of the governments of the two countries respectively chosen by the Governments of the Contracting Parties within a period of thirty days and the third arbitrator to be designated by the government of a third country to be determined upon consultation between the governments so chosen.

4. The Governments of the Contracting Parties shall abide by any award made by the arbitration board under the provisions of the present Article.

Article IV

The present Agreement shall be ratified. The instruments of ratification shall be exchanged in Seoul as soon as possible. The present Agreement shall enter into force on the date of the exchange of the instruments of ratification.

II. Arguments of the Parties

(Intentionally Omitted)

III. Background of the Case

The background and overall circumstances of this case will be reviewed first as a premise for judgment.

A. How the Agreement was Signed and the Process of Claim Settlement

1. The United States Army Military Government in Korea (USAMGIK), which was stationed in Korea after the nation's liberation from Japanese colonial rule, promulgated Edict No. 33 on December 6, 1945, which stipulates that former properties of Japan be reverted to the U.S. Military Government whether it be national or private, and subsequently the former properties of Japan were transferred to the Korean government by the "Initial Financial and Property Settlement between the Government of the United States of America and the Government of the Republic of Korea" that came into force immediately after the establishment of the government of the Republic of Korea on September 20, 1948.

2. Meanwhile, the San Francisco Peace Treaty signed between Japan and part of the Allied Powers on September 8, 1951 does not recognize Korea's claim of damages against Japan. Still, Article 4 (a) of the Treaty provides that the disposition of property and claims including debts between Japan and its nationals and the authorities presently administering the areas which no longer belong to Japan and the residents thereof shall be the subject of special arrangements between Japan and such authorities. At the same time, Article 4 (b) stipulates that Japan recognizes the validity of dispositions of property of Japan and Japanese nationals made by or pursuant to directives of the United States Military Government in any of the aforementioned areas.

3. In order to dispose of the property and claims including debts pursuant to Article 4 (a) of the aforementioned treaty, the talks for normalization between Korea and Japan began in full swing with the preliminary meeting of the 1st Korea-Japan Normalization Talks on October 21, 1951 and the main meeting on February 15, 1952. Following seven main meetings and subsequent meetings of preliminary talks, political talks and sub-committees, four side agreements－the Agreement, Agreement on Fisheries between the Republic of Korea and Japan, Agreement Between Japan and the

Republic of Korea Concerning the Legal Status and Treatment of the People of the Republic of Korea Residing in Japan, and Agreement concerning Cultural Assets and Cultural Cooperation between the Republic of Korea and Japan－were signed on June 22, 1965.

4. According to the "Annotated Translation on Claims" submitted by the respondent, the Korean government suggested eight provisions regarding its properties and claims (hereinafter the "eight provisions") at the 1st Korea-Japan Normalization Talks (Feb. 15-Apr. 25, 1952) as follows:

(1) Return the old books, art works, antiques, other national treasures, original copies of map, and 90 percent gold and silver transferred from Korea

(2) As of August 9, 1945, repay debts of the Japanese government against Chosun Government General

(3) Return the money transferred or wired since August 9, 1945

(4) As of August 9, 1945, return the properties in Japan of juridical persons which have headquarters or main offices stationed in Korea

(5) Repay the national bonds, public bonds, and banking notes of Korean juridical or natural persons purchased from the Japanese government and its people, receivable accounts of drafted Koreans, and other claims of Koreans

(6) Grant legal status to Korean juridical or natural persons' stocks or other types of securities issued by Japanese juridical persons

(7) Return the proceeds collected through the aforementioned properties and claims

(8) Begin the aforementioned return and settlement immediately upon conclusion of the Agreement within six months

5. However, the 1st Normalization Talks failed due to Japan's counter-argument of claiming its right against Korea, and no substantial talks on the claims issue took place until the 4th Korea-Japan Normalization Talks because of the difference in opinions over Dokdo and Peace Line issues, the controversial remarks of chief Japanese delegate in negotiations, Kubota Kanichiro, that "Japan's 35 year occupation of Korea was beneficial to the Korean people" plus the political situation of the two countries.

6. The practical talks on the eight provisions were finally held at the 5th Korea-Japan Normalization Talks (October 25, 1960-May 15, 1961), and Japan maintained that, regarding the first provision, the 90 percent gold and silver has been transferred through legal procedures and there are no legal grounds to be returned; on the second, third and fourth provisions, Korea has rights to claim only limited to those applicable after the promulgation of U.S. Military Government Edict No. 33 on December 6, 1945; on the fifth provision, Japan was strongly opposed to Korea's bringing up the issue of compensation for individual damages, demanded thorough submission of evidence, namely, the precise number of drafted men and the evidentiary materials thereof. As such, the Claims Committee of the 5th Korea-Japan Normalization Talks discussed from the first through fifth provisions out of the eight provisions before it was halted by the May 16 coup in 1961, but the two countries only confirmed their fundamental differences in perception and failed to bridge the gap.

7. As the 6th Korea-Japan Normalization Talks resumed on October 20, 1961, the two sides sought a political approach thinking that detailed talks over claims would only delay the settlement. At the Foreign Ministers' talks in March of 1962 following the talks between Korean President Park Chung Hee and then Japanese Prime Minister Hayato Ikeda on November 22, 1961, it was agreed that the two sides would submit informal proposals for Korea's demand in value and Japan's payable amount, respectively. As a result, the difference between the two sides was confirmed; Korea asked for 700 million U.S. dollars as repayment of claims, whereas Japan was willing to repay 74,000 U.S. dollars for claims and offer 200 million U.S. dollars in loans.

8. Against this background, Japan had initially proposed to raise the total amount of compensation considerably in the form of grants and loans for economic cooperation and, in exchange, to renounce the victims' claims, stating that repayment of claims requires strict establishment of matters of law and fact and should be limited to below south of the 38th parallel, which reduces the total value compensated and thus unacceptable by the Korean government. In

response, Korea first proposed to carry out the compensation in two forms, pure repayment of claims and grants, in order to address the issue from a broader perspective instead of its initial position seeking all in claims repayment, but, retreating again from this position, proposed to address the issue just by specifying the total amount without labeling respective amounts for each category of the claims payment and non-payable grants in settling the claims.

9. Thereafter, then Central Intelligence Director Kim Jong Pil first met with then Japanese Prime Minister Hayato Ikeda and, subsequently, with Minister of Foreign Affairs Masayoshi Ohira, and at the 2nd talks with Foreign Minister Ohira on November 12, 1962, they reached a basic agreement on proposals to be submitted to both of the governments regarding the amount involved in the claims, terms and conditions of payment, etc. Following a more fine-tuning process, then Foreign Minister Lee Dong Won and then Japanese Foreign Minister Etsusaburo Shiina reached an understanding on the settlement of problem concerning property and claims and the economic cooperation between the two countries on the occasion of the 7th Korea-Japan talks on April 3, 1965 and, on June 22, 1965, signed the Agreement, which states that Japan shall provide a designated amount of grants and loans without any labels attached and that the Contracting Parties confirm that the problem concerning property, rights and interests of the two Contracting Parties and their nationals (including juridical persons) and concerning claims between the Contracting Parties and their nationals is settled completely and finally.

10. On February 19, 1996, the Korean government enacted the "Act on Operation and Management of Claim Fund (repealed by Act No. 3613 on Dec. 31, 1982)" to provide legal grounds for civil compensation using the grants, but the beneficiaries were limited to the deceased among those who had been drafted against their will by Japan as well as those holding civil claims for private loans or bank deposits which had been discussed as such during the aforementioned talks. Thereafter, the "Act on Settlement of Civil Claims against Japan" was enacted on December 21, 1974 (repealed by Act No. 3614 on Dec. 31, 1982), and a total sum of 87.693 million won in compensation was

provided from July 1, 1975 to June 30, 1977.

11. The comfort women issue was discussed neither at the Korea-Japan normalization talks aimed at signing the Agreement nor included in the eight provisions. It was not even specified in the list of beneficiaries of compensation through legislative measures after signing the Agreement.

B. Beginning and Development of the Comfort Women Issue

1. The issue of comfort women victims was raised in earnest by the launch of the Korean Council for the Women Drafted for Military Sexual Slavery by Japan in August 1991 and the press conference held by Kim, O-Soon (deceased on Dec. 1997).

2. The Japanese government totally denied responsibility and made a statement implying that it recognized the comfort women as "prostitutes" brought by a private trader who followed the military. But the Japanese government had no choice but to make a drastic change in their stance as then Professor Yoshimi Yoshiaki of Chuo University discovered six official evidentiary documents indicating the involvement of the Japanese military in the drafting of comfort women from the Japanese Defense Agency Library in January 1992.

3. Pushed by the emergence of victims, discovery of evidence, and public opinion, the Japanese government embarked on a fact-finding investigation and announced the results of the first investigation issued in July 1992 admitting its involvement in the comfort women issue but that there was no evidence of forced drafting. Then on August 4, 1993, Chief Cabinet Secretary Yohei Kono issued a statement, unveiling the second government investigation results as well as admitting to and apologizing for the involvement of the Japanese military and authorities in forced drafting and labor and thus committing a grave and critical violation of human rights.

4. The comfort stations were first installed as a preventive measure against frequent occurrence of rapes committed by Japanese soldiers

during the Shanghai Incident in 1932 that resulted in problems, such as local resistance and sexually transmitted diseases.

The Japanese military built a comfort station at an occupied area as it sent many troops to China for the Sino-Chinese War starting from July 1937, and the number of comfort stations grew after the Nanjing Massacre in December 1937. This act was taken partly to offer soldiers "mental solace" thus boosting their morale and alleviating discontent of soldiers prone to deserting a war that never seemed to end and also, in particular, to reduce the possibility of leaking military confidentiality by "employing" colonized women who cannot speak Japanese.

From 1941, the Japanese military created comfort stations in its occupied territories in Southeast Asian and the Pacific region as well during the Asia-Pacific War. The areas where comfort stations were located as confirmed by official documents are those invaded by Japan, including Josun, China, Hong Kong, Macao, and the Philippines. The number of comfort women is estimated at 80,000-100,000 or 200,000; 80 percent of them were Josun women, and the remainder were from the Philippines, China, Taiwan, and the Netherlands.

5. In response, the Korean government enacted the "Act on the Support of Livelihood Stability for Former Comfort Women Drafted into the Japanese Forces under Japanese Colonial Rule (Act No. 4565)" on June 11, 1993 and began providing support for living expenses to the comfort women victims, but the Japanese government maintained its position that compensation for comfort women victims had already been settled by the Agreement and no legal measures can be taken additionally. At the same time, the Japanese government revealed on August 31, 1994 that it may provide consolation money or settlement funds individually from a humanitarian perspective as a moral responsibility for damage of the comfort women's dignity and honor and seek ways such as the Fund for Women in Asia at a private, but not governmental level.

6. Judging that the Fund for Women in Asia is in essence the Japanese government's way of evading its responsibility, the comfort

women victims and their support groups in Korea, Taiwan, etc. expressed their opposition early on to the idea of the fund as humanitarian charity instead of a justified compensation. The Korean government demanded the suspension of the Fund for Women in Asia from the Japanese government but was denied. Upon which the Korea government paid in lump sum a total of 43 million won, the amount originally intended by the fund, to the victims by appropriating the government budget and money raised in private, on the condition that no support would be received from the fund.

7. Meanwhile, the nine comfort women victims including Kim, O Soon filed a claim against Japan for compensation of the Pacific War victims on December 6, 1991, but the claim was finally dismissed at the Supreme Court on November 29, 2004. In the process, the appellate court Tokyo High Court ruled that the plaintiffs may have obtained the claims of damages occurring from the duty for safety consideration and unlawful acts but that all those claims correspond to the "property, rights and interests" of Article 2 Section 3 of the Agreement and thus have been extinguished. The victims partly won the lawsuit filed on December 25, 1992 seeking official apologies to comfort women who worked in Busan at the court of first instance, but the first instance decision was overturned by the appellate court, and the Supreme Court also dismissed the appeal on March 25, 2003. Even the case filed on April 5, 1993 by Song, Shin-Do and other Koreans residing in Japan seeking apologies to comfort women from Japan was terminated by dismissal of the Supreme Court on March 28, 2003.

8. In response, once the relevant document was revealed by the judgment of February 13, 2004 ordering disclosure of documents of Korea-Japan talks related to the Agreement, the Korean government, following the decision of August 26, 2005 by the Joint Government-Private Committee co-chaired by the Prime Minister and to which the respondent is a member representing the government, announced its position that the Agreement was signed with the purpose of resolving the financial, civil debtor/creditor relationship between Korea and Japan based on Article 4 of the Treaty of San Francisco and that the

Japanese government has legal liability for "anti-humanitarian illegalities" involving state power such as the comfort women, which are not considered to have been resolved under the Agreement.

However, the Japanese government countered the resolution adopted by the U.S. House of Representatives and the 2008 working group report of a regular session of the U.N. Human Rights Council containing recommendations and queries of countries calling for the settlement of "comfort women" issue by arguing that the comfort women issue has been completely concluded through (1) the apology statement of then Chief Cabinet Secretary Kono Yohei, (2) settlement of legal issues under the Agreement, and (3) the Fund for Women in Asia.

9. The aforementioned actions and attitude of the Japanese government were accepted neither by the victims nor by the international community.

The U.N. Sub-Commission on Human Rights has steadily conducted research on the comfort women issue, and its first report titled "Coomaraswamy Report" on January 4, 1996 confirmed that human rights violation by the Japanese government of the comfort women who were forced into sexual slavery by the Japanese military during WWII was a clear violation of international law and proposed six-point recommendations for Japan including the compensation of damages at the national level, punishment of those responsible, disclosure of all materials under the custody of government, official written apology, and revision of textbooks, and decided to adopt the report at the 52nd session of the U.N. Human Rights Committee on April 15, 1996.

In addition, on August 12, 1998, the U.N. Sub-Committee on Prevention of Discrimination and Protection of Minorities announced and adopted a more detailed report submitted by Special Rapporteur Gay J. McDougall which supplements the Coomaraswamy Report and mainly asserts the Japanese government's legal liability for compensation and punishment of those responsible. The McDougall Report (1) clarified that the comfort women system was a form of sexual slavery

and underscored its forceful nature characterizing it as a rape center or rape camp, (2) stressed the identification of war criminals while pursuing the punishment of those responsible, (3) called for active intervention from the U.N., such as the U.N. Secretary General being reported on the progress of the issue at least twice a year by the Japanese government and the U.N. High Commissioner for Refugees forming a panel in cooperation with the Japanese government for punishment of those accountable and appropriate compensation, and (4) emphasized the need for prompt and immediate compensation by the Japanese government considering the old age of the surviving victims.

10. As the "shift to the right" in Japan led by the Koizumi and Abe administrations triggered the movement toward removing the comfort women issue from textbooks and correcting the "Kono statement," countries around the world began responding firmly as stated below.

On July 30, 2007, the U.S. House of Representatives unanimously adopted a resolution on comfort women, the key points of which are that the government of Japan should: (1) formally acknowledge, apologize, and accept historical responsibility for its Imperial Armed Force's coercion of young women into sexual slavery (comfort women) during its colonial and wartime occupation of Asia and the Pacific Islands from the 1930s through the duration of World War II, (2) refute any claims that the sexual enslavement and trafficking of the comfort women never occurred, and (3) educate current and future generations about this crime while following the international community's recommendations with respect to the comfort women.

The House of Representatives of the Netherlands (Nov. 8, 2007), the House of Commons of the Parliament of Canada (November 28, 2007), and the Council of Europe (Dec. 13, 2007) consecutively adopted a resolution calling on the Japanese government to, among others, make a formal apology, accept historical, legal responsibility for the brutality of forcing over 200,000 comfort women into sexual slavery, provide compensation for victims, and educate current and future generations about the sexual enslavement.

11. The U.N. Human Rights Council, following a regular session on the human rights situation of Japan on June 12, 2008, officially adopted a working group report containing recommendations and queries of countries on the comfort women issue, while the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights published a report in Geneva on October 30, 2008 on a review of human rights in Japan, advising the Japanese government to acknowledge its legal liability toward comfort women and apologize in a manner acceptable by the majority of victims.

12. In Korea as well, the plenary session of the National Assembly, with 260 concurring votes out of 261, passed a resolution urging Japan to formally apologize and pay damages to comfort women victims to restore their dignity, and, starting from the Daegu Metropolitan Council in July 2009, a total of 46 municipal and metropolitan councils nationwide, as of March 2011, adopted a resolution calling for the settlement of the comfort women issue. On December 11, 2010, the Korean and Japanese Bar Associations also issued a joint statement which acknowledged that (1) inconsistent interpretation and response of the Korean and Japanese governments regarding the substance and scope of the provision of the Agreement which settles the issue completely and finally has disrupted legitimate remedy of rights and increased distrust of victims and that (2) the government and the National Diet of Japan have to introduce legislation settling the comfort women issue including apology and financial compensation. The aforementioned resolutions and statement urge the Japanese government to settle the issue through legislation when there is still one more victim surviving and the Korean government to take a more aggressive diplomatic policy.

IV. Review on Justiciability

A. Constitutional Complaint against the Omission to Act

The executive's omission to act can be challenged only when the

governmental power in question neglects its duty derived specifically from the Constitution and thus those who had their basic rights violated are entitled to request an administrative action or exercise of governmental power (12-1 KCCR 393, 98Hun-Ma206, March 30, 2000).

The "governmental power's duty derived specifically from the Constitution" stated above comprehensively includes the duty to take action by government power (1) stipulated in the Constitution, (2) derived from interpreting the Constitution, and (3) specifically written in the statutes (16-2(B) KCCR 212, 219, 2003Hun-Ma898, Oct. 28, 2004).

B. Duty to Take Action by the Respondent

Since the constitutional complaint becomes non-justiciable if the governmental power is not obligated to act as stated above, it shall be reviewed whether the respondent has the aforementioned duty to take action.

The Agreement is a treaty signed and promulgated under the Constitution, and holds the same effect as domestic law under Article 5 Section 1 of the Constitution. Yet, Article 3 Section 1 of the Agreement states that "Any dispute between the Contracting Parties concerning the interpretation and implementation of the present Agreement shall be settled, first of all, through diplomatic channels, and Section 2 of the same Article stipulates that "Any dispute which fails to be settled under the provision of paragraph 1 shall be referred for decision to an arbitration board composed of three arbitrators, one to be appointed by the Government of each Contracting Party within a period of thirty days from the date of receipt by the Government of either Contracting Party from the Government of the other of a note requesting arbitration of the dispute, and the third arbitrator to be appointed by the government of a third country agreed upon within such further period by the two arbitrators, provided that the third arbitrator shall not be a national of either Contracting Party."

According to the aforementioned provisions, in the event of a dispute between Korea and Japan over the interpretation of the Agreement, the government shall settle it primarily through diplomatic

channels and then resort to arbitration. In this context, it will be reviewed whether such act of dispute settlement by the government corresponds to the "duty to take action by governmental power specifically written in the statutes" as stated above.

The complainants, who are "comfort women victims" forced into sexual slavery by the Japanese military during Japan's colonial period, filed a claim for damages against Japan. However, the government of Japan refuses to pay for damages while arguing that the damage claims of the complainants have been extinguished by the Agreement, whereas the Korean government maintains that the Agreement does not settle the issue and therefore the claims are still valid. And eventually, this has resulted in a dispute over the interpretation of the Agreement between Korea and Japan.

Article 10 of the Constitution provides 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." The "human dignity" herein is a supreme constitutional value as well as a goal set forth by the state that is binding on all government institutions, which therefore indicates that the state is entrusted with the duty and task to realize human dignity. For this reason, human dignity is not only a "boundary of state power" associated with individuals' right to protection from the state, but also an objective of state power to protect people from a third party when their dignity is at stake.

Moreover, Article 2 Section 2 of the Constitution provides that "It shall be the duty of the State to protect citizens residing abroad as prescribed by Act," and the Constitutional Court has previously held that "The protection that citizens residing abroad enjoy during their stay in their country of residence under Article 2 Section 2 of the Constitution that specifies the state's duty to protect expatriates refers to diplomatic protection offered by the state in their relationship with residing countries for their fair treatment in all areas guaranteed by treaties, international laws and regulations as well as statutes of their country of residence and support in legal, cultural, educational and all

other areas specifically designated by law based on political consideration for expatriates (5-2 KCCR 646, 89Hun-Ma189, Dec. 23, 1993). By this holding, the Constitutional Court has already acknowledged that the state's duty to protect citizens residing abroad is derived from the Constitution.

Meanwhile, the Preamble of the Constitution specifies that "the people of Korea uphold the cause of the Provisional Republic of Korea Government born of the March First Independence Movement of 1919." Therefore, the duty to restore human dignity and worth of the victims who suffered tragic lives for a long period by being forced into sexual slavery during Japan's colonial rule in which the state failed to fulfill its most basic duty to protect safety and life of the people is, although this happened before enactment of the Constitution, the most fundamental duty that the incumbent government upholding the cause of the Provisional Korean Government holds toward the people.

In light of the aforementioned provisions of the Constitution and Article 3 of the Agreement, the respondent's duty to initiate dispute settlement procedures in accordance with Article 3 of the Agreement stems from the Constitution that calls for the state to assist and protect its people whose dignity and worth has been seriously impaired by organized, continued unlawful acts of Japan in settling damage claims. As the complainants' fundamental rights are likely to be violated seriously if the state fails to fulfill its duty, it should be interpreted that the respondent's duty to act comes from the Constitution as one that is specifically stipulated in the statute.

Although the Korean government did not directly infringe on the basic rights of comfort women victims, it is liable for causing current disruption in settling their damage claims against Japan and restoring their worth and dignity as human beings by not specifying the substance of claims and employing a broad expression of "all claims" in signing the Agreement. In that sense, it is hard to deny that the respondent has the duty to take specific action to clear the disruption.

C. Non-Exercise of Governmental Power

The respondent first opted for "diplomatic channels" to settle the dispute, not holding the government of Japan financially accountable and having the Korean government undertake the financial support and compensation for comfort women victims while raising the issue continuously with the international community by focusing on a more important and fundamental issue: calling on the Japanese government for thorough fact-finding, formal apology and reflection, and proper history education. The respondent argues that such an action is a legitimate exercise of diplomatic discretion broadly vested in the Korean government and thus obviously qualifies as a dispute settlement measure through "diplomatic channels" provided in Article 3 Section 1 of the Agreement. For this reason, the respondent contends that this does not constitute as non-exercise of governmental power.

However, non-exercise of governmental power in question in this case refers to the government's failure to fulfill its duty to take dispute settlement procedures in Article 3 of the Agreement to settle the dispute over the interpretation of the Agreement as to whether the comfort women victims' damage claims have been terminated by the Agreement, so the diplomatic action that ignored the victims' damage claims does not qualify as a the duty to act relevant in this case. In addition, from the perspective of restoring human worth and dignity of the complainants, Japan as the offender admitting its fault and taking legal responsibility thereof and the Korean government's provision of financial support as part of social security benefits to the victims are completely different issues, so it is not to be considered that the duty for action has been accomplished just because the Korean government is offering some livelihood support.

According to the respondent's arguments as well, the Korean government had, early on from the 1990s, decided not to claim financial damages from the Japanese government, expressed its position by replying to relevant groups that it "would not take actions against the Japanese government as it is highly likely to elevate to a destructive legal dispute," and stated several times that it would not

take any action regarding the dispute over interpretation of the Agreement.

Meanwhile, the Korean government has declared as aforementioned that the comfort women issue is not considered to have been settled through the decision of August 26, 2005 made by the Joint Government-Private Committee. However, this hardly constitutes a settlement through diplomatic channels under Article 3, and even if it does, the settlement efforts should continue and the procedure of arbitration referral provided in Article 3 must be taken should there be no further way for a diplomatic resolution. Yet, the respondent has neither mentioned the comfort women issue directly since 2008 nor has specific plans for settlement. Therefore, the respondent has, by any account, failed to fulfill its duty to take action.

D. Sub-Conclusion

Thus, the respondent did not take action although the duty to do so is derived from the Constitution and thereby has likely infringed on the fundamental rights of the complainants.

In this context, this case will be reviewed on the merits of whether the respondent's refusal or negligence to take action infringes on the complainants' fundamental rights and if it is therefore constitutional or not.

V. Review on Merits

A. Dispute over Interpretation of the Agreement

1. Article 2 Section 1 of the Agreement states that "The Contracting Parties confirm that the problem concerning property, rights and interests of the two Contracting Parties and their nationals (including juridical persons) and concerning claims between the Contracting Parties and their nationals, including those provided for in Article IV, paragraph (a) of the Treaty of Peace with Japan signed at the city of San Francisco on September 8, 1951, is settled completely and finally." In this regard, Article 2 (g) of the Agreed Minutes states that the

"completely and finally settled problem concerning property, rights and interests of the two Contracting Parties and their nationals and concerning claims between the Contracting Parties and their nationals in the aforementioned Article 2 Section 1 of the Agreement includes all claims within the scope of the eight provisions submitted by Korea at the 1st Korea-Japan Normalization Talks, and therefore it is confirmed that no claims can be made regarding the eight provisions."

2. In interpreting Article 2 Section 1 of the Agreement, the position of the Japanese executive and judiciary is, as reviewed above, that the damage claims of the Korean people including comfort women have all been comprehensively included in the Agreement and therefore renounced or the repayment thereof terminated. In contrast, the Korean government, through the decision of the Joint Government-Private Committee on August 26, 2005, has expressed its stance earlier that "unlawful acts against humanity" involving the Japanese government and other governmental powers such as the comfort women issue are not resolved by the Agreement and that the Japanese government is to be held legally responsible.

3. Even in the proceedings of this constitutional complaint, the respondent has repeatedly confirmed that there are differing views between the two countries since Japan believes that the comfort women victims' damage claims have been extinguished by the Agreement while the Korean government maintains that the comfort women's damage claims are different from those contained in the Agreement, and therefore these disparate views qualify as a "dispute" provided in Article 3 of the Agreement.

The respondent's argument of its supplementary documents submitted on June 19, 2009 following the oral argument of this case is also built up on the premise that there is a dispute over interpretation of the Agreement as it states that, "In deciding to opt for 'diplomatic channels' to settle the dispute, the Korean government's choice of ... out of several diplomatic options available amounts to a rightful exercise of discretion broadly granted to the government, which, as a matter of fact, is one of the dispute settlement measures through

'diplomatic channels' specified in Article 3 Section 1 of the Agreement."

4. In this sense, it is evident that the Korean and Japanese governments have dissenting views in interpretation as to whether the claims specified in Article 2 Section 1 of the Agreement involves the damage claim of comfort women, and that this conflicting interpretation constitutes a "dispute" defined in Article 3 of the Agreement.

B. Dispute Settlement Procedures

Article 3 Section 1 of the Agreement states that "Any dispute between the Contracting Parties concerning the interpretation and implementation of the present Agreement shall be settled, first of all, through diplomatic channels," and that any dispute that fails to be settled under Article 2 Section 1 shall be referred for arbitration. In other words, these provisions foresaw the potential for interpretation disputes at the time of signing the agreement and therefore designated each contracting nation as the actor for settlement, stipulating the principles and procedures of dispute settlement.

Therefore, once the aforementioned dispute occurs, the respondent should, in principle, settle it firstly through diplomatic channels pursuant to relevant procedures under Article 3 of the Agreement and then, if this effort is exhausted, take the case to an arbitration board.

In this context, it will be reviewed below whether the respondent's failure to initiate the abovementioned dispute settle procedures has violated the complainants' fundamental rights and whether it is constitutional or not.

C. Whether Respondent's Omission to Act Violates Fundamental Rights

1. Distinguishing this Case from Precedent

In a previous case in which the government was accused of failing to refer to arbitration under Article 3 Section 2 of the Agreement

(98Hun-Ma206, Mar. 30, 2000), the Constitutional Court held, "Whether it be viewed from the format or content of Article 3 of the Agreement or from the nature of diplomacy, the Korean government is considered to have a fair amount of leeway on whether to take a diplomatic channel or refer to arbitration. Therefore, it is hard to conclude that, just because the diplomatic talks between the two countries as the contracting parties have remained unsuccessful for a long period of time, the Korean government is absolutely obligated to refer to arbitration in its relationship with the complainants, who are Korean victims of forced drafting residing in Japan and their families; it is neither the case that the complainants have the right to call for arbitration referral from the government. Furthermore, even the state's duty to protect citizens residing abroad (Article 2 Section 2, Constitution) and the duty to confirm and guarantee the fundamental, inviolable rights of individuals (Article 10, Constitution) do not imply a concrete duty of the government to take concrete action to specifically refer to arbitration the dispute between Korea and Japan over the interpretation and implementation of the Agreement nor a right to claim such duty from the government."

The above decision concerns whether the respondent has the obligation to opt for "dispute settlement through referral to arbitration" specified in Article 3 Section 2 of the Agreement, and at issue was whether the respondent can set aside the primary option of diplomatic channels under Article 3 Section 2 of the Agreement and immediately invoke the duty to seek "dispute settlement through arbitration referral" in Article 3 Section 2 of the Agreement.

However, the issue in the instant case is whether the respondent is obligated to take the dispute settlement procedure under Article 3 Section 1 and 2 of the Agreement. In particular, given Article 3 Section 1 of the Agreement that stipulates settlement through a wide range of diplomatic channels instead of a specific method, the issue is whether, at the instance a Korean-Japanese dispute has occurred over interpretation of the Agreement, the respondent has the constitutional duty to settle it through diplomatic channels first and then proceed with referral to arbitration in case of failure of the former.

The point of this case is, therefore, not whether the respondent has the duty to adopt a specific measure among many ways to settle the dispute over interpretation of the Agreement, but whether it has the obligation to take diplomatic efforts, etc. under the aforementioned provision of the Agreement to do so. For this reason, this case differs from the abovementioned precedent.

2. Discretion of the Respondent

Diplomacy goes beyond the relationship between the state and its people in a nation that shares the same value and laws and includes the relationship between states in international environment composed of different values and laws. Therefore, it is undeniable that diplomacy is an area where broad discretion is vested in the government's policymaking that considers the situation and nature of the dispute, political landscape in and outside of the country, international laws, and common practice.

Yet, rights guaranteed under the Constitution are binding on all state powers, so administrative authority should also be exercised in a way that fundamental rights are guaranteed effectively in accordance with the duty to protect fundamental rights, and the domain of diplomacy cannot be completely excluded from those subject to judicial review, either. For diplomatic actions associated with people's fundamental rights, if a failure to fulfill the duty to take concrete action as reviewed earlier is decided as a clear violation of the constitutional duty to protect fundamental rights, it should be declared as an act of fundamental rights infringement and thus unconstitutional. Ultimately, the discretion of the respondent should inevitably be restricted to the reasonable scope consistent with the binding force of fundamental rights on government institutions, taking into account factors such as the gravity of the violated fundamental rights, urgency of the risk of fundamental rights violation, possibility of providing a legal remedy, and consistency with national interests.

3. Whether Omission to Act Infringes on Fundamental Rights

(A) Significance of the Infringed Fundamental Rights

The damage done to comfort women is unprecedented and unique, as it stems from forced mobilization and sexual slavery by the Japanese government and military.

The particularity of comfort women has been affirmed not only by the international community but also by the Japanese courts. The report of a non-governmental organization named International Commission of Jurists released on September 2, 1994 and the "Coomaraswamy Report" of the U.N. Sub-Commission on Human Rights published on February 6, 1996 defined it as "sexual slavery by the military." The report of August 12, 1998 submitted by Special Rapporteur Gay J. McDougall of the U.N. Sub-Committee on Prevention of Discrimination and Protection of Minorities concluded that the act of coercing sexual slavery amounts to a crime against humanity.

The resolution adopted by the U.S. House of Representatives in July 2007 also described Japanese military's sexual slavery as "forced military prostitution by the government of Japan, considered unprecedented in its cruelty and magnitude" and "one of the largest cases of human trafficking in the 20th century." Furthermore, in its ruling on April 27, 1998, the Shimonoseki Branch of the Yamaguchi District Court admitted to the liability of legislative inaction in the comfort women issue and ordered to pay compensation, stating that it is a "clear case of sexual and ethnic discrimination, fundamental violation of the dignity of women, and undermining of national pride."

The comfort women victims' right to claim damages from the government of Japan for its extensive anti-humanitarian crime is not just part of the property rights enshrined under the Constitution, but also implies the post-facto restoration of dignity and value and personal liberty that has been ruthlessly and continuously violated. Therefore, blocking the repayment of damage claims is not just confined to a

constitutional property issue but is also directly associated with the infringement of fundamental dignity and value of human beings (20-2(A) KCCR 91, 100-101, 2004Hun-Ba81, July 31, 2008).

(B) Urgency of a Legal Remedy for Violation of Rights

In the three lawsuits filed with the Japanese courts since 1991, the comfort women victims lost their case, one of the reasons being that the damage claims of comfort women victims have been extinguished by the Agreement.

It has now become virtually impossible to resort to judicial remedies from Japan's courts or expect voluntary apology and remedies from the Japanese government. It is already over 60 years since the end of WWII when comfort women were forced into sexual slavery for the Japanese Military, and more than 20 years since the victims brought lawsuits against Japan.

As of March 13, 2006, 125 comfort women remained alive out of 225 subjected to the Act on the Support of Livelihood Stability for Former Comfort Women Drafted into the Japanese Forces under Japanese Colonial Rule, but the number of death increased even during the hearings of the complaint in this case, just leaving 75 survivors of comfort women victims registered with the government as of March 2011. This case originally started with 109 complainants, but 45 died while the case was pending, which left only 64 complainants. Since even those alive are aged, further delay in the court proceedings may make it permanently impossible to bring justice to history and restore their dignity and value through repayment of damage claims.

(C) Possibility of a Legal Remedy

The respondent argues that, given the uncertainty of the outcome after referring the issue to arbitration, the Korean government decided not to claim financial damages from Japan and instead to provide, by

itself, the victims with financial assistance and compensation.

Even if the infringed rights are significant and there is an urgent risk of violation, it is difficult to impose the duty to take action on the respondent if there is absolutely no chance of providing a legal remedy. However, the duty of action is required not only when a legal remedy is definitely warranted, but also when the possibility of obtaining one exists. In this case, if the victims are willing to take the chance of finally having their claim for damages against the Japanese government denied, the respondent should fully consider the intent of the victims.

Article 19 of the Draft Articles on Diplomatic Protection adopted by the UN International Law Commission and submitted to the General Assembly in 2006 sets forth as a recommendation that a state entitled to exercise diplomatic protection should give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred and take into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought.

In this case, as the complainants are filing a complaint to seek the respondent's exercise of duty to take action, their intent as victims is clear. Moreover, taking into account the background of signing the Agreement and the domestic, foreign views appalled by the unprecedented violation of women's rights calling for Japan's admission of fact, apology, and compensation, the possibility of obtaining compensation from the Japanese government in case the respondent takes a dispute settlement procedure under Article 3 of the Agreement should not be foreclosed.

(D) Consistency with Critical National Interests

The respondent argues that it is difficult to undertake the duty to take concrete action demanded by the complainants, stating that taking

steps for dispute settlement under Article 3 of the Agreement and claiming financial compensation from the Japanese government may cause a destructive legal dispute or strained diplomatic relations. However, even if the nature of diplomatic actions that require strategic choices based on understanding of international affairs is taken into account, it is nevertheless hard to conclude that an extremely unclear and abstract reason such as the possibility of a "destructive dispute" or "strained diplomatic relations" qualify as pertinent reasons for disregarding legal remedies for the complainants facing serious risks of basic rights violation. It is neither a national interest to be considered seriously.

Instead, it would be more constructive to the future of a sincere Korean-Japanese relationship and consistent with truly major national interest to call on the Japanese government to take on its legal responsibility toward the victims by making efforts to share recognition of historical facts, thereby deepening mutual understanding and trust between the two countries and their peoples, and to prevent similar tragedies by taking this as a lesson learned.

(E) Sub-Conclusion

The respondent's failure to take action in this case violates the significant fundamental rights of the complainants enshrined in the Constitution.

D. Sub-Conclusion

According to Article 10, Article 2 Section 2, and Preamble of the Constitution and Article 3 of the Agreement, the respondent's duty to take steps for dispute settlement under Article 3 of the Agreement is derived from the Constitution and specifically stipulated in the statutes. Also, widely considering the possibility of serious violation of fundamental rights such as dignity and value as human beings and property rights, as well as the urgency and possibility of remedy, the respondent does not have the discretion to not take action and cannot be deemed to have fulfilled its duty of action to take dispute settlement procedures under Article 3 of the Agreement.

In conclusion, such inaction of the respondent violates the Constitution and thus the fundamental rights of the complainants.

VI. Conclusion

Therefore, the instant constitutional complaint has merits and is thus upheld. All Justices joined this opinion except for the concurring opinion of Justice Cho, Dae-Hyun (Part VII) and dissenting opinions of Justices Lee, Kang-Kook, Min, Hyeong-Ki, and Lee, Dong-Heub (Part VIII).

VII. Concurring Opinion of Justice Cho, Dae-Hyun

The complainants are victims known as comfort women who were forced into sexual slavery by the Japanese military and are entitled to damage claims, and they argue that exercising their damage claims has become difficult due to the Agreement. In this case, the Constitutional Court cannot deny a constitutional complaint filed by the complainants arguing that their claims have been infringed upon with the rationale that the viability and scope of damage claims has not been determined in procedures of ordinary courts.

It is the duty of the state to confirm and guarantee the comfort women's right to a damage claim against Japan as fundamental human rights of individuals (latter part of Article 10, Constitution). Nevertheless, the Korean government agreed in the Agreement to receive the total value equivalent to three hundred million U.S. dollars in grants on a non-repayable basis and to confirm that the problem concerning claims between the two countries and their nationals has been settled completely and finally and that no contention shall be made with respect to any such claims.

And the Japanese courts state that the complainants are not entitled to claim damages against the government of Japan because of the said Agreement.

People are divided as to whether the complainants' damage claims

against Japan have been extinguished by the Agreement. If the Agreement does terminate the damage claims, it happens that the state, which is obligated to guarantee the property rights of the complainants, has signed an agreement which strips the complainants of their property rights. Even if the Agreement does not nullify the right to damages, the complainants are deterred from exercising their right to claim damages because of the Agreement. Therefore, it is duly considered that the Korean government has the duty to initiate diplomatic talks or arbitration procedures with Japan in accordance with Article 3 of the Agreement with the purpose of addressing the unconstitutional interference of the Agreement with the complainants' exercise of right to claim damages against Japan.

Furthermore, it may be viewed that the Agreement is in violation of the fundamental rights of the complainants as it hinders the exercise of the complainants' right to claim damages, but it is hard to conclude that the Agreement violates Article 37 Section 2 of the Constitution if we interpret it so that the Korean government received three hundred million U.S. dollars from the Japanese government to repay altogether the Korean people's claims against Japan during the Japanese colonial rule. Yet, despite the possibility of this understanding, the Korean government is still not free from its duty to compensate for the damages of its people who have lost their right to claim damages owing to the Agreement ordering Japan to supply three hundred million U.S. dollars in non-payable grants.

The Korean government enacted the "Act on Operation and Management of Claim Fund" on February 19, 1966 following its receipt of three hundred million U.S. dollars from Japan in non-payable grants, but the beneficiaries excluded comfort women such as the complainants and were limited to the deceased victims who had been drafted against their will by Japan. The government enacted the "Act on the Support of Livelihood Stability for Former Comfort Women Drafted into the Japanese Forces under Japanese Colonial Rule," based on which it provided comfort women with support for living expenses in lump sum and on a monthly basis, as well as priority rental of housing, living allowance, medical aid, and nursing

aid, but this hardly qualifies as a fully satisfactory compensation for the damage claims of the complainants.

Therefore, the Korean government not only has the duty to resolve the unconstitutionality of the Agreement by taking diplomatic or arbitration procedures against Japan pursuant to Article 3 of the Agreement, but also has to declare its responsibility to fully repay the damages caused by the Agreement by preventing the complainants from exercising their right to claim damages.

Moreover, it is barely possible that the complainants' disrupted exercise of right to claim damages against Japan will be resolved through diplomatic talks or arbitration measures, which are rather likely to result in vain hope and frustration, so it should be further emphasized that the Korean government is obligated to fully compensate for the complainants' claims against Japan. Since the complainants are all aged, it is all the more necessary that the state's compensation measures take place in a prompt manner.

VIII. Dissenting Opinion of Justices Lee, Kang-Kook, Min, Hyeong-Ki, and Lee, Dong-Heub

Unlike the majority opinion, we believe that the respondent does not necessarily have the duty toward the complainants to proceed with dispute settlement measures in Article 3 of the Agreement even by our written provisions of the Constitution or any constitutional jurisprudence, and therefore this constitutional complaint filed by the complainants is non-justiciable for the reasoning below.

A. Pursuant to Article 68 Section 1 of the Constitutional Court Act, non-exercise as well as exercise of governmental power can be subjected to constitutional complaints, but only those whose rights have been violated by such inaction by the government are entitled to file a constitutional complaint. For this reason, constitutional complaints against the omission to act by administrative power shall be limited to cases where the government neglects its duty specifically stipulated in the Constitution and therefore those entitled to the rights can call for

administrative action or exercise of government power (3 KCCR 505, 513, 89Hun-Ma163, September 16, 1991; 12-1 KCCR 393, 401 KCCR 98Hun-Ma206, March 30, 2000).

Additionally, it is also the Court's established precedent that the "duty specifically stipulated in the Constitution" implies all three types of cases, namely, when the duty to take action is written in the Constitution, or derived from the Constitution through interpretation, or specifically stipulated in statutes (16-2(B) KCCR 212, 219).

However, it is to be noted that the governmental power's duty to take concrete action stipulated in the Constitution, or derived from interpretation of the Constitution, or prescribed by statutes should be directed "toward the people entitled to basic rights." Only the "individual whose constitutional right has been violated by the governmental power's neglect of duty despite the individual's right to call for administrative action or exercise of governmental power" will be able to file a constitutional complaint against the omission to act by the administrative power in question.

The majority opinion reasons that, in consideration of Article 10, Article 2 Section 2 of the Constitution, the portion that states "the people of Korea upholds the cause of the Provisional Republic of Korea Government born of the March First Independence Movement of 1919" in the Preamble of the Constitution, and Article 3 of the Agreement, the duty of the respondent to take action in this case is "derived from the Constitution and specifically stipulated in the statute" and that the duty to take concrete action borne by the respondent is to "take dispute settlement procedures pursuant to Article 3 of the Constitution." It will be reviewed hereafter whether this interpretation is appropriate.

B. First, the texts and interpretation of Article 10, Article 2 Section 2, and Preamble of the Constitution do not elicit the "duty to take concrete action derived from the Constitution."

Some provisions of the Constitution stipulating the legal relationship

of the state and the people set forth fundamental rights and other rights in concrete and clear terms, but there are others stated in open, abstract, and declaratory language, so that the binding force of rights and duties between the state and the people takes effect only via constitutional interpretation or specific statutes. However, the state's duty to guarantee the fundamental rights of citizens as provided in Article 10 of the Constitution and the state's duty to protect citizens residing abroad as prescribed by Article 2 Section 2 of the Constitution fall under the latter category, which means that they merely stipulate the general and abstract duty of the state to guarantee the basic rights of the people and to protect them, and that the provision alone does not derive from itself the state's duty to take any specific action for the people. The same applies to the portion of the Preamble of the Constitution that states "the people of Korea uphold the cause of the Provisional Republic of Korea Government born of the March First Independence Movement of 1919." Although the Preamble of the Constitution sets forth national tasks and guiding ideas and principles to establish state order, as well as embodying the national consensus on the nation's basic order of values, thus acting as the supreme norm that sets the standard for statutory interpretation and legislation, the state's duty to take concrete action for the people cannot be derived from the text of the Preamble itself.

It is also the Constitutional Court's precedent that the duty of the state to take concrete action and the people's right to call for such action from the state is not derived from Article 10, Article 2 Section 2, and Preamble of the Constitution (On Article 10, Article 2 Section 2 of the Constitution: 12-1 KCCR 393, 402-403, 98Hun-Ma206, March 30, 2000; 10-1 KCCR 705, 710, 97Hun-Ma282, May 28, 1998, and on Preamble of the Constitution: 17-1 KCCR 1016, 1020-1021, 2004Hun-Ma859, June 30, 2005)

Therefore, however significant and urgent the state of the complainants' fundamental rights violation may be, it is impossible to derive from Article 10, Article 2 Section 2, and Preamble of the Constitution alone what the state should do. Ultimately, there should be a "statute that lays down a duty of concrete action" as a medium

in order to recognize the state's duty to take concrete action for the complainants.

C. Next, it will be reviewed whether the provision on dispute settlement procedures prescribed by Article 3 of the Agreement qualifies as a case in which a "statute lays down a duty of concrete action" and thus "the duty of action can be derived from the Constitution."

1. First, "the concrete action laid down in statutes" should be interpreted as a case where the statute stipulates that "the state is obliged to take a specific action for the people." This is because, filing of a constitutional complaint against an administrative power's omission to act is limited to cases where the public power concerned neglects its duty even if an individual entitled to fundamental rights can request for the exercise of administrative action or governmental power under the statute stipulating the duty of concrete action (12-1 KCCR 393, 98Hun-Ma206, March, 30, 2000), and the statute stipulating this duty to take concrete action should "grant the entitled people the right to demand the state to exercise a duty of concrete action." This is a premise also required, as a matter of course, to verify the possibility of basic rights violation or cause and effect relations in a constitutional complaint filed by those who had their fundamental rights infringed on by the state's failure to take concrete action as mentioned above.

Basically, if laws enacted by the National Assembly or administrative rules and regulations binding on the people contain portions granting specific rights, this is a case where "the duty to take action is specifically stipulated in statutes." Almost all of the constitutional complaints against the omission to act by the administrative power concerned issues of whether the state's specific duty of action toward the complainant is stipulated in the statute and whether there is an omission to take action, and it was held that the state had the duty of action when, the relevant statute spells out the duty of action as either a statutory obligation binding on administrative powers or a discretionary action where non-exercise of governmental power has resulted in such

a serious violation of the complainant's fundamental rights, that the duty of action should be interpreted as a statutory obligation (10-2 KCCR 283, 96Hun-Ma246, July 16, 1998 and 16-1 KCCR 699, 2003Hun-Ma851, May 27, 2004 for the former, 7-2 KCCR 169, 94Hun-Ma136, July 21, 1995 for the latter). On the other hand, if the duty of action was prescribed in the statute as a pure discretionary act by the administrative power, it was ruled that the state did not have the duty to take specific action for the complainant (17-1 KCCR, 2004Hun-Ma859, June 30, 2005).

However, even if treaties or other types of diplomatic documents like the Agreement stipulate the contents and procedures as to how to settle disputes between the contracting parties, this is basically premised on their mutual accountability between the two parties, so a certain specification of a duty merely allows a contracting party to demand the duty from the other party. For this reason, in order for an individual to be able to call on the state to "fulfill the rights and duties a nation may hold against the other country," it should be specifically stated in the treaty concerned that the people have the right to call on the country to take such actions. As long as there is no such explicit phrase in the treaty, the fact that the treaty deals with the legal relationship of the people alone does not give rise to the right to call on the government to take procedural measures provided in the treaty.

The Agreement concerns "property, rights and interests of the two Contracting Parties and their nationals as well as claims between the Contracting Parties and their nationals (Article 2 Section 1 of the Agreement), which is spelt out in general, abstract terms and therefore whether or not Japan's compensation for comfort women victims such as the complainants in this case falls under the claims mentioned in the Agreement is not clear. Consequently, it is likely that the difference in positions between the two countries has led to a "dispute" over interpretation and implementation of the Agreement on the legal relationship of the complainants. Nevertheless, unless the Agreement gives the nationals concerned the right to call for dispute settlement procedures pursuant to Article 3 of the Agreement, the fact that the

complainants' fundamental rights are involved alone does not necessarily provide them with a concrete right to call on their government to implement the dispute settlement procedures set forth in the Agreement.

Therefore, the Agreement cannot derive from itself the state's duty to take concrete action as stated in the majority opinion because nowhere in the Agreement is it provided that the nationals concerned have the right to demand their government to take the dispute settlement procedure of Article 3 nor do Article 10, Article 2 Section 2, and Preamble of the Constitution provide grounds for such duty of action, so, eventually, not even all of the Agreement and the aforementioned constitutional provisions combined can infer from them the state's duty to take concrete action toward the complainants of this case.

2. Furthermore, given the textual content of Article 3 of the Agreement, the duty to take diplomatic actions pursuant to Article 3 to settle the dispute over interpretation of the Agreement is neither considered a "duty" to take "concrete" action.

(A) Article 3 of the Agreement provides that, "Any dispute between the Contracting Parties concerning the interpretation and implementation of the present Agreement shall be settled, first of all, through diplomatic channels (Section 1)," and "Any dispute which fails to be settled under the provision of paragraph 1 shall be referred for decision to an arbitration board composed of ... within a period of thirty days from the date of receipt by the Government of either Contracting Party from the Government of the other of a note requesting arbitration of the dispute (Section 2)." Yet, nowhere in the provision is it stated that a dispute "must" be settled through diplomatic channels or a deadlock in diplomatic settlement "must" be resolved through referral for arbitration. The phrase "shall be settled through diplomatic channels" is interpreted as no more than a diplomatic pledge between the two contracting parties to settle disputes diplomatically. The portion "shall be referred for decision to an arbitration board" becomes effective "upon receipt of a note requesting arbitration of the dispute," and nowhere can we find here the grounds to interpret that referral for

arbitration is "compulsory." In conclusion, it cannot be derived from anywhere in Article 3 Section 1 and 2 that it is "compulsory" to take a diplomatic procedure for settlement or refer the decision to an arbitration board.

However, the majority opinion states, without any mentioning of the aforementioned doubts on interpretation, that "it is impossible to perceive that the respondent has the discretion not to fulfill such duty of action" solely based on the significance of the complainants' fundamental rights and urgency of remedies for violation of their rights. For this reason, it is indeed a huge logical jump to have interpreted a non-compulsory phrase of an international treaty as a "compulsory" provision that can enforce the respondent, a government body of one contracting party, to implement an act provided in the treaty only on grounds that the affected people are in a desperate situation.

Instead, it would be more reasonable to define the act of taking dispute settlement procedures provided in Article 3 of the Agreement as a "discretionary act" of the two contracting parties given the format and content of the provision. In a constitutional complaint case where the Korean victims of forced drafting residing in Japan argued that the state has the duty to take concrete action of referring to arbitration the dispute over damage claims, the Constitutional Court has also interpreted that the duty of action falls under the discretion of the government with the reasoning below.

"Article 3 of the Agreement stipulates that disputes between the two countries over the interpretation and implementation of the Agreement shall be, first of all, settled through diplomatic channels and those failed to be settled through this procedure shall be referred for decision to an arbitration board, and "whether viewed in terms of the format and content of the provision or nature of diplomatic issues, it is inferred that the government is given a great deal of discretion on whether to take diplomatic channels or arbitration referral to settle the aforementioned disputes." Therefore, it is difficult to conclude that the government is, no matter what, obligated to refer for arbitration in its relationship with the complainants who are Korean victims of forcible

drafting residing in Japan just because the diplomatic talks between the two countries have been stalemated for a long period; by the same token, it is hard to decide that the complainants are given the right to urge the government to refer for arbitration (12-1 KCCR 393, 402, 98Hun-Ma206, March 30, 2000)."

The majority opinion states that the above precedent differs from this case in that, because the constitutional complaint of the precedent was filed on grounds that the government had put aside the duty of diplomatic settlement in Article 3 Section 1 of the Agreement and failed to refer the dispute for arbitration as provided in Article 3 Section 2 of the Agreement, this case may arrive at a different conclusion as its key issue is the dispute settlement procedure in Article 3 of the Agreement. Yet, this view comes from a misunderstanding of the precedent. It would be more pertinent to perceive that the main basis for not recognizing the duty to take concrete action lies in the reasoning, as reviewed earlier, that both the "diplomatic settlement" or "referral for arbitration" in Article 3 of the Agreement are not "compulsory" but a matter of diplomatic "discretion" of the Korean government.

(B) Moreover, the "diplomatic channels" and "referral for arbitration" specified in Article 3 of the Agreement may be somewhat binding in nature, but this does not necessarily imply a "concrete" action, either.

The "duty to settle through diplomatic channels" is nothing more than general, abstract obligations of the state such as the duties to guarantee fundamental rights, protect nationals residing abroad, pursue the inheritance and development of traditional and national culture, promote welfare of the physically disabled, etc., and protect public health. A general, abstract duty is not a "concrete" duty of action in itself and, although specified in the Constitution, it is not automatically translated into a "concrete" duty of action sought by the people from the state. When the Constitution, which governs the normative relationship between the state and its people as a founding norm, cannot serve as the basis to call on the state to exercise its duty, it cannot be interpreted that a mere stipulation in the lower norm of "treaty" is

translated into a duty of "concrete" action that can be requested to the state by the people, who are not even direct parties to the treaty.

Furthermore, it is difficult to secure an objective review standard to decide on the responsible party or method, progress, and conclusion of exercising the "duty of diplomatic settlement," which belongs to an area of highly political actions, non-exercise of which is difficult to confirm. Therefore, although the duty of diplomatic settlement is subjected to judicial review by the Constitutional Court, judicial restraint under the principle of separation of powers is required. In this case alone, when seriousness of the comfort women issue and the subtle diplomatic relations between Korea and Japan that need to be continued nonetheless are taken into account, there is no clear standard to decide whether such duty of diplomatic settlement has been fulfilled or not, such as on how much diplomatic effort should suffice, whether the diplomatic efforts that started in the beginning but has stopped now or efforts unsatisfactory to the complainants over the past 40 years since signing of the Agreement do not suffice, and when the duty of arbitration referral in Article 2 takes effect. It is at issue whether the "diplomatic duty" that involves all these elements could be considered as a "concrete" duty of action that can people can demand from the state. It is all the more problematic in that if the Constitutional Court imposes the "duty of diplomatic effort" using vague terms on the government merely based on grounds that it is specified in the Agreement without questioning the specifics of duty fulfillment, this runs the risk of violating the principle of separation of powers vested by the Constitution in the executive that holds jurisdiction in policy judgment and formulation on political, diplomatic actions and its execution.

D. Sub-Conclusion

Because the duty to take concrete action is not derived from Article 10, Article 2 Section 2 of the Constitution, a portion of the Preamble of the Constitution, and Article 3 of the Agreement, the instant constitutional complaint, in which the complainants argue that their fundamental rights have been violated by the respondent's failure to proceed to dispute settlement specified in Article 3 of the Agreement,

should be dismissed for non-justiciability.

Given the desperateness of the complainants who, after being mobilized for sexual slavery by the Japanese military, were deprived of their life as decent human beings but were not even given apologies from Japan, any Korean national cannot but relate to them, and it is our desperate hope that the government does its utmost to resolve this at the state level. However, the Constitutional Court has to basically judge by the Constitution and laws, so it cannot go beyond the borders of the Constitution and laws as well as constitutional jurisprudence however significant or desperate the situation of direct parties. If legal remedies to address the significance of basic rights protection and urgency of the complainants in this case are not found from statutes or other constitutional jurisprudence, the issue of the complainants' legal status will eventually have to be entrusted to political power, and the Constitutional Court cannot force the respondent to push the bounds of the Constitution, law, and constitutional interpretation either. This is the constitutional boundary that the Constitutional Court has to adhere to under the principle of separation of powers.

Justice Lee, Kang-Kook (Presiding Justice), Cho, Dae-Hyun, Kim, Jong-Dae, Min, Hyeong-Ki, Lee, Dong-Heub, Mok, Young-Joon, Song, Doo-Hwan, Park, Han-Chul, Lee, Jung-Mi

6. Case on Placing Limitation on Number of Transfer of Workplace by Foreign Workers

[23-2(A) KCCR 623, 2007Hun-Ma1083, 2009Hun-Ma230 · 352(consolidated), September 29, 2011]

Questions Presented

1. A case which limitedly admits that foreigners are entitled to the freedom to choose workplace
2. Standard of review for the protection of foreigners' freedom to choose workplace
3. Whether Article 25 Section 4 of the former 'Act on the Employment etc. of Foreign Workers' (enacted by Act No. 6962 on August 16, 2003 and before revised by Act No. 9798 on October 9, 2009) which prevents foreign workers with employment permit from transferring their workplaces more than three times (hereinafter, the 'Instant Provision') infringes upon the freedom to choose workplace (negative)
4. Whether the Instant Provision violates the principle against blanket delegation (negative)
5. Whether Article 30 Section 2 of the Former Enforcement Decree of the Act (enacted by Presidential Decree No. 18314 on March 17, 2004 and before revised by Presidential Decree No. 22114 on April 7, 2010, hereinafter, 'the Enforcement Decree') which allows only one additional transfer (hereinafter the 'provision of the Enforcement Decree') violates the principle of statutory delegation (negative)
6. Whether the provision of the Enforcement Decree infringes upon the freedom to choose workplace (negative)

Summary of Decisions

1. In this case, among the types of freedom of occupation, the freedom to choose workplace is at issue. As the freedom to choose workplace is closely related to the right to pursue happiness as well

as human dignity and value, it should not be simply regarded as a right reserved exclusively for citizens but one vested in all mankind and therefore, foreigners may enjoy the freedom to choose workplace even if limitedly so. Given the fact that a status as legitimate workforce in our society has been already granted to the complainants who lawfully obtained employment permit, legally entered Korea and have been maintaining regular relationships in life in our country, the complainants should be regarded as being entitled to the freedom to choose workplace.

2. When introducing a system for accepting foreign workforce, the legislature is endowed with a wide range of legislative discretion to constitute the contents of the system on the basis of a policy decision in consideration of the current situation of the local labor market and economy, national security and maintenance of social order. Therefore, unless such a legislation is clearly irrational or unfair, such legislative decision should be respected, and foreign workers' freedom to choose workplace can finally be materialized only after the legislature concretely prescribes the contents of the system by enacting laws on the basis of such a policy decision.

3. The Instant Provision was enacted to protect local workers' employment opportunities by limiting foreign workers from imprudently transferring their workplace and to contribute to the balanced development of national economy through effective supply and demand of human resources for small or medium sized companies. Further, the Instant Provision allows foreign workers to transfer workplaces up to three times during the three years of their stay in Korea for certain reasons stipulated in the Act and an additional transfer is possible if there is any exceptional ground specified by the Enforcement Decree. Therefore, the Instant Provision does not seem clearly unreasonable beyond the extent of discretion granted to the legislature, and does not infringe upon the complainants' freedom to choose workplace.

4. As the decision whether to increase the number of possible workplace transfers should be made in consideration of many aspects of the local labor market such as employment opportunities for local

workers and the demand and supply of human resources for small or medium sized companies, this case falls into a case where the requirements of concreteness and clarity for delegated rule-making need to be relaxed. Also, considering the legislative purposes and overall intent of the Act, it is possible to predict that matters to be specified in the Presidential Decree by the delegation of the proviso of the Instant Provision would be the specific conditions under which an additional transfer of workplace is exceptionally allowed and the possible number of such additional transfers. Therefore, the proviso of the Instant Provision does not violate the principle against blanket delegation.

5. The proviso of the Instant Provision stipulates "Provided, that the foregoing sentence shall not apply if there is any inevitable reason specified by Presidential Decree." But given the facts that unless additional transfers are unlimitedly allowed, delegation of the possible number of additional transfer to the Enforcement Decree is naturally required; and that pursuant to the principle of presumption of constitutionality, the proviso of the Instant Provision can be interpreted as 'Provided, that ··· if there any inevitable reason as the Presidential Decree stipulates,' which conforms to the Constitution, it is proper to consider that the Instant Provision also delegates the relevant specifics related to the possible number of additional transfer to be determined by the Enforcement Decree. Therefore, the provision of the Enforcement Decree does not violate the principle of statutory reservation, as regulating matters delegated to it by its parental Act without deviating from the scope of delegation.

6. Given the facts that the provision of the Enforcement Decree was provided to allow an extra transfer of workplace, in addition to the Instant Provision which allows foreign workers to transfer their workplaces up to three times during the three years of their stay in Korea; that the provision of the Enforcement Decree extensively stipulates almost all possible grounds for the additional transfer of workplace for involuntary causes; and that the systemic management of foreign workers for maintaining national security and social order and a period for adjustment to the culture and language for foreign

workers are required, it can be concluded that the provision of the Enforcement Decree is neither excessively arbitrary without any reasonable cause nor in violation of the complainants' freedom to choose workplace.

Concurring Opinion and Dissenting Opinion by Justice Mok, Young-Joon and Justice Lee, Jung-Mi

1. As the right to choose workplace is more related to the freedom reserved for 'citizens' rather than to 'all human beings', it does not extend to foreign nationals. But among the types of general freedom of action, the freedom of employment contract, which is closely related to foreign nationals' survival and human value and dignity, extends to foreign nationals. In this regard, since the complainants' freedom to enter a new employment contract after canceling the former one is limited by the Instant Provision and the provision of the Employment Decree, the complainants are entitled to the freedom of employment contract.

2. As the Instant Provision was enacted to protect local workers' employment opportunities and to contribute to the balanced development of national economy through effective supply and demand of human resources for small or medium sized companies, its legislative purpose is legitimate and the means to achieve the purpose is appropriate. Also, considering the fact that the Instant Provision allows foreign workers to transfer workplace up to three times during the three years of their stay in Korea and an additional transfer is possible if there is any exceptional grounds specified by the Enforcement Decree, it neither violates the principle of least restrictive means nor breaks the balance between competing interests.

3. The Instant Provision delegates the Presidential Decree to stipulate the specific details of 'inevitable reasons' for which the limitation on the number of workplace transfer does not apply. As the provision of the Enforcement Decree not only stipulates the details of the 'inevitable reasons' delegated by the Act but also limits the number of additional transfer to 'one time' even when a case falls into one of the

inevitable reasons specified in the Enforcement Decree, it violates the principle of statutory reservation, deviating from the scope of delegation.

Also, the provision of the Enforcement Decree includes transfers for which foreign workers are not responsible in the count of possible workplace transfers, such as unavoidable transfer due to the financial problem of the workplace. And as it allows only one transfer in any case without exception, it fails to observe the principle of least restrictive means. Further, the provision of the Enforcement Decree also fails to keep the balance between the protected public interest and the limited private interests.

Therefore, the provision of the Enforcement Decree infringes upon the complainants' freedom of employment contract.

Dissenting Opinion by Justice Song, Doo-Hwan on the Provision of the Enforcement Decree (Opinion of Unconstitutionality)

Even foreigners, if they have lawfully obtained employment permit, legally entered Korea and have been maintaining a regular life in our country, should be regarded as the bearers of the freedom to choose workplace as long as lawfully staying in Korea, since they should be entitled to enjoy the freedom to choose means to make a living and maintain regular relationship in life while guaranteed human dignity and value. Therefore, the complainants' freedom to choose workplace should be recognized and the provision of the Enforcement Decree infringes upon the complainants' freedom to choose workplace, in violation of the principle of statutory reservation and the principle against excessive restriction.

Dissenting Opinion by Justice Kim, Jong-Dae (Opinion of Dismissal)

Considering 1) the language of our Constitution which clearly designates 'citizens' as the holders of fundamental rights protected by the Constitution; 2) the historical background of the enactment of the Constitution where it was decided that foreign nationals should not be considered as the bearers of fundamental rights protected by our

Constitution, but their legal status should be guaranteed by international laws and treaties; 3) the basic relationship among state, Constitution and basic rights; 4) the requirement that the bearers of fundamental rights should be same as the bearers of basic duties under the Constitution; 5) the principle of reciprocity in the status of foreigners under the Constitution; 6) the unreasonableness in deciding whether the complainants are the bearers of the fundamental right after reviewing whether the basic right allegedly infringed is a right reserved for all human beings or only for citizens, in which the standard of review is unclear and the order of judgment is reversed; and 7) the sufficient guarantee of foreign nationals' status by international laws and treaties, it is reasonable to consider that foreigners are not entitled to all fundamental rights under the Constitution.

But, there remains possibility that foreigners who entered our country and have been living a regular life as Koreans do can be exceptionally considered the bearer of a fundamental right, by practically treating them as Korean citizens.

In conclusion, as the complainants in this case are not the bearers of the fundamental right, they have no standing in a constitutional complaint. Thus, this constitutional complaint should be dismissed for non-justiciability.

Parties

Complainants

1. Suha ○○ (2007Hun-Ma1083)
2. F.M. Zainal (2009Hun-Ma230)
3. T.L.Macatangay (2009Hun-Ma230)
4. B.Q. Duan (2009Hun-Ma230)

Representative of the Complainants: Jung, Jung-Hoon and two others

Sub-agent: Kang, Ji-Hyun and four others
5. N.V. Dan (2009Hun-Ma352)
Representative: Lee, Jung-Hyun

Holding

Complainants' constitutional complaint is denied.

Reasoning

I. Introduction of the Case and Subject Matter of Review

A. Introduction of the Case

1. 2007Hun-Ma1083

(A) Complainant is a foreign worker of Indonesian nationality. After receiving a legitimate employment permit pursuant to the 'Act on the Employment etc. of foreign workers' (hereinafter the 'Act'), the complainant entered Korea on July 22, 2005 and started to work thereafter.

(B) Article 25 Section 4 of the Act prevents foreign workers with employment permit from transferring their business or place of business (hereinafter, 'workplace') more than three times and the complainant transferred his workplace three times following the procedures stipulated in the aforementioned Article 25 of the Act.

(C) The employer of the workplace, where the complainant had been working since May 25, 2007 after the third transfer, notified the complainant of his intention to cease the employment after June 25, 2006 due to financial and management difficulties. The complainant visited the Job Center at Ansan City with the employer to consult his transfer of workplace, but was finally notified that due to Article 25 Section 4 of the Act and Article 30 Section 2 of the Enforcement Decree, no additional transfer was possible.

(D) Hereupon, the complainant filed this constitutional complaint on September 21, 2007, arguing that Article 25 Section 4 of the Act and Article 30 Section 2 of the Enforcement Decree which prevent foreign workers with employment permit from transferring their workplace more than three times in principle and allow only one additional transfer if there is any exceptional ground for which the foreign workers are not responsible, are unconstitutional, infringing upon his freedom to choose workplace, right to work, etc.

2. 2009Hun-Ma230

(A) Complainants are foreign workers from Indonesia, the Philippines and Vietnam. After receiving legitimate employment permits pursuant to the Act, they entered Korea on November 7, 2006, February 28, 2006 and July 5, 2007, respectively, and started to work thereafter.

(B) Article 25 Section 4 of the Act prevents foreign workers with employment permit from transferring their workplaces more than three times and the complainants transferred their workplaces three times following the procedures stipulated aforementioned Article 25 of the Act.

(C) After the complainants transferred workplaces three times, their resignations were processed on grounds of dismissal, termination of employment contract, etc., and due to Article 25 Section 4 of the Act and Article 30 Section 2 of the Enforcement Decree, they became unable to change their workplaces any more.

(D) Hereupon, the complainants filed this constitutional complaint on April 27, 2009, arguing that Article 25 Section 4 of the Act and Article 30 Section 2 of the Enforcement Decree which prevent foreign workers with employment permit from transferring their workplaces more than three times in principle and allow only one additional transfer if there is any exceptional ground for which the foreign workers are not responsible, are unconstitutional, infringing upon their freedom to choose workplace, right to work, etc.

3. 2009Hun-Ma352

(A) Complainant is a foreign worker whose nationality is Vietnamese. After receiving legitimate employment permit pursuant to the Act, the complainant entered Korea on May 25, 2008 and started to work thereafter.

(B) Article 25 Section 4 of the Act prevents foreign workers with employment permit from transferring their workplaces more than three times and the complainant transferred his workplace three times following the procedures stipulated aforementioned Article 25 of the Act.

(C) After the complainant transferred his workplace three times, his resignation was processed on the ground of termination of employment contract (dismissal for managerial reasons) and due to Article 25 Section 4 of the Act and Article 30 Section 2 of the Enforcement Decree, no additional transfer became possible.

(D) Hereupon, the complainant filed this constitutional complaint on June 30, 2009, arguing that Article 25 Section 4 of the Act and Article 30 Section 2 of the Enforcement Decree which prevent foreign workers with employment permit from transferring their workplaces more than three times in principle and allow only one additional transfer if there is any exceptional ground for which the foreign workers are not responsible, are unconstitutional, infringing upon his freedom to choose workplace, right to work, etc.

B. Subject Matters of Review

[Provisions at Issue]

Former Act on the Employment, etc. of Foreign Workers (enacted by Act No. 6962 on August 16, 2003 and before revised by Act No. 9798 on October 9, 2009)

Article 25 (Permission for Transfer to Another Business or Place of Business) (4) Any foreign worker's transfer to another business or place of business under paragraph (1) shall not, in principle, exceed

three times during the period of time prescribed in Article 18 (1): Provided, That the foregoing sentence shall not apply if there is any inevitable ground specified by Presidential Decree.

Former Enforcement Decree of the Act on the Employment, etc. of Foreign Workers (enacted by Presidential Decree No. 18314 ON March 17, 2004 and before revised by Presidential Decree No. 22114 on April 7, 2010)

Article 30 (Permission for Transfer to Another Business or Place of Business) (2) pursuant to the proviso of Article 25 Section 4 of the Act, the head of employment security office may allow additional transfer to another business or place of business only once when a foreign worker transfers due to the causes falling under Article 25 Section 2 Item 2 to Item 4 of the Act.

[Related Provision]

(Intentionally omitted)

II. Arguments of Complainants and Related Bodies

(Intentionally omitted)

III. Review on Justiciability

A. Foreigner's entitlement to basic rights

1. In an earlier decision, the Court stated that a constitutional complaint under Article 68 Section 1 of the Constitutional Court Act can only be filed by a bearer of fundamental rights, and ruled that a 'citizen' or a 'foreigner' who has a status similar to that of our citizen can be s bearer of fundamental rights (6-2 KCCR 477, 480, 93Hun -Ma120, December 29, 1994). In other words, foreigners are entitled to fundamental rights considered as 'human rights' such as human dignity and worth and the right to pursue happiness, but not rights just reserved for citizens, and therefore, foreigners can be recognized as bearers of fundamental rights considered human rights in principle (see 13-2 KCCR 714, 724, 99Hun-Ma494, November 29, 2001).

2. As such, foreigners are not unlimitedly entitled to all fundamental rights but limitedly entitled to some fundamental rights pertaining to 'human rights'. Therefore, we hereby first clarify what kinds of fundamental rights are limited by the Instant Provision and whether foreigners can be recognized as bearers of such fundamental rights in terms of the nature of the rights concerned.

B. Whether complainants are bearers of fundamental right

1. Determination of fundamental rights concerned

Complainants argue that their right to work and freedom of occupation are infringed by the Instant Provision.

As the right to work includes 'a right to have a place to work' and 'a right to have reasonable working environment,' the latter covering the rights to demand a healthy working environment, just compensation for labor, guarantee of reasonable working conditions, etc. (See 19-2 KCCR 297, 305, 2004Hun-Ma670, August 30, 2007), the Instant Provision which limits the number of transfer of workplace does not limit the aforementioned right to work.

Meanwhile, a freedom of occupational choice refers to a freedom to freely choose, engage in and change one's occupation, including the right to choose workplace where an individual can conduct its occupational activities (1 KCCR 329, 336, November 20, 1989; 14-2 KCCR 668-667).

The right to choose workplace means that anyone be offered a practical opportunity to be employed in the field of occupation of his or her choice or can freely choose or decide to continue or terminate already created labor relationships without the interference of the state(14-2 KCCR, 668, 678, 2010Hun-Ba50, November 28, 2002).

Since the Instant Provision prescribes the maximum number of transfer of workplace, thereby limiting foreign workers' freedom to

terminate already created labor relationships (leaving current jobs, in the instant case), it limits the freedom to choose workplace among the types of the freedom to choose one's occupation.

2. Whether a foreigner is entitled to the freedom to choose one's occupation

Freedom of occupation includes both the freedom to choose one's occupation, which is freedom to select an occupation or the specific field of occupation of one's choice, and the freedom to conduct the occupation one has already chosen in a way he/she wants to. Such freedoms are closely related to the right to pursue happiness guaranteed by Article 10 of the Constitution as it is the essential means for satisfying the basic demands of everyday life and to develop one's personality (9-2 KCCR 537, 543, 96Hun-Ma109, October 30, 1997; 10-2 KCCR 283, 307-308, 96Hun-Ma246, July 16, 1998).

Also, the freedom of occupation is one of the elements constituting the social market economy order, as a state's social and economic orders are created by an individual's conducting of occupation of one's choice (13-1 KCCR 1441, 1458, 2001Hun-Ma132, June 28, 2001).

Since the freedom to choose workplace at issue in this case, among the types of the freedom of occupation, is closely related to human dignity and worth and the right to pursue happiness, it should be considered as a right reserved for all human beings, not just a right reserved only for citizens. Given the nature of the right, foreigners should not be absolutely denied the freedom to choose workplace as in the case of political rights, social basic rights or the freedom to enter the territory of a state, but should be entitled to the freedom to choose workplace, even if limitedly so (See 12-2 KCCR 168, 183, 97Hun-Ka12, August 31, 2000).

Meanwhile, as the matter of recognizing foreigners as bearers of basic rights and the degree of limiting that basic right are separate problems, recognizing that foreigners are entitled to the freedom to choose workplace does not necessarily mean that they also receive the

same degree of protection in relation to the freedom to choose occupation as our citizens.

3. Whether the complainants can be recognized as the bearers of the freedom to choose workplace

The complainants in this case are foreign workers who legitimately entered Korea with employment permits pursuant to the Act and have been maintaining a regular life in our country. The complainants specifically argue that their right to freely transfer workplace, which was commenced upon legitimate employment permit pursuant to the Act, should be recognized. As long as it is presupposed that they have been conferred status as lawful workforce in our society, having legitimately entered Korea with employment permit pursuant to the Act and maintaining regular life in our country, the freedom to choose or decide to continue or terminate already created labor relationship without state's interference in the area of occupation has the character of a right conferred to all human beings which the complainants with foreign nationalities may also enjoy.

Accordingly, considering the aforementioned nature of the freedom to choose workplace, the complainants shall be recognized as being entitled to the freedom to choose workplace.

Meanwhile, the separate opinion mentioned infra criticizes that the requirements of 1) foreign workers' legitimate entry into Korea with employment permit and 2) the maintenance of regular life in our country in order to be entitled to the freedom to choose workplace for foreigners show that foreigner's freedom to choose is not recognized as a constitutional right guaranteed by the Constitution, but as a mere legal right under the Act. But, the freedom to choose workplace, among the types of the freedom of occupation, should be regarded as a fundamental right guaranteed by the Constitution which holds the nature of a right conferred to all human beings. Also, the requirement of legitimate entry with employment permit and the maintenance of regular life in our country are simply prerequisites for foreigners to enjoy the constitutional right of the freedom to choose workplace and such legal limitations do

not necessarily change the nature of the freedom to choose workplace from a constitutional right to a legal right.

IV. Review on Merits

A. Review of Employment Permit System for Foreign Workers

1. Rationale for adoption of the employment permit system

Around October 1991, when 'Guidelines for Issuing Visa to Foreign Trainees of Industrial Technology (Ministry of Justice Directive No. 255)' was enacted, foreigners started to enter Korea and provide labor. Since then, foreign laborers have entered our country in the name of trainees of industrial technology and provided simple labor, but due to their status as trainee, they were not sufficiently protected by the Labor Standard Act, thereby forcefully receiving unfair wage and treatment, and finally becoming illegal aliens after leaving their workplaces in many cases. Accordingly, many social and economic problems, such as disturbances in the labor market, shortage of labor for small and medium sized companies, infringement of foreign labors' human rights, and loss of national reputation, ensued. To deal with these problems, the 'Act on the Employment etc. of Foreign Workers,' the main content of which is the introduction of 'foreign worker employment permit system' (hereinafter, 'employment permit system'), making it possible for employers to legally hire foreign workers in simple labor and making the government directly supervise foreign workers, was legislated on August 16, 2003 and became effective on August 17, 2004.

2. Main contents

The main contents of the Act are as follows (see 21-1(A) KCCR 659, 673-675, 2006Hun-Ma1264, September 24, 2009):

First, the Act is mainly applicable to non-professional and visiting foreign workers, focusing on foreign labor force with low skills (Article 2 and Article 12 Section 1 of the Act).

Secondly, the Act requires an employer who desires to employ foreign workers to make an 'effort to recruit citizens' as a necessary condition for issuing employment permit for foreign workers (Article 6 of the Act), and the Act also makes it possible to limit the size and types of business eligible for employment of foreign workers in consideration of the demand and supply of manpower in the local labor market (Article 8 Section 2 of the Act). That is, lack of manpower in the local market should be solved by giving priority to hiring local idle manpower, including senior or female workers while complementarily utilizing foreign manpower.

Third, by preventing foreign workers from working as employees for more than three years and from working again in Korea before the lapse of six months from the date of their last departure from the country, the Act stipulates a short-term period of employment for foreign workers in order to prevent the possible disorder caused by the social costs of marriage, childbirth and child support as well as the disturbance in local labor market due to foreign worker's long term stay in Korean society (Article 18 of the Act).

Fourth, the Act recognizes foreign workers who are employed according to Act as legal 'workers,' in contrast to trainees of the past, by clearly stipulating a provision that prohibits discrimination against them (Article 22 of the Act), and requiring an employer who desires to employ foreign workers to draw up an employment contract (Article 9 Section 1 of the Act).

B. Review on the Instant Provision

1. Matters at issue

The complainants argue that the Instant Provision infringes on their right to work, freedom of occupation and the right to pursue happiness by imposing a ceiling on the number of possible transfer of workplace, thereby placing them in a situation where they are forced to work against their will, and violates the principle against blanket delegation since the proviso of the Instant Provision which delegates

the relevant specifics of exception to the three time rule to the Enforcement Decree fails to give any direction to predict the possible number and reasons of additional transfer to be determined by the Enforcement Decree.

As we have reviewed, however, imposing a ceiling on the number of possible transfer of workplace limits the complainants' freedom to choose workplace among the types of the freedom of occupation, not their right to work. And in a case where 'occupation' becomes an issue as a right to be protected and both the freedom of occupation and the right to pursue happiness are claimed to be infringed, the constitutional review on the infringement of the freedom of occupation takes priority over the review on the infringement of the right to pursue because the right to pursue is a general right and the freedom of occupation is a specific freedom (128 KCCG 589, 595, 2007Hun-Ba3, May 31, 2007; 21-2(A) KCCR 375, 379, 2007Hun- Ma1037, July 30, 2009). Therefore, we will not review as to whether the Instant Provision infringes on the right to work and the right to pursue happiness. In the following, we examine whether the Instant Provision infringes on the complainants' freedom to choose workplace, in violation of the principle against blanket delegation or the principle against excessive restriction.

2. Whether the freedom to choose workplace is infringed

(A) Standard of review

The legislators are endowed with wide discretion in providing the contents of a system for accepting foreign workers based on policy decisions considering local labor market conditions, national economic situation, national security and maintenance of order. Therefore, unless the contents of such legislation are unreasonable and irrational, the legislators' decision should be respected and foreign workers' freedom to choose workplace can be concretized only after the legislature specifically prescribes the contents of the system through enacting law based on such policy decisions. So, in this case where the legislators prescribe a statutory provision that places limitation on the possible

number of transfer of workplace, such a statutory provision cannot be declared unconstitutional unless it is excessively arbitrary without reasonable ground.

(B) Whether the freedom to choose workplace is infringed

The Instant Provision was enacted to protect local workers' employment opportunities by limiting foreign workers from imprudently transferring their workplaces and to contribute to the balanced development of national economy through effective supply and demand of human resources for small or medium sized companies. Further, the Instant Provision allows foreign workers to transfer workplaces up to three times during the three years of their stay in Korea for certain reasons stipulated in the Act and an additional transfer is possible if there is any exceptional ground specified by the Enforcement Decree. Specially, as foreign workers who find employment in Korea pursuant to the employment permit system are mostly engaged in simple labor, it is clear that they are in competition with citizens who belong to the economically vulnerable groups engaged in simple labor. In this sense, relaxing the limits on foreign workers' transfer of workplace would result in the deterioration of working conditions as well as adverse effects on local workers' employment opportunities.

Further, the Act does not place an absolute ban on foreign workers' transfer of workplace, but permits their transfer within a certain scope, by allowing them to transfer workplace up to three times during the three years of their stay in Korea if there is a certain reason falling under the cases enumerated in Article 25 Section 1 of the Act and the Instant Provision; and provides a chance for an additional transfer if there is any exceptional ground specified by the Enforcement Decree. As such, the Instant Provision, while achieving the legislative purpose to protect the employment opportunity of local workers and to alleviate labor shortage in small and medium sized businesses, sufficiently fulfils its duty to protect foreign workers by preventing forced labor that may possibly be caused by an absolute ban on their transfer of workplace as the complainants contend. Therefore, the Instant Provision does not seem clearly unreasonable beyond the extent

of discretion granted to the legislature, and does not infringe upon the complainants' freedom to choose workplace.

3. Whether the principle against blanket delegation is violated

(A) Article 75 of the Constitution, which stipulates that "the President may issue presidential decrees concerning matters delegated by statutes with the scope specifically defined and also matters necessary to enforce statutes" provides a constitutional ground for delegated legislation but clarifies that a general and all-inclusive delegation shall not be allowed as it limits matters to be legislated by a presidential decree to 'matters delegated to Act with the scope specifically defined.' The extent of detail and level of clarity required for a proper delegation depend on the nature and substance of the regulation in question, for instance, in the case of penal regulations or tax regulations which tend to directly restrict or infringe people's fundamental rights, delegations should be highly detailed and very clear and therefore the requirements and scope of such delegation should be more stringently regulated than that of legislation stipulating social benefit administration. On the other hand, when the object of regulation is extremely varied or when regulation has to be modified constantly, the required level of detail and clarity would be relatively less stringent (14-1 KCCR 579, 585, 2000Hun-Ma8, June 27, 2002).

(B) Delegation of law-making power must be limited to a matter concretely and individually defined. A uniform standard is not possible, as the scope of delegation can be different depending on the types and nature of the matters to be regulated by laws, but at least the basic contents and scope of the matter to be regulated by a presidential decree should be specified in detail in the parental statute so that anyone may predict the general outline of things to be regulated by the presidential decree. Whether it is possible to predict the content in outline should be discerned after systemically reviewing the related provisions as a whole, and should not be merely based on the delegating provision itself (12-2 KCCR 387, 394, 98Hun-Ba104, December 14, 2000).

(C) The main text of the Instant Provision stipulates that a foreign worker cannot transfer his/her workplace more than three times in principle. But according to its proviso, such a limitation shall not apply if there is any inevitable ground specified by the presidential decree, thereby delegating the details of inevitable grounds for an additional transfer to the presidential decree.

In other words, the proviso of the Instant Provision can be regarded as legislative consideration to guarantee more protection for foreign workers' fundamental rights beyond the main text, by allowing an additional transfer of workplace in an inevitable situation. In this case, it is not easy to uniformly stipulate all the conditions and grounds for additional transfer as an exception to the principle stipulated in the main text of the Instant Provision, because such conditions and grounds should be decided as a matter of policy after considering the current local market situations such as local workers' employment opportunity and demand and supply of manpower for small and medium sized companies. Therefore, we find that this delegation falls under the case where the required level of detail and clarity should be relatively less stringent as the object of regulation is extremely varied or when the regulation has to be modified constantly.

Also, considering the legislative purposes and overall intent of the Act, it can be predicted that the matters to be determined by the presidential decree are the details of inevitable grounds for an additional transfer and the possible number of the additional transfer.

Meanwhile, the definition of 'inevitable' is defined in the Korean dictionary as follows: 'unable to avoid, evade or escape against one's will.' If so, 'inevitable ground' stipulated in the proviso of the Instant Provision pertains to a case in which a foreign worker finds no other alternatives but to change workplace, or in other words, has to transfer workplace against his/her will due to circumstantial changes for which he/she is not responsible, and it is clearly anticipated that related provisions in the presidential decree will be provided within this boundary.

Accordingly, the provision of the Enforcement Decree stipulates that "pursuant to the proviso of Article 25 Section 4 of the Act, the head of employment security office may allow additional transfer to another business or place of business only once when a foreign worker transfers due to causes falling under Article 25 Section 2 Item 2 to Item 4 of the Act."

Therefore, the proviso of the Instant Provision does not violate the principle against blanket delegation.

4. Sub-conclusion

The Instant Provision neither violates the principle against blanket delegation, nor infringes on the complainants' fundamental rights.

C. Review on the Provision of the Enforcement Decree

1. Whether the principle of statutory reservation is violated

Article 75 of our Constitution provides that "the President may issue presidential decrees concerning matters delegated to him/her by statutes with the scope specifically defined," thereby establishing a basis for statutory delegation and expressly indicating the scope and limit of statutory delegation. Accordingly, the contents of delegated rule-making should be decided within the limited scope of matters to be delegated and the objectives of delegation set by the parental statute. A delegated rule-making that violates this scope and limit deviates from the scope of delegation and therefore, violates the principle of statutory reservation as it is a regulation not based on statute (see 22-1 KCCR 97, 106-107, 2007Hun-Ma910, April 29, 2010).

While the proviso of the Instant Provision, as the parental statute of the provision of the Enforcement Decree in this case, provides that "[p]rovided, that the foregoing sentence shall not apply if there is any inevitable ground specified by Presidential Decree," the provision of the Enforcement Decree allows additional transfer to another business or place of business only 'once,' as well as prescribes the specific contents of the "inevitable ground." So, there can be an issue as to

whether the part of 'allowing additional transfer ··· only once' deviates from the scope of statutory delegation.

Given the facts, however, that it is reasonable to delegate the possible number of additional transfer to the enforcement decree unless additional transfer is unlimitedly allowed; and that pursuant to the principle of presumption of constitutionality, the proviso of the Instant Provision which stipulates that "[p]rovided, that the foregoing sentence shall not apply if there is any inevitable ground specified by Presidential Decree" can be interpreted in conformity with the Constitution as "[p]rovided that ··· if there is any inevitable reason as the Presidential Decree stipulates," it is proper to consider that the Instant Provision also delegates the relevant specifics related to the possible number of additional transfer to the enforcement decree.

Therefore, as the provision of the Enforcement Decree in this case prescribes specific contents of the inevitable grounds and the number of possible transfer within the scope of delegation by the Act as the parental statute, it does not violate the principle of statutory reservation.

2. Whether the freedom to choose workplace is infringed

As reviewed above, legislators are endowed with wide discretion in providing the contents of a system for accepting foreign workers and the provision of the Enforcement Decree prescribing the contents of employment permit system can be declared unconstitutional only when it is clearly irrational or unfair without reasonable ground.

The complainants argue that the provision of the Enforcement Decree violates their freedom to choose workplace, etc., as it prescribes extremely stringent requirements for exceptionally allowing additional transfer and grants only one additional transfer.

However, given the facts that the parental statute, or the Instant Provision in this case, does not infringe on foreign workers' freedom to choose workplace as reviewed; that the provision of the Enforcement Decree was enacted to allow additional transfer in addition to the

Instant Provision which grants foreign workers to transfer workplace for three times during their three-year stay in Korea; that the "causes falling under Article 25 Section 2 Item 2 to Item 4 of the Act" stipulated in the provision of the Enforcement Decree as a condition for additional transfer of workplace can be considered as including almost all possible causes in which foreign workers transfer their workplaces for involuntary causes; and that it is necessary to consider that foreign workers need a period of cultural and linguistic adjustment and a systemic management of foreign workers is required for the maintenance of national security and order, granting just one additional transfer of workplace by the provision of the Enforcement Decree cannot be considered as excessively arbitrary without any reasonable ground. Therefore, the provision of the Enforcement Decree does not violate complainants' freedom to choose workplace.

V. Conclusion

For the above stated reasons, it is so ordered that the constitutional complaint is rejected as set forth in the holding. All justices joined this opinion, with the exception of the concurring opinion and partial dissenting opinion of Justice Mok, Young-Joon and Justice Lee, Jung-Mi (Part VI), the dissenting opinion of Justice Song Doo-Hwan with respect to the provision of the Enforcement Decree (Part VII) and the dissenting opinion (opinion of dismissal) of Justice Kim, Jong-Dae (Part VIII).

VI. Concurring Opinion and Dissenting Opinion of Justice Mok, Young-Joon and Justice Lee, Jung-Mi

A. Concurring Opinion with respect to Justiciability

Justice Lee, Kang-Kook, Justice Min, Hyeong-Ki, Justice Lee, Dong-Heb, Justice Song, Doo-Hwan and Justice Park, Han-Chul (hereinafter, 'the opinion of five Justices') decide that the constitutional complaint is justiciable as the complainants are regarded as the bearers of the freedom to choose workplace. We, however, do not agree with the opinion which recognizes that the complainants are entitled to the

freedom to choose workplace. Rather, our conclusion is that this constitutional complaint is justiciable because the complainants are entitled to the right to employment contract. Our concurring opinion is as follows:

1. Freedom of employment contract and entitlement to protection thereof

The right to pursue happiness guaranteed under Article 10 of the Constitution, when concretely expressed, includes the general freedom of action and the right to free development of personality. As the freedom of contract is derived from the general freedom of action included in the right to pursue happiness under the Constitution, it is also protected by the right to pursue happiness (10-2 KCCR 621, 633, 97Hun-Ma345, October 29, 1998).

Meanwhile, as the right to pursue happiness is a 'right possessed by all human beings' to which foreigners are also entitled (see 13-2 KCCR 714, 723-724, 99Hun-Ma494, November 29, 2001), the freedom of employment contract, which is closely related to foreigner's survival and human dignity and value, can be extended to foreign nationals, too.

The complainants' freedom to enter a new employment contract after canceling the former one is limited by the Instant Provision and the provision of the Employment Decree which prevent the complainants from transferring their workplace more than three time in principle, and allow them only one more additional transfer only when a situation falls under the inevitable grounds stipulated in the Enforcement Decree.

Consequently, with respect to the freedom of employment contract encroached by the Instant Provision and the provision of the Employment Decree, foreigners like the complainants may be regarded as the bearers of the freedom.

2. Whether the complainants are entitled to the freedom of employment contract

(A) According to the opinion of five Justices stated supra, as long as foreigners are authorized to work in our society with proper employment permit, thereby being conferred a status as legitimate workforce in our society, such foreigners, like the complainants, are entitled to the freedom to choose or decide to continue or terminate already created labor relationship without state's interference in the area of their choice, and since such a freedom to choose workplace is placed within the scope of protection guaranteed by the freedom of occupation under our Constitution, the complainants should be regarded as the bearers of the freedom to choose workplace.

(B) We pose a question, however, as to whether it is proper to acknowledge that the freedom to choose workplace, as one type of the freedom of occupation, extends to foreigners based on the so-called 'nature of right' theory (a theory that recognizes the entitlement of a right to a certain person based on the nature and character of the right in question). Of course, it cannot be denied that the freedom to choose workplace bears the characters of liberty rights, but still the issues whether to allow employment of foreign workforce, and if so, to which extent such employment is to be permitted strongly involves national policy decisions depending on the economic situation. In other words, the decision whether to employ foreigners or allow foreigners to conduct economic activities affect the local labor market and is interconnected with the national economic and immigrant policy. Therefore, problems such as how much foreign workforce should be allowed to control the supply of workforce, whether they should be allowed to work in limited or unlimited individual sections of local economy and further, how far their right to choose workplace should be recognized, should be decided as a national policy decision based on the society's economic situation and cultural uniqueness. In this regard, the freedom to choose workplace under the Constitution should be regarded as a freedom to which the citizens are exclusively entitled, rather than a "freedom of human beings", and therefore, we believe that the complainants as foreign nationals are not entitled to

the freedom to choose workplace (97Hun-Ka12 decided on August 31, 2000, quoted in the Opinion of five Justice to support their argument that 'foreigners are entitled to the freedom to choose workplace although limitedly', actually did not recognize foreigners as the bearer of the freedom to choose workplace in a limited scope, but simply exemplified the discrimination based on nationality by stating that 'foreigners, in principle, are not entitled to enjoy the nine fundamental rights including the freedom to choose workplace, or only allowed in a limited scope.').

(C) Moreover, the opinion of five Justices, which asserts that foreign workers who have been given legitimate work permit should be regarded as being entitled to the freedom to choose workplace within a limited scope, connotes logical inconsistency. The entitlement to fundamental rights means a status with which a person is entitled to enjoy fundamental rights under our Constitution and which is not newly created by laws. As such, the argument that a person is entitled to fundamental rights under our Constitution simply because he/she has legitimately acquired legal permission to work under our law, which is not a constitutional factor, seems to illogically put the cart before the horse. If the freedom to choose workplace is recognized only for those who legally entered our country pursuant to the Act, as the majority opinion states, it would be treating foreigner's freedom to choose workplace as a statutory right, not a human right, which is insufficient reason to recognize that foreigners such as the complainants are entitled to the freedom to choose workplace.

(D) According to the opinion of Five Justices, the freedom to choose workplace, among the various types of occupational freedoms, should be regarded as a right reserved for all human beings, not merely a right reserved only for citizens because it is closely related to human dignity and value and the right to pursue happiness. But, as the opinion states, all types of occupational freedoms in essence, as a means of satisfying the basic needs of human beings, are closely related to human dignity and value and the right to pursue happiness. Acknowledging foreigners' entitlement to the freedom to choose workplace in separation of other types of occupational freedoms,

therefore, could leave legal matters pertaining to the entitlement of fundamental rights in extreme ambiguity.

3. Sub-conclusion

As the complainants are entitled to enjoy the freedom of employment contract derived from Article 10 of the Constitution, the constitutional complaint filed by the complainants is justiciable.

B. Separate Opinion on the Instant Provision

1. Whether the principle against excessive restriction is violated

The freedom of employment contract derived from Article 10 of the Constitution is recognized not only for nationals but also for foreigners, and therefore, restriction on such freedom should conform to the principle against excessive restriction.

As the Instant Provision was enacted to protect local workers' employment opportunities through indirectly restricting foreign workers' workplace transfer and to facilitate sufficient supply of human resources for small or medium sized companies through effectively controlling employment of foreign workers, its legislative purpose is legitimate and the means to achieve the purpose is appropriate.

In addition, as the Instant Provision does not absolutely prohibit foreign worker's workplace transfer, but allows them to transfer workplace up to three times during the three years of their stay in Korea for certain reasons stipulated in the Act and as an additional transfer is possible if there is any exceptional ground specified by the Enforcement Decree, it observes the principle of least restrictive means and maintains the balance between legal interests in light of the aforementioned legislative purposes.

Therefore, the Instant Provision does not infringe on the complainants' freedom to choose workplace in violation of the principle against excessive restriction.

2. Whether the Instant Provision violates the principle against blanket delegation

As we agree with the opinion of five Justices in that the Instant Provision does not violate the principle against blanket delegation, no further elucidation is necessary.

C. Opinion of unconstitutionality on the provision of the Enforcement Decree

1. Whether the principle of statutory reservation is violated

(A) Delegated legislation and statutory reservation

Article 75 of the Constitution, which stipulates that "the President may issue presidential decrees concerning matters delegated to him/her by statutes with the scope specifically defined and also matters necessary to enforce statutes" provides a constitutional ground for delegated legislation initiated by the President and also provides the scope and limitation of such delegated legislation by limiting matters to be legislated by a presidential decree to 'matters delegated to him/her by Act with the scope specifically defined.' Accordingly, a delegated order should be decided within the limited scope of matters authorized by delegation and the objectives set by the parental statute, and a delegated order that violates this scope and limits is regarded illegal, from which we may draw the limit of a delegated order by the conditions set down in the parental statute. Hence, if a delegated order deals with matters not stipulated in the parental statute, it deviates from the scope of delegation (see 9-1 KCCR 487, 494-495, April 24, 1997) and in violation of the principle of statutory reservation as it is a regulation not based on statute (22-1 KCCR 97, 106-107, 2007Hun-Ma910. April 29, 2010).

(B) Review on the provision of the Enforcement Decree

The Instant Provision places limitation on the number of workplace transfer by a foreign worker up to three times in principle, but

according to its proviso, such a limitation shall not apply if there is any inevitable ground specified by presidential decree, thereby delegating the details of inevitable grounds for an additional transfer to presidential decree.

Meanwhile, the provision of the Enforcement Decree, stipulating that pursuant to the proviso of Article 25 Section 4 of the Act, the head of employment security office may allow 'additional transfer to another business or place of business not more than once' when a foreign worker transfers due to the causes falling under Article 25 Section 2 Item 2 to Item 4 of the Act, not only prescribes the details of 'inevitable reason' delegated by the Act but also limits the number of additional transfer to 'once' even when a case falls into one of the inevitable reasons specified in the Enforcement Decree.

As such, the provision of the Enforcement Decree stipulates matters not delegated by the Instant Provision or the parental statute, thereby limiting the complainants' freedom of employment contract without any statutory ground beyond the scope of delegation, and therefore violates the principle of statutory reservation.

2. Whether the principle against excessive restriction is violated

As the Instant Provision was enacted to protect local workers' employment opportunities by limiting foreign workers from imprudently transferring their workplace and to contribute to the balanced development of national economy by sufficient supply of human resources for small or medium sized companies through effective employment management for foreign workers, thereby its legislative purpose is legitimate.

Also, limitation on the number of transfer of workplace by foreign workers stipulated by the provision of the Enforcement Decree is an appropriate means to achieve the legislative purposes to protect local workers' employment opportunities and to solve manpower shortage for small or medium sized companies.

But as the provision of the Enforcement Decree includes transfers

for which foreign workers are not responsible in the count of possible workplace transfers, such as unavoidable transfer due to the financial problem of the workplace and allows only one transfer in any case without exception, it fails to observe the principle of least restrictive means. That is, although it is possible to exclude from the number of transfers those caused by reasons for which the foreign workers cannot be held accountable, such as a financial problem of the workplace or intentional closure of business by employer, or to make flexible the number of additional transfers so that the complainants' freedom of contract can be less restricted, the provision of the Enforcement Decree allows only one additional transfer regardless of the reasons. Therefore, the provision of Enforcement Decree fails to satisfy the least restrictive means test.

Further, while the private interest of foreign workers with legitimate employment permit to work stably during the permitted period to acquire material basis for human survival and to support their family members living in their homelands is not small, the public interests to protect local workers' employment opportunities and to stabilize local labor market do not seem to be sufficiently achieved by the provision of the Enforcement Decree that allows transfer of workplace up to four times. Therefore, the provision of the Enforcement Decree fails to strike the balance between the limited private interests and the protected public interests.

3. Sub-conclusion

For the foregoing reasons, the provision of the Enforcement Decree infringes upon the complainants' freedom of contract, in violation of the principle of statutory reservation and the principle against excessive restriction.

VII. Dissenting Opinion by Justice Song, Doo-Hwan on the Provision of the Enforcement Decree (opinion of unconstitutionality)

A. I share the same conclusion with the opinion of unconstitutionality stated in VI(C) supra that the provision of the Enforcement Decree

violates the principle of statutory reservation and the principle against excessive restriction.

But, as I disagree with the argument that 'foreigners are not entitled to the freedom to choose workplace,' I hereby clarify the reason.

B. In regard to the issue as to whether foreigners are entitled to fundamental rights under the Constitution, even by the so-called 'nature of right' theory, it is acceptable that the freedom to choose occupation or the freedom to choose workplace cannot be recognized for all foreigners in general. Nevertheless, I cannot agree with the opinion that whatsoever foreigners are not entitled to the freedom to choose occupation or the freedom to choose workplace.

Even a foreigner without Korean nationality, if he/she has lawfully obtained work permit through procedures provided by the state, legitimately entered and has been maintaining regular life in our country, he/she is not merely a foreigner but can be regarded as a rightful subject of personality and livelihood living in Korea. Therefore, for at least during the period of his/her legitimate stay in Korea, he/she should be guaranteed to enjoy the freedom to choose means to make a living and maintain regular life with the guarantee of human dignity and value.

The complainants in this case, legitimately entered Korea with employment permit issued pursuant to the procedures decided by the state from 2005 to 2008, respectively, and have been maintaining a regular life and making a living through working for more than one year or three years at which point they filed this constitutional complaint. In this case (when they leave this country upon expiration of authorized stay set aside), they should be guaranteed to enjoy the freedom to choose workplace as a basis on which their living and relationship in life can be properly maintained at least during their stay in Korea without being compelled to choose between forced labor and forced departure.

Meanwhile, regarding the fundamental rights at issue in this case, I

don't think we have to choose either 'the freedom to choose workplace' or 'the freedom to cancel a former employment contract and to form a new one.'

C. Regarding this issue, there is an argument that a foreigner cannot be entitled to any fundamental rights guaranteed under the Constitution. Although such an argument seems reasonable and simple and clear in its application, I can hardly agree with this because it is questionable whether constitutional rights should be considered as being created solely by the Constitution without other sources or origins. And such an argument seems to give too much weight on the language and text of the Constitution itself.

D. In conclusion, the provision of the Enforcement Decree infringes upon the complainants' freedom to choose workplace, in violation of the principle of statutory reservation and the rule against excessive restriction.

VIII. Dissenting Opinion by Justice Kim, Jong-Dae (Opinion of Dismissal)

I disagree with the majority opinion that acknowledges the entitlement to fundamental rights of the complainants, who are foreigners.

But, as there is a separate opinion that criticizes the logic of the majority opinion, denying foreigners the freedom to choose workplace, I share the opinion specifically on that part because I think foreigners should not be entitled to all fundamental rights under our Constitution. Therefore, I hereby unfold my opinion as follows.

A. Critique on the general view on foreigner's entitlement to fundamental rights

1. The currently accepted common view of the academia, the precedents of our Court and the majority opinion of in the instant case all divide fundamental rights into two types: 'a right reserved for human beings' and 'a right reserved for citizens.' And according to this

division, as far as a right is considered to be awarded to all human beings concerned, not only citizens but also foreigners are entitled to the right. But I think this view is unjustified for the following reasons.

First, based on the language of our Constitution, foreigners cannot be the bearers of fundamental rights under the Constitution.

The issue whether a person should be considered a bearer of fundamental rights is a matter of interpretation of the Constitution, deciding who is entitled to enjoy the fundamental rights 'guaranteed by the Constitution.' Therefore, in order to solve the matter, first and foremost, we need to take a look at the language of the Constitution itself, reviewing to whom the Articles of the Constitution stipulating fundamental rights expressly reserve such rights. Next, the real intention of our constituent power (the people) as manifested in the history of the framing of the Constitution should be examined.

First of all, the Constitution, based on its text and language pertaining to the entitlement of fundamental rights, neither recognizes a foreigner or a stateless person to be entitled to fundamental rights nor conceptually divides 'human beings' and 'citizens' in deciding who bears a certain type of fundamental right. Regarding both the 'rights reserved for all human beings' claimed by the general view of the academia and the precedents of our Court including the dignity and value as human being (Article 10) and the right to equality (Article 11 Section 1), and the 'rights exclusively reserved for citizens' such as the right to election (Article 24) or the right to hold public office (Article 25), the Constitution clearly and expressly limits the bearers of such rights to 'all citizens'.

Next, in light of the history of the framing of the Constitution, after debating over the choice of a term referring to the bearer of fundamental rights between 'people' and 'citizens,' the constituent power finally resolved to use the term 'citizen.' At the time, the need for protection of the status of foreigners who were not included in the definition of citizen was also contemplated, but the framers decided not to extend the subject of all fundamental rights to noncitizens.

Instead, the need for guarantee of the status of foreigners was reflected in Article 7 of the First Constitution (Article 6 Section 2 of the current Constitution), which provided that "the status of aliens shall be guaranteed as prescribed by international law and treaties" on the premise that the effects of treaties and the generally recognized rules of international law are subordinate to the Constitution (first sentence of Article 9 of the First Constitution and Article 6 Section 1 of the current Constitution).

Considering the historical background of the framing of the Constitution regarding the adoption of Article 7 on the protection of foreigner's rights as well as faithfully interpreting the text of the Constitution, I think the will of our constituent power was that foreign nationals were intentionally excluded from the bearers of fundamental rights under the Constitution, and that it was sufficient to protect their status through international treaties and conventions subordinate to the Constitution.

Second, in terms of the profound relations among state, constitution and fundamental rights, only those who have Korean nationality can be entitled to fundamental rights under the Constitution.

Basically, it is clear that without a state, there is no constitution. And without a constitution, there are no fundamental rights one can argue against the state. Therefore, even 'a human right or a right reserved for human beings' can be protected as a fundamental right under the Constitution only when such right is 'adopted' by the Constitution.

The existence of our country, the Republic of Korea, is a prerequisite condition for our Constitution and therefore, it is inevitable that even 'a human right or a right reserved for human beings' is tailored to embrace the particular historical experiences of our country and its contemporary situation in being incorporated by our Constitution. Although 'a human right or a right reserved for human beings' existed even before the Constitution, thereby being designated as a innate and natural right, only after being embraced by our Constitution can it

finally have normative effect as a subjective public right that binds our government. Therefore, according to our Constitution, only Korean citizens, who are the components of our political community can be the subjects entitled to fundamental rights.

Third, it is a basic tenet of the Constitution of people's sovereignty that a citizen's fundamental right and his/her duties under the Constitution are two phases of the same thing, and therefore, the bearer of fundamental rights should be identical to that of fundamental duties.

Corresponding to this tenet, the Constitution designates 'citizens' as the subjects of both fundamental rights and duties (Article 38 and Article 39 Section 1). Therefore, to recognize a right reserved for all human beings or supra-constitutional right rising above citizen's rights, while not distinguishing the notion of 'duty of human beings' that rises above 'citizen's duty,' could result in a dangerous construction of the Constitution which threats the foundation of our Constitution based on the two equal axes of fundamental rights and duties.

Fourth, it is the basic principle of our Constitution that a foreigner's status should be protected on the basis of reciprocity.

Article 6 Section 2 of the Constitution stipulates that "the status of aliens shall be guaranteed as prescribed by international law and treaties." This provision is the constitutional basis on which our legal order accepts the general principle under international law regarding foreigner's status. And as reciprocity in the protection of a foreigner is a well established practice in the international legal arena, our Constitution, through this provision, determines its respect for the principle of reciprocity.

Accordingly, we may recognize a foreign national as a subject of fundamental rights under our Constitution only when that specific country, of which the foreigner arguing for his/her entitlement to fundamental rights is a national, acknowledges our citizens' entitlement to fundamental rights under its Constitution. The majority opinion, however, extends entitlement to fundamental rights depending on the nature of the rights, regardless of the complainants' nationalities or

how the constitutions of the complainants' countries treat our citizens, which is in contradiction with our Constitution which embraces the principle of reciprocity. Our Constitution is the Constitution of the Republic of Korea, not an international constitution. Too much globalization in terms of constitutional values, disregarding the historical background of our Constitution, is not a proper way to uphold our Constitution.

The core of the general view which criticizes the opinion denying foreigners the same protection of fundamental rights as citizens is that "such denial runs counter to the trend of the contemporary times where the world has been reduced to a global village within a day's reach from one another and the protection of fundamental rights is becoming more and more globalized." But such anticipation of a global village cannot justify interpreting the Constitution against the express language of the Constitution. Once it is realized, the constituent power will make a new political resolution to guarantee foreigners protection of individual fundamental rights. But the current situation is one where it is an international practice for each nation to have different standards for recognizing foreigners' status upon the principle of reciprocity, and I am worried that if we unilaterally takes a too progressive a view forejudging the future, it may possibly bring about an uncontrollable situation for us in the near future.

Fifth, from the perspective of handling constitutional complaints in practice, the majority opinion is unreasonable. According to the majority opinion, upon examining the complainant's argument, if he/she asserts a right reserved for human beings, the Court should review the constitutional complaint on its merit as the complainant is entitled to such right, whereas if he/she asserts a right reserved for citizens, the complaint should be dismissed before being reviewed on its merit. But such a line-drawing of fundamental rights between rights endowed to human beings and those endowed to citizens is unclear and unobjective, and moreover, if we divide one fundamental right, based on its contents, into two parts, namely a right reserved for human beings and one reserved for citizens, the standard for such a division or line-drawing becomes more ambiguous. Especially the opinion

of five Justices, among the majority opinion, argues that as this constitutional complaint pertains to the freedom to choose workplace among the types of the freedom of occupational choice which is closely related to the right to pursue happiness guaranteed under Article 10 of the Constitution, the complainants who are foreign nationals should be entitled to the fundamental right. But I can hardly presuppose what kind of fundamental rights guaranteed by the Constitution could be ruled out as not being related to the right to pursue happiness. Also, since the issue of entitlement to fundamental rights pertains to the general and abstract qualification to be a bearer of fundamental right, if a decision as to whether a complainant is entitled to a fundamental right can only be rendered after first reviewing the nature of the fundamental right at issue, it would be inappropriately putting the cart before the horse.

The statement by the opinion of five Justice that the complainants are entitled to the freedom to choose workplace simply because they legally entered our country with the employment permit legitimately issued pursuant to the Act does not correspond with the general and abstract nature of the entitlement to fundamental rights discussed above.

Sixth, the decision not to allow a foreigner to be subject to fundamental rights does not necessarily mean that foreign nationals are totally excluded from the realm of constitutional protection. Instead, it simply means that a foreigner may not file a constitutional complaint on the ground of the infringement of fundamental rights based on our Constitution. The status of foreign nationals can sufficiently and adequately be protected through international laws or treaties which have the same effect as domestic laws. Through the International Covenant on Economic, Social and Cultural Rights (Covenant No. 1006) and the International Covenant of Civil and Political Rights (Covenant No, 1007) adopted by our Constitution, foreigners may enjoy rights which in substance are almost the same as rights our Constitution guarantees our citizens without discrimination. Even so, however, foreigners should not be considered as the bearers of fundamental rights guaranteed by the Constitution, but simply considered to have

the same rights under laws and treaties, subordinate to the Constitution, as our citizens. Therefore, when their rights are allegedly infringed, foreigners who are the subject of legal rights can ask the ordinary courts for remedy and while pending the case, they may ask the Constitutional Court to review the constitutionality of the statutory provision that stipulates foreigners status that contradicts the constitutional order for the protection of foreigners, through filing a motion to request for a constitutional review of the relevant provision in question pursuant to Article 41 of the Constitutional Court Act or filing a constitutional complaint pursuant to Article 68 Section 2 of the Constitutional Court Act. In the instant case, the complainants should have filed a motion to request for a constitutional review of the relevant provisions at issue while filing a suit for the confirmation of nullity of the discharge in the ordinary court.

2. As reviewed above, foreigners, in principle, cannot be entitled to fundamental rights guaranteed by the Constitution of the Republic of Korea. But, I also think it possible that if a foreigner without Korean nationality under the Nationality Act has been living in our country for a considerable amount of time maintaining a regular life the same as a Korean national (for instance, if qualified to be naturalized as a Korean citizen), he/she can be practically treated as a citizen so that his/her entitlement to fundamental rights under our Constitution can exceptionally be recognized. However, this is an exception, and therefore, the requirements for being qualified as the exception, such as the length of stay in our society and livelihood, should be carefully elaborated by decisions of the Constitutional Court.

B. Constitutional complaint pursuant to Article 68 Section 1 of the Constitutional Court Act and entitlement to fundamental rights

A constitutional complaint filed pursuant to Article 68 Section 1 of the Constitutional Court Act is a system with the feature of subjective litigation by which a citizen, when his/her fundamental right is infringed by exercise or non-exercise of governmental power, may file a constitutional complaint directly to the Constitutional Court asking for remedies, and the aggrieved party seeking a constitutional review

under Article 68 Section 1 of the Constitutional Court Act should be the one whose own fundamental rights are directly and presently infringed by exercise or non-exercise of governmental power (see 7-1 KCCR 416, 421, 93Hun-Ma12, March 23, 1995, etc.). This means that only those who are entitled to the fundamental rights recognized by the Constitution are eligible to file a constitutional complaint (see 6-2 KCCR 477, 480, 93Hun-Ma120, December 29, 1994, etc.). Accordingly, the question as to whether a foreign national is entitled to a fundamental right is equal to the question as to whether a foreign national is eligible to directly file a constitutional complaint pursuant to Article 68 Section 1 of the Constitutional Court Act. In my opinion, given that the direct purpose of constitutional adjudication is to provide a remedy for an infringement of fundamental rights (which is different from the filing of suit to the ordinary court to seek legal remedy), foreigners who cannot be entitled to fundamental rights under the Constitution are not eligible to file a constitutional complain pursuant to Article 68 Section 1 of the Constitutional Court Act.

C. Conclusion

Considering the structure of Articles that stipulate the fundamental rights under our Constitution, the history of the framing of our Constitution, the substance and function of human rights and the incorporation of human rights by our Constitution, the methods with which our Constitution protect foreign nationals, I believe that foreigners are not entitled to the fundamental rights under the Constitution. Therefore, the complainants in this case are not eligible to file a constitutional complaint pursuant to Article 68 Section 1 of the Constitutional Court Act which is a remedy for an infringement of fundamental rights guaranteed by the Constitution. Thus, this constitutional complaint should be dismissed as non-justiciable.

By Justice Lee, Kang-Kook (Presiding Justice), Kim, Jong-Dae, Min, Hyeong-Ki, Lee, Dong-Heub, Mok, Young-Joon, Song, Doo-Hwan, Park, Han-Chul, Lee, Jung-Mi

II. Summaries of Opinions

1. Case on Prohibition of Filing a Complaint against Lineal Ascendants

[23-1(A) KCCR 12, 2008Hun-Ba56, February 24, 2011]

In this case, the Constitutional Court examined whether Article 224 of the Criminal Procedure Act, which does not allow a person to file a complaint against his/her lineal ascendant(s), violates the principle of equality. While five-majority Justices joined in an opinion stating that such Article is unconstitutional in violation of equality, the Court held the Article constitutional as it lacked a vote of six or more Justices required for the ruling of unconstitutionality.

Background of the Case

The complainant filed a complaint against his mother alleging false accusation and malicious perjury, but such complaint was dismissed pursuant to Article 224 of the Criminal Procedure Act. The complainant appealed against the prosecutor's non-charge decision based on the Prosecutors' Office Act, after which he filed a petition for adjudication by the court. While the suit was pending, the complainant moved the court to file a request for constitutional review of Article 224 of the Criminal Procedure Act. Upon dismissal, the complainant filed this case with the Constitutional Court on June 12, 2008.

The question presented for the Court's review is whether Article 224 of the Criminal Procedure Act (enacted by Act No. 341 on September 23, 1954; hereinafter, the "Instant Provision") infringes upon the fundamental rights of the complainant. The provision subject to review is as follows.

Provision at Issue

The Criminal Procedure Act (enacted by Act No. 341 on September 23, 1954)

Article 224 (Limitation of Complaint) A complaint shall not be lodged against a lineal ascendant of the principal himself or of his spouse

Summary of Decision

1. Court Opinion

The main dispute at issue in this case is whether the Instant Provision, which prohibits a person who has a special relationship called "Bi-Sok," i.e. descendant with the would-be accused, from exercising the right to file complaints, violates the right to equality guaranteed by Article 11 Section l of the Constitution. Such prohibition, regardless of whether the crime is an offense subject to a complaint, does not appear to severely restrict the victim's right to be heard in criminal proceeding for the following reasons: Prosecution of a crime which is not subject to a complaint can be commenced without any complaint from the victim; Even for crimes requiring victim's complaint, certain special laws, including 'the Prevention of Sexual Assault and Protection of Victims Act' and 'the Special Act on Punishment of Sex Crimes,' allow a person to press charges against his/her lineal ascendant(s). Therefore, the Instant Provision prohibiting an alleged victim from filing a charge against his/her lineal ascendant can be applied to only a small number of crimes such as 'Violation of Private Secrecy' (the Article 316 of Criminal Act) or 'Occupational 'Disclosure of Client or Patient' (the Article 317 of Criminal Act,). Thus, the Court will examine this case under the principle against arbitrariness, in determining whether the principle of equality is violated.

As a general rule, a victim's right to make complaints against an alleged criminal offender is only a legal right guaranteed in the

criminal procedure, and over which the legislature should exercise extensive policy-making power considering the nation's traditional judicial culture, morality and cultural traditions as well as the purpose pursued. With regard to family matters, traditional morality plays a more important role than law, and such traditional morality is inherently affected by the nation's distinct cultural and moral traditions, which have been chosen and accumulated by the people of the nation and society, as well as universal values and ethics. Parts of the Confucian tradition, which our country adopted and made part of our tradition over a long period of time, still remain as an innate part of our morality. In this respect, the Instant Provision appears to be reasonable in its differential treatment in restraining a descendant of the would-be accused, from exercising the right to file complaints when that prohibition is for the purpose of deterring the unethical nature of such complaint and maintaining our tradition of 'Hyo,' the filial duty of children to take care of their parents. Therefore, the Instance Provision does not violate the principle of equality set by Article 11 Section 1 of the Constitution.

2. Dissenting Opinion of Five Justices

Among crimes requiring victim's complaint for initiation of prosecution, the number of crimes subject to the Instance Provision has dramatically decreased as special statutes have been enacted. Nevertheless, a complete deprivation of the victim's right to press charges, regardless of the type and the scope of the offense at issue, shall be deemed to be a severe restriction on the victim's right to be heard in judicial process. Likewise, in cases of crimes not subject to complaint, the fact that a filing of a complaint for the victim is left to others itself leads to such a great constraint on the victim's right to be heard, that the Court should review this case applying the strict scrutiny standard.

The Instant Provision aims to maintain the basic order in the family system founded upon the Confucian tradition and this legislative goal is legitimate. However, its way of restricting the basic right, depriving certain victims of their right to file charges in criminal proceedings,

appears to be problematic in its proportionality between the purpose and the extent of such differential treatment. While an ascendant-descendant relationship can be a factor to be considered in determining the gravity of a crime in terms of the nature of the crime and the responsibility of the perpetrator, it shall not be a reason to deny the State's exercise of its power to punish criminals. We cannot see a reasonable balance between the aim and means in having such differential treatment among victims of criminal offences, especially when the government renounces its power to criminally punish ascendants who do not deserve protection of the law, while neglecting its duty to protect descendants as criminal victims. Moreover, the deprivation of the victim's right to file charges cannot be regarded to be the only and absolutely necessary measure to be taken in maintaining the basic order of the family system.

Hence, the instant provision does not provide a proportionate means to achieve the objective of the differential treatment, in violation of the principle of equality.

2. Case on Imposing Obligation on Online Service Providers to Disable Unauthorized Transmitting of Original Works

[23-1(A) KCCR 53, 2009Hun-Ba13·52·110(consolidated), February 24, 2011]

The Constitutional Court unanimously held Article 104(1) of the Copyright Act (hereinafter, the "Instant Provision I") and Article 142(1) and (2) of the Copyright Act(hereinafter, the "Instant Provision II") constitutional and also, in a 7-2 decision, held Article 104(2) of the Copyright Act (hereinafter, the "Instant Provision III") constitutional. The Instant Provision I sets forth a provision imposing an obligation on online service providers of special type (hereinafter, "OSP of special type") to take necessary measures including technical measures disabling unlawful transmission of original works upon the right holder's request. An OSP who violates the obligation under Instant Provision I is to be punishable by a fine under Instance Provision II. Pursuant to Instant Provision III, the Minister of Culture, Sports and Tourism may decide and announce a notification defining OSPs of special type which should be subject to such obligation. The Court found that these provisions neither violated the rule against blanket statutory delegation nor infringed on freedom in job performance in violation of the rule against excessive restriction.

Background of the Case

Administrative penalty of fines were imposed on petitioners for not taking any necessary measures including technical ones to disable unauthorized transmission of original works. Complainants, as OSPs, who operate Internet websites using "peer to peer" or "P2P" file sharing computer programs to provide audio and video file-downloading service, were deemed to be OSPs of special type recognized under Article 104 of the Copyright Act. Complainants filed a notice of appeal with the court and, during the proceeding, moved the court to file a request to the Constitutional Court for constitutional review on statutes of Instant Provisions I, II and III. Upon dismissal, the complainants filed this constitutional complaint.

Provisions at Issue

The Copyright Act (amended by Act No. 8101 on December 28, 2006 but prior to amendment by Act No. 9625 on April 22, 2009)

Article 104 (Responsibility of Online Service Providers of Special Type)

1. Online service providers whose main purpose is to enable people to transmit original works among them by using computers (hereinafter "online service providers of special type") shall take necessary measures such as technological measures to disable illegal interactive transmission of original works upon request of the right holders. In such cases, matters related to the request of rights holders and necessary measures shall be set forth by Presidential Decree.

Article 142 (Fine for Negligence)

1. A person who has failed to take necessary measures pursuant to Article 104(1) shall be punished by a fine for negligence not exceeding 30 million won. A person who failed to carry out obligations under Article 106 or to perform the order of the Minister of Culture, Sports and Tourism under Article 133(4) shall be punished by a fine for negligence not exceeding 10 million won.

2. A fine for negligence pursuant to paragraph 1 shall be imposed and collected by the Minister of Culture, Sports and Tourism as prescribed by Presidential Decree.

The Copyright Act (amended by Act No. 8852 on February 29, 2008)

Article 104 (Responsibility of Online Service Providers of Special Type)

2. The Minister of Culture, Sports and Tourism may decide and announce the extent of online service provider of special type pursuant to the provisions of paragraph 1.

Summary of Decision

The Constitutional Court unanimously held Instant Provision I and Instant Provision II constitutional and also, in a 7-2 decision, held Instant Provision III constitutional. The Court reasoned as follows:

1. Court Opinion

(1) Due to the subject nature regulated by the laws in this case, a concrete and descriptive wording of the statute defining "OSPs of special type" which take certain responsibility for disabling unauthorized transmission of original works is inevitably difficult, and a professional and empirical analysis is required in legislation. We, therefore, recognize that it is necessary to delegate to the Ministry of Culture, Sports and Tourism the power of announcing notifications defining OSPs of special type. In addition, the part of the "right holder's request" to a OSP of special type and the part of "necessary measures" including technical measures that disable unlawful transmission of original works also respectively need to be regulated flexibly by legislative delegation to lower-level rules considering the nature of the original work itself, the features of online copyright infringement in reality and the phase of technology development. Instant Provisions I and III do not violate the principle of rule against blanket statutory delegation in that the contents of the text to be promulgated in the notification made by the Minister of Culture, Sports and Tourism and President Ordinance as to the scope of OSPs of special type, right holder's request, and necessary measures are sufficiently foreseeable when we examine the purpose of legislation of the Copyright Act, policies in enactment of the Instant Provisions, and related regulations.

(2) Through disabling unauthorized transmission of original works, the instant provisions aim to protect copyrights and to improve culture and develop related industries. The provisions amount to be proper means to achieve those goals pursued. Furthermore, there can be no alternative means to achieve the same legislative goals while less intrusive than the instant provisions, thus not violating the rule of the least restrictive means due to reasons as follows: Instant Provisions I and III require certain OSPs to take measures disabling unauthorized transmission of original works only upon the right holders' request; technologically impracticable measures are not required to be taken; and online copyright infringements have been prevalent so far. Provisions at issue, also, properly balance interests involved in that, while imposing limited responsibility to take technical measures on

designated OSPs cannot be deemed a significant interference on the freedom of occupation, public interest in preventing harmful consequences of unlawful transmission of original works for the sake of improving and developing culture and related industries is grave. Therefore, Instant Provisions I, II and III do not infringe upon the complainants' freedom of occupation.

(3) Treating OSPs of special type differently from the other OSPs on the ground that services provided by the former is, in its nature, more likely to be used for unauthorized transmission than services provided by the latter, appears to have reasonable justifications not to constitute an unlawful discrimination.

(4) By not allowing OSPs of special type, which acknowledge that unlawful transmission can be easily generated due to the nature of their services, to facilitate unlawful transmission, Instant Provisions I, II and III articulate and specify the principle that a person should take accountability for his/her own behavior and are not incompatible with that principle.

2. Dissenting Opinion (Concerning Unconstitutionality of Instant Provision III)

Article 104(2) of the Copyright Act allows the Minister of Culture, Sports and Tourism to make regulations with respect to the person who takes responsibility prescribed in Article 104(1). But our Constitution has specific provisions regarding "Bupkyu-Myoungryoung" (hereinafter, "rules and regulations"), which are issued by particular administrative authorities such as the President but have statutory effects regulating people's rights and duties. The provisions stipulate specific types of rules and regulations; particular administrative authorities that have the power to issue them; permissible scope of delegation of that function; and conditions of delegation, etc. Therefore, not only any rules and regulations impermissible under the Constitution cannot be enacted by the legislature, but also matters to be regulated by rules and regulations cannot be delegated to administrative regulations or rules which have no such statutory effect. Thus we conclude that Article

104(2) violates the Constitution in that it directly delegates the power to issue rules regulating peoples' duties to the Minister of Culture, Sports and Tourism in the form of public notice, rather than by rules and regulations as enumerated in the Constitution.

3. Article 47 of the Former Military Criminal Act Case

[23-1(A) KCCR 200, 2009Hun-Ka12, March 31, 2011]

The Constitutional Court held that Article 47 of the former Military Criminal Act (hereinafter, the "Instant Provision") which prescribes criminal punishment for a person who holds a duty to observe a legitimate order or rule but violates or disobeys the order, is not against the Constitution

Background of the Case

Movant at the requesting court was charged with crimes of forgery and use of official documents, violation of an order and desertion from military service (2009Ko17). The indictment on the charge of violating an order states that the defendant (movant in this case), as the assistant commanding officer of a costal unit, had a duty to closely watch and monitor the sand beach and iron fence on the shoreline under the order of the commanding general of the 8th army corps, issued in the form of guidelines, on the duty of guards. However, the movant failed to perform that duty, thereby violating a legitimate order on the duty of patrol, from 03:40 to 05:50 on June 25, 2009 stating reasons of having other chores. Thereafter and until July 5, 2009, the movant violated the legitimate order to patrol nine times including leaving his military unit during his patrol time without permission (hereafter, AWOL). The Military Tribunal of the 22d Division, on its own motion, requested this constitutional review of the Instant Provision on September 18, 2009.

Provision at Issue

The former Military Criminal Code (revised by Act No. 1003 on January 20, 1962, but before revised by Act No. 9820 on November 2, 2009)

Article 47 (Violation of Order) A person who holds a duty to observe a legitimate order or rule but violates or fails to observe the

order or rule shall be punished by imprisonment with or without prison labor for not more than two years.

Summary of Decision

In a vote of 4 (constitutional) to 4 (unconstitutional), the Constitutional Court held that the Instant Provision is compatible with the Constitution.

1. Court Opinion

Even though the Instant Provision employs a somewhat broad and abstract phrase, 'legitimate order or rule' that necessitates supplementary interpretation by judges, the Instant Provision is not against the rule of clarity in the principle of *nulla poena sine lege* because this Court finds that the person subject to the provision at issue can reasonably understand the meaning of that provision, and also because it is unlikely that a law enforcement agency make an arbitrarily broad interpretation of the Instance Provision since a concrete and comprehensive standard of construction on the Instant Provision has been provided by case laws including Supreme Court's decisions.

In addition, we do not regard that the Instant Provision, which imposes a duty to obey legitimate orders and prescribes concrete types and scope of criminal penalties for the violation of that duty, goes beyond the limit of delegated rule-making authority, considering the fact that delegation is necessary to provide for details of the order and that uniqueness of the military requires obedience to orders be maintained.

2. Dissenting Opinion of Four Justices

In this case, we find that the Instant Provision is against the principle of punishment by statute, the legal principle of *nulla poena sine lege*, because, the core elements of the crime, including the person authorized to make the 'order or rule', the content, the scope or the form of such order or rule, are delegated to be defined in such

order or rule without any specification in the law, and also because such delegation cannot be deemed necessary.

Besides, we note that the definitions of 'order or rule' are too vague and abstract for a military person or civilian in the military to identify which actions are prohibited. The Instant Provision also allows arbitrary interpretations of the authorities in charge of making investigations, indictments and judgments on the violations under the Instant Provision, in deciding whether the elements of crime are satisfied. Thus, the Instant Provision violates the rule of clarity required by the principle of punishment by statute.

4. Case on Determination of Pro-Japanese and Anti-National Activities

[23-1(A) KCCR 258, 2008Hun-Ba111, March 31, 2011]

In this case, the Constitutional Court held constitutional Article 2, Item 7 and Item 19 (hereinafter, the "Instant Provisions") of the 'Special Act on Investigation of Anti-National Activities during Japanese Occupation' (hereinafter, the "Special Act") which define, as a type of pro-Japanese and anti-national activities, the act of receiving the title of nobility for contribution to Japanese annexation of Korea, or passing on the title; or the act of conspicuously collaborating with Japanese colonialism by a person who received reward or recognition for his or her collaboration in the Japanese colonial rule and invasive war.

Background of the Case

The Commission for the Investigation of Pro-Japanese and Anti-National Activities (hereinafter, the "Commission") decided the fact that complainant's great-grandfather had been conferred the title of baron and had received a reward of Eunsagongche, a kind of government bond with huge interest income, and a commemoration medal of Japanese annexation of Korea for his contribution, shall be determined as pro-Japanese and anti-national activity. In response, the complainant filed a suit with the Seoul Administrative Court to vacate such decision and thereafter moved that court to request constitutional review on the constitutionality of the Instant Provisions. Upon dismissal, the complainant filed this constitutional complaint.

Provision at Issue

The Special Act on Investigation of Anti-National Activities during Japanese Occupation (revised by Act No. 7939 on April 28, 2006)

Article 2 (Definition)

For the purpose of this Act, the term of "Pro-Japanese and Anti-National Activities" means activities which falls into one of the

following acts committed during the period from the outbreak of the Russo Japanese war, which was the beginning of Japanese invasion into Korea, till August 15, 1945:

7. Receiving the title of nobility for contribution to Japanese annexation of Korea or the acts of passing on such title;

19. Conspicuously collaborating with Japanese colonialism by a person who received reward or recognition for his or her collaboration in the Japanese colonial rule and invasive war

Summary of Decision

In a 7 (constitutional) to 1 (unconstitutional) vote, the Constitutional Court held that the Instant Provisions are not against the Constitution.

1. Opinion of the Court

While the Instant Provisions seem to somewhat influence the public's evaluations on the person subject to investigation and restrict the right to personality of the bereaved, the Special Act including the Instant Provisions – through the process of democratic public debate and in accordance with public opinion – was enacted to ensure that the truth in our country's history and national legitimacy be brought to light and placed on formal record. In addition, we find that the legislature gave careful consideration in defining the term of 'Pro-Japanese and Anti-National Activities' to mean receiving the title of nobility 'for contribution to the Japanese annexation of Korea' or 'substantively supporting the Japanese Occupation', rather than simply receiving such title or rewards from the Japanese colonial government. Furthermore, measures to minimize disadvantages on the person subject to investigation are designed in the Special Act, not to mention that there is no provision requiring any disadvantageous treatment of such person or his/her descendants. For the foregoing reasons, we conclude that the Instant Provisions do not infringe on the petitioner's right to personality in violation of the rule against excessive restrictions.

Besides, the Instant Provisions simply define the term of 'Pro-Japanese and Anti-National Activities' and the Special Act as a

whole was enacted to bring historical truth to light by making a report and disclosing such report to the public thereafter rather than to define disadvantages on Japan collaborators or their descendants. Therefore, the Instant Provisions or the Commission's decisions on the 'Pro-Japanese and Anti-National Activities' under the Instant Provisions can be considered neither to recognize or establish a privileged class violating Article 11, Section 2 of the Constitution nor to violate the principle against passing on honors to descendants under Article 11, Section 3 of the Constitution, which states that 'the awarding of an honor or a medal in any form shall be effective only for recipients and no privileges shall be ensue therefrom.' Moreover, the Instant Provisions or the Committee's decisions in accordance to those provisions can be regarded to violate neither the rule against retroactive legislation under Article 13, Section 2 of the Constitution nor the principle against guilt by association under Article 13, Section 3 of the Constitution prohibiting unfavorable treatment to a person on account of an act not of his own doing but committed by a relative.

2. Dissenting Opinion of One Justice

The determination and revelation by the State of the fact that a person engaged in pro-Japanese and anti-national activities should be considered as an act of imposing punishment by officially damaging an individual's reputation. Such penalty can be a kind of punishment within the meaning of Article 13, Section 1 of the Constitution, violating the rule against retroactive legislation prescribed on the same section of the Constitution. Furthermore, such punishment described in the Special Act is against the principle of double jeopardy articulated in Article 13, Section of the Constitution because, in this case, the government, without having any applicable provision of the Constitution, is trying to punish Pro-Japanese collaborators again simply because the punishment imposed in the past was not enough, although the government punished Pro-Japanese collaborators according to Article 101 of the Constitution version of 1948.

5. *Confiscation of Property Awarded for Pro-Japanese Collaboration During Japanese Occupation Case*

[23-1(A) KCCR 276, 2008Hun-Ba141, 2009Hun-Ba14 · 19 · 36 · 247 · 352, 2010Hun-Ba91(consolidated), March 31, 2011]

The Constitutional Court held that the statute at issue, which presumes property acquired by Pro-Japanese collaborators during Japanese occupation to be property awarded for their collaboration with Japan and requires confiscation of the property from the collaborators or their descendants, is not against the Constitution

Background of the Case

Min ○-Hui, who had been conferred the title of viscount by the Japanese colonial government on October 7, 1910 for his contribution to the Japanese annexation of Korea, also received a commemoration medal for his collaboration with Japanese colonial rule. The title of land, which had been conferred to him at the time by the Japanese colonial government thereafter has been transferred to his descendants and registered.

The Investigative Commission on Pro-Japanese Collaborators' Property (hereinafter, the "Commission"), on November 22, 2007, decided that Min ○-Hui is "A person who engaged in pro-Japanese and anti-national activities, whose property is subject to confiscation" (hereinafter, the "Collaborators") articulated in Article 2, Item 1 of the Special Act to Redeem Pro-Japanese Collaborators' Property (hereinafter, the "Special Act") and that the land described above should be seized by the Korean government because the land is an asset of Pro-Japanese collaborators as defined in Article 2, Item 2 of the Special Act.

Min ○-Hui's descendants, petitioners in this case, filed a suit with the Seoul Administrative Court to vacate the confiscation decision and moved the court to request the Constitutional Court for review on

the constitutionality of Article 2 through Article 5 (hereinafter, the "Instant Provisions") of the Special Act. When the administrative court consequently dismissed the request, the petitioners filed this constitutional complaint asserting that the Instant Provisions infringe on their property rights and therefore are unconstitutional.

Provision at Issue

The Special Act to Redeem Pro-Japanese Collaborators' Property (as revised by Act No. 7975 on September 22, 2006)

Article 2 (Definition) The terms used in this Act are defined as follows.

1. "Pro-Japanese collaborators whose property acquired in the Japanese colonial period (1910-1945) are subject to the confiscation" (hereinafter, the "Collaborator") are persons who fall into any of the following *Subsections*:

(1) A person who committed one of the actions described in Article 2, Item 6 through Item 9 of 'the Special Act on Investigation of Anti-National Activities during Japanese Occupation' (*Cham-ui*, assist secretary of the ministry, in Item 9 includes *Chan-ui* and Bu *Chan-ui*, judge and assist judge): *Provided*, however, that such person shall not be considered as a Collaborator in the cases where such person resisted or returned the title of nobility, or actively engaged in the independence movement thereafter and is recognized as such by the decision of the Commission under Article 4 of this Act.

The Special Act to Redeem Pro-Japanese Collaborators' Property (as revised by Act No. 7769 on December 29, 2005)

Article 2 (Definition) The terms used in this Act are defined as follows.

2. The term "The property of a person who engaged in pro-Japanese and anti-national activities" (hereinafter, the "Pro-Japanese Collaborator's Property") means property acquired by a person as a reward for his/her collaboration with Japanese Imperialism during the period from the outbreak of the Russo Japanese war - which was the beginning of Japanese invasion into Korea- to August 15, 1945, or such property

inherited or transferred by will or as a gift with the knowledge how the property was acquired. The property of the Pro-Japanese Collaborator acquired during the period from the outbreak of the Russo Japanese war to August 15, 1945 shall be presumed to be property acquired as a reward for Pro-Japanese collaboration.

Article 3 (Confiscation of Pro-Japanese Collaborator's property)

1. The Pro-Japanese Collaborator's Property (including Collaborator's Property used, occupied, or managed by foreign embassies under the international treaties/agreements or occupied or managed by the State) shall be owned by the State at the time of occurrence of the causes of action including acquisition of donation of the property: *Provided*, however, that the State shall not affect the rights of a third party who has acquired the property bona fide or by payment of fair compensation.

Summary of Decision

The Constitutional Court held that the provision of the Special Act which presumes property acquired by Pro-Japanese collaborators during Japanese occupation to be property awarded for their collaboration with Japan (Article 2, second sentence of Item2 of the Special Act, hereinafter the "Presumption provision") and the provision of the Special Act which requires the confiscation of such property from those collaborators or their descendants (Article 3, Section 1 of the Special Act, hereinafter the "Confiscation Provision") are not against the Constitution.

1. Opinion of the Court

A. Whether the Presumption Provision violates Due Process of Law

It is difficult for the state to prove whether a certain property is Pro-Japanese Collaborator's Property because the Korean government's effort to confiscate those properties is being made after quite a long time after the liberation from Japanese occupation. On the contrary, it is highly probable that the person who acquired those properties know the details about how they have come to own the properties. In

addition, the Presumption Provision does not entirely shift the burden of proof to the Collaborator's side and a procedural safeguard, an administrative suit to rebut that presumption is available. Even in the case where disposition authorities or the courts do not easily accept the rebuttal, the legislature is not to be blamed for its abuse or deviation of legislative discretion in enacting the Presumption Provision, but the disposition authorities or the courts should be blamed for not fulfilling the aims of that Provision. For the foregoing reasons, the Presumption Provision neither infringes on the right of access to courts nor violates due process of law.

B. Whether the Confiscation Provision violates Article 13, Section 2 of the Constitution

The Confiscation Provision is retroactive legislation, but retrospective law can be allowed when such law, as an exception, is justified because, for example, people could have expected such retroactive legislation. In this case, Japan collaborators could reasonably have expected the retroactive confiscation of the property rewarded for collaboration with Japan considering the anti-national nature in the course of acquisition of such property and the preamble of the Constitution declaring to uphold the spirit of the Korean interim government established during the Japanese occupation. Furthermore, because confiscation of Pro-Japanese Collaborator's Property is a national task taken as a very exceptional measure in our history, the concern that retroactive legislations may become frequent with this Court's holding of constitutionality of this particular retroactive legislation can be fully removed. Therefore, the Confiscation Provision is retroactive law but is not against Article 13, Section 2 of the Constitution.

C. Whether the Confiscation Provision infringes on the right to property

The Confiscation Provision pursues legitimate aims as it intends to rectify past injustices, enhance the spirit of the nation and realize the constitutional ideal of the March 1 Independence Movement that resisted the Japanese Imperialism. The Confiscation Provision is a proper means

in achieving such legislative aims, because it would be much difficult to handle Pro-Japanese Collaborators' Property under the existing property law system including civil law. Among the various types of Pro-Japanese and anti-national activities defined under Special Act on the Fact-Finding of Anti-National Activities under the Japanese Occupation, the Confiscation Provision limits the types of activities subject to this provision to only four types which are serious and clear in their scope. Moreover, there are exceptions for the Pro-Japanese Collaborator who later actively engaged in the independence movement. In addition, a Pro-Japanese collaborator and his/her descendants can prevent confiscation by proving that the property at issue was not acquired as a reward of collaboration with Japan and there is a provision to protect a bona fide third party. Given the foregoing reasons, we find that the Confiscation Provision is not against the rule of least restrictive means and, considering the legitimacy of rectifying history and the value of true social integration, it strikes a balance among the interests related. Therefore, the Confiscation Provision does not infringe on the petitioners' property rights.

2. Concurring Opinion of One Justice

If this Court interprets Article 13, Section 2 of the Constitution, which prohibits the deprivation of citizens' property right by a retrospective legislation, to allow citizens to be deprived of their property rights by retroactive legislation when there are special reasons, it would certainly be a creation of a constitutional provision. This is neither an appropriate construction of the Constitution nor consistent with the constitutional doctrine of separation of powers.

Considering the spirit and tradition in our Constitution as well as the backgrounds in its creation, property acquired as a reward of collaboration with Japan cannot be protected by the 'property right' provision of our Constitution, because the Constitution of this country was established through the fight against and by overcoming Japanese imperialism. However, the government shall abide by constitutional restraints in locating the Collaborator's Property and setting up the confiscation process of that property. In this case, the provisions at issue do not appear to be against that constitutional restraint.

3. Concurring Opinion of One Justice

Examining the preamble of the Constitution requiring maintenance of the spirit of the Korean interim government established during Japanese occupation, and the crime of treason defined in the criminal code of the Daehan Empire (1897-1910), we should conclude that criminal nature was inherent in the acquisition of Pro-Japanese Collaborators' Property and that criminal nature has been persistent even up to now, as our country has failed to officially settle the past. Thus, the Confiscation Provision is a quasi retroactive legislation that has effect on ongoing facts or legal rights.

4. Dissenting Opinion of Two Justices: Partial Limited Unconstitutionality

Our modern system of land ownership was established in 1912 when the Japanese colonial government started to file up the land survey records. Thus, even land acquired before that land survey in 1912, and in no relation with pro-Japanese anti-national activities, is likely to be presumed as Pro-Japanese Collaborator's Property under the Presumption Provision. While no official public notice or registration of land ownership existed before 1912, the Pro-Japanese Collaborator has to provide evidence to prove that the land at issue was acquired before 1904 in order to rebut the presumption. But before the drawing up of land survey records, there were no method of public announcement of land ownership. Furthermore, facts that happened more than 100 years before are very difficult to prove. As a result, it is highly likely that even property unrelated to collaboration with Japan can be deprived under the Presumption Provision. Thus, it is unconstitutional as far as the part of 'acquired' of the Presumption Provision is interpreted to include property acquired before 1904 but recorded as acquired thereafter through the land survey of 1912.

5. Dissenting Opinion of Two Justices: Partial Unconstitutionality

Even if it is absolutely necessary for the punishment of Pro-Japanese and anti-national activities and confiscation of the Pro-

Japanese Collaborator's Property to be carried out, the means of punishment and confiscation should be compatible with the Constitution. The Confiscation Provision amounts to a deprivation of property right by a retroactive legislation. However, Article 13, Section 2 of the Constitution, which was introduced to correct the history of repeated political and social retaliations enabled by retroactive legislations during the period from the April 19 Democratic Revolution in 1960 through the May 16 Military Coup in 1961, is an absolute prohibition permitting no exceptions. In this case, the Confiscation Provision is retroactive legislation that deprives the petitioners' property rights with no constitutional basis, violating Article 13, Section 2 of the Constitution.

6. Case on Restoration of Returned Electoral Deposit and Campaign Expenses By Candidate Whose Election is Invalidated

[23-1(B) KCCR 62, 2010Hun-Ba232, April 28, 2011]

The Constitutional Court held that the part 'a person whose election is invalidated under Article 264 of the Public Official Election Act' of Article 265-2, Section 1 ("the Instant Provision") of the former Public Official Election Act (hereinafter, the "POEA"), which requires a person whose election was invalidated by committing an election crime to pay back his election deposit and campaign expenses returned or compensated by the National Election Commission(hereinafter, the "Commission"), is not against the Constitution.

Background of the Case

Petitioner was elected school superintendent of Seoul Metropolitan Government. However, petitioner's election was invalidated when he was sentenced to a fine of 1.5 million KW for making a false report on spouse's assets in violation of the POEA. Thereafter, the Seoul Metropolitan Division of the Commission notified the petitioner that he was required to pay back his returned election deposit and already compensated campaign expenses. In response, the petitioner filed a suit for the confirmation of invalidity of that Commission's notification and, at the same time, moved the court to file with the Constitutional Court for review of constitutionality of the Instant Provision. After the court dismissed that suit and the motion, petitioner filed the instant constitutional complaint.

Provision at Issue

POEA (revised by Act No.7681 on August 4, 2005, but before revised by Act No. 9974 on January 25, 2010)

Article 265-2 (Return of Expenses by Persons, etc. whose Election is Invalidated)

(1) A person whose election is invalidated (including any person

who resigns his post prior to the final judgment after having been indicted) under Articles 263 (election invalidated for overspending the election expenses) through 265 (election invalidated for election crime committed by campaign staff including campaign manager) shall return the amount returned or preserved under the provisions of Articles 57 (return of election deposit) through 122-2 (preservation of election expenses). In such cases, when the election of a candidate recommended by a political party in the presidential election is invalidated, and when the election of candidates in the elections for proportional representative National Assembly members and for the proportional representative local council members have been all invalidated, those political parties that recommended them shall return the said amount.

Summary of Decision

In a vote of 8 (constitutional) to 1 (partial unconstitutional), the Constitutional Court held the Instant Provision not against the Constitution.

1. Court Opinion

A. Whether there is a restriction on basic rights

The Instant Provision prescribes only monetary penalty against the person who has committed an election crime rather than removal from public office or deprivation of government employee status. That penalty also cannot be deemed to prevent an indigent person from running for election. Therefore, the Instant Provision does not restrict people's right to hold public office but, by imposing monetary disadvantages, only limits the property right of those punished under the Instant Provision.

B. Whether any property right is infringed

The Instant Provision pursues the legitimate aim of deterring election crimes by imposing penalties on the elected person who committed

such crime and of ensuring clean and fair elections. It is necessary to reinforce punitive measures against election malpractice in order to deter election crimes and establish fair elections. Moreover, we find that the standard of punishment and its details articulated in the Instant Provision is not excessive because it limits the scope of punishable conducts based on the sentenced penalties, excluding cases where the crime is insignificant and minor or where mitigating circumstances are considered in deciding penalties. Thus, the Instant Provision does not infringe on the property right in violation of the principle against excessive restriction.

C. Whether the right to equality is violated

The Instant Provision, as it is applied only to elected candidates, treats unsuccessful candidates differently from successful ones. However, even though the Instant Provision does not make an unsuccessful candidate subject to the punishment at issue, the same effect on attaining the legislative purpose of the fair and clean election may be expected because every election candidate would regard the provision at issue, which imposes penalty only on the elected candidate, as a provision to be a constraint on himself/herself so far as all of the election candidates have the same goal of being elected. Consequently, we do not find the Instant Provision, as an arbitrary legislation, infringes on the petitioner's right to equality.

D. Whether the principle of the public financing in elections is violated

The principle of public financing in elections is a principle that the people shall bear all the election expenses in that election itself is a process to select people's representatives who have to perform their public duty and that a citizen with limited financial resources shall be provided with opportunities to run for elections. It is not against the spirit of the principle to not compensate election expenses to a candidate who has committed the election crimes. In addition, it is necessary to consider that: 1) an election candidate would seek to receive more votes even by committing the election crimes if the government preserve

his or her election expenses only based on the rate of votes received; and 2) it would be too much a burden for the government if it has to bear the double expenses of reelection when a person's election is invalidated. For the reasons foregoing, we find that the Instant Provision does not violate the principle of public financing in elections as the provision at issue is stipulating a limited exception not against the purpose of such principle.

2. Concurring Opinion of One Justice

The election deposit system was installed with the intention to improve efficiency in electoral management by means of preventing too many candidates running for elections. In my view, the election deposit system would likely be distorted if the government, not pursuing the original purpose, exploits that system as a means to deter election crimes. Furthermore, because reelection candidates would also have to make their deposit, the government would not be doubly returning deposits; moreover, we cannot find any example of election law in other countries that uses an electoral deposit paid by candidate as a tool to restrict election crimes. In light of the reasons explained above, it is desirable that the Instant Provision be revised as to maintain the original purpose and characteristic of the electoral deposit system.

3. Dissenting Opinion of One Justice

It is unconstitutional that an elected person be required to return his or her electoral deposit in the instance of invalidation of that election. We need to encourage as many candidates as possible running for public office to register because the public offices election, as a core process to realize representative democracy, is one of the means to exercise basic rights including the right to hold public office. Thus I cannot recognize any need to require the return of electoral deposit to prevent the election from being overrun with candidates. Therefore, in light of its restraint on the basic rights without any justifiable reason, such electoral deposit system violates the Constitution, and therefore the Instant Provision requiring the elected person to return the

compensated electoral deposit in the instance of invalidation of his or her election is also against the Constitution.

7. Suspension of Performing Duties of Head of Local Government During his Detention Prior to Final Judgment

[23-1(B) KCCR 126, 2010Hun-Ma474, April 28, 2011]

In a vote of 4 (denial): 4 (denial): 1 (unconstitutional) the Constitutional Court held that Article 111, Section 1, Item 2 (the "Instant Provision") of the Local Autonomy Act (the "LAA"), which in the instance of detention of the head of a local government upon his or her indictment, suspends the head from performing duties and has the deputy as acting head of that local government, neither infringes the right to hold public offices nor violates the right to equality because it is not inconsistent with the rule against excessive restriction or the principle of presumption of innocence.

Background of the Case

A. Complainant was elected as head of the Seoul Metropolitan borough of Jung-gu in the 5th nationwide local election held on June 2, 2010, and took office on July 1, 2010.

B. The complainant, however, was arrested on June 19, 2010, after being elected and was charged with violation of the election law. Upon indictment on June 29, 2010, he was suspended from performing his duties as the head of the Seoul Metropolitan borough of Jung-gu from the first day of taking office in accordance with the Instance Provision, which stipulates that the head of local government shall be suspended from performing his or her functions "when he or she is detained after indictment" and the deputy head is required to act for him or her.

C. On July 29, 2010, the complainant filed this constitutional complaint claiming that the Instant Provision infringes on his right to hold public office and the right to equality.

Provision at Issue

Local Autonomy Act (wholly revised by the Act No. 8423 on May 11, 2007)

Article 111 (Acting Head of Local Government, etc.)

(1) Where the head of a local government falls under any of the following sub-paragraphs, the deputy Mayor, vice governor, or deputy head of the City/Do or Si/Gun/Gu concerned (hereafter referred to as the "deputy head of the local government" in this Article) shall act for him or her:

2. Where he or she is detained after an indictment;

Summary of Decision

1. Majority Opinion (Denial)

A. Opinion (Denial) of Four Justices

(1) Whether the rule against excessive restriction is violated

The legislative purpose of the Instant Provision is to prevent a harmful effect on the normal and effective administration of local government for the welfare of the residents by suspending the head of local government from his duties during the period of detention, a situation that makes him or her unable to perform his or her duties in a proper and timely manner.

In the instance where the head of local government is detained such that he or she is physically isolated from society and his or her communication is limited even with visitors, it would be hard to secure continuity and flexibility in the administration of the local government or to implement policies which bring out the best result for the residents' welfare. Moreover, there would be uncertainty about when the detained head of local government would be released and return to office. For the foregoing reasons, we cannot find any adequate measures other than suspension of the head of local

government to prevent such negative effects on timely and smooth administration of local government and welfare of the residents.

Besides, since detention is enforced by a warrant issued by the court based on the judge's recognition of the reasons for detention, there is no room for us to take any further consideration of the nature of the crime or the gravity of the matters at issue, such as whether the crime committed by the head of local government is related to his or her duties, whether the crime causes any specific harm on the administration of local government, or whether the crime is a serious antisocial crime or a minor offences of negligence, in determining whether suspension is necessary. Additional requirements for suspension of performing duties, therefore, need not be set forth.

Considering that the head of local government is temporarily suspended from his or her office only for the period of detention and therefore he or she can always go back to work whenever he or she is released from detention, we find that the infringement caused by the Instant Provision is the least restrictive and the legal interests concerned are also balanced.

(2) Whether the principle of presumption of innocence is violated

The Instant Provision intends neither to convey the message of social condemnation on the fact that the head was indicted and detained, nor to suspend his function by relying on the likelihood of being found guilty. Rather it is to avoid a loss of efficiency in execution of his duties and potential harm to the integrity and continuity of the administration of the local government as a result of detention, i.e., his physical absence from work. In other words, such suspension imposed in accordance with the Instant Provision can be deemed as neither 'a disadvantage stemmed from an acknowledgment of the commission of crime or guilt' nor 'a social and moral condemnation based on the assumption of his guilt.' For these reasons, the Instant Provision is not against the principle of presumption of innocence.

(3) Whether the right to equality is violated

As for the Prime Minister, ministers of various administrative branches and the members of the National Assembly, there is no provision such as the suspension provision like the Instant Provision. Compared to those mentioned above, however, the head of local government, who is an elective public officer having sole authority over decision making, the nature of the job and the detention status have different effect on the integrity of administration of the local government. Thus, we do not deem the differential treatment between the two groups aforementioned as arbitrary.

Also, different treatment between the head of local government who is detained and the one who is hospitalized, the latter of which is provided with a 60-day wait-period prior to suspension, is deemed as reasonable. While access to the detention center by ordinary people is strictly restricted, hospital visitation is relatively unrestricted, discharge from hospital is predictable with only rare exceptions, and the job may be performed in the hospital.

B. Concurring opinion (Denial) of Four Justices

(1) Whether the rule against excessive restriction is violated

Aside from the legislative intent of preventing a harmful effect on the normal and effective administration of local government and the welfare of the residents by suspending the head of local government from his duties during the period of his or her detention, the legislature also intends to recover the residents' trust by excluding from office the head of local government who is indicted and detained by warrant, as he has undermined the high level of morality and integrity required for the position and thereby damaged the residents' confidence in the head of local government.

To achieve those two aforementioned legislative aims, there are no meaningful alternatives other than excluding the head of local government from the date of occurrence to the date of closure of his

indictment and detention that undermine the high level of ethics and honesty required in his position and damage the residents' confidence. We therefore neither need to set forth additional conditions for the suspension nor take into account the nature of the crime or gravity of the matter at issue. The Instant Provision achieves the balance between the public interest pursued and the individual's interest violated.

(2) Whether the principle of presumption of innocence is violated

Even though a certain disadvantage is one basically prohibited under the principle of presumption of innocence, it might be considered to be consistent with that principle when it is given in a way to respect the principle of proportionality and is least restrictive.

Suspension of performing duties imposed by the Instant Provision, a restriction on the complainant's right to hold public office, amounts to a disposition which has a disadvantageous effect. However, the purpose of imposing such suspension is not to condemn or punish the head based on the prosecution's indictment or the court's detention warrant but to achieve the two legislative goals mentioned above. Additionally, the disadvantage does not go beyond what is necessary and least restrictive, complying with the principle of proportionality. Therefore, it is not inconsistent with the principle of presumption of innocence.

(3) Whether the right to equality is violated

Unlike the case of detention, the instance where the head of local government is hospitalized due to illness or personal reasons is an event which is irrelevant to whether the morality and integrity required of the position and the residents' confidence has been undermined. Thus, there is a reasonable basis for the different treatment when the head of local government is allowed a 60 day wait period prior to the enforcement of suspension of performing duties in the case of hospitalization.

C. Dissenting Opinion of One Justice

In my view, suspension of duties is imposed only with two requirements – indictment by public prosecutor and detention warrant issued by a judge – before the final judgment is rendered. However, the detention status following indictment and warrant issuance is just the beginning of the criminal procedure including trials, sentencing, appeals, and other procedures leading to the final judgment. Thus, the presumption of innocence is violated here because, based upon the premise that the complainant is guilty on his crime, it conveys a negative message and social condemnation, going beyond what is necessary and least restrictive.

It is unlikely that there is a profound and pressing need to suspend the office of the head of local government that retains democratic legitimacy by solely relying on the fact that the head of local government is detained, because, at the stage of issuing a warrant, it is not possible to determine whether the accused is guilty or whether a grave harm on the public interest would be caused unless the head is immediately suspended. Likewise, the public prosecutor's indictment has no particular significance in light of the practice of criminal justice against the suspects or the accused who are detained. I conclude that suspending the duties of the head of local government by solely relying on the two requirements, without additional requirements, does not comply with the rule against excessive restriction, infringing on the complainant's right to hold public office.

8. Case on Disallowance of Pre-conviction Detainee's Attorney Consultation on a Holiday

[23-1(B) KCCR 201, 2009Hun-Ma341, May 26, 2011]

The Constitutional Court held that the complainant's right to assistance of counsel is not infringed in the instant case where the complainant, after being tried without detention but thereafter detained for failure to attend court on the sentencing date, was disallowed consultation with counsel on a holiday but was allowed consultation two days after, ending up having a trial held more than 10 days thereafter. In a separate concurring opinion, three Justices expressed their view that the current practice of correctional institutions that refuses consultation with an attorney simply for the reason that it is a Saturday or holiday must be corrected in order to fully realize the right of to assistance of counsel.

Background of the Case

While pending trial on fraud charges without detention, an arrest warrant was issued against the complainant for failure to appear in court on the court date of sentencing on May 1, 2009 and he was detained on May 27. The court-appointed attorney for the complainant requested a consultation but was not allowed on the ground that it was Memorial Day, June 6. Two days thereafter the attorney consulted with the complainant. Trial was held on June 19, 2009, and the complainant was found guilty on June 24. The complainant filed this constitutional complaint against the Minister of Justice and the head of Seoul Detention Center arguing that the disallowance of consultation with his attorney on Memorial Day infringed on his right to assistance of counsel.

Summary of Decision

1. Court Opinion

We cannot conclude that the right to assistance of counsel was

infringed simply by the fact that such consultation was not allowed on a certain date a detainee or his attorney wanted to have that consultation. For the right to consultation with an attorney to be infringed, some disadvantages to the suspect or defendant in exercising his/her defense right should be found as a consequence of the refusal of attorney consultation in connection with the case investigation or court proceeding around the time of such refusal. On the other hand, we should not find the infringement of right of assistance of counsel if we can find the opportunity to have consultation with his/her attorney was sufficiently given to a pre-conviction detainee for exercising his/her right to defense in connection with the case investigation or court proceeding around the time of such refusal, even where such consultation with attorney was not made in the date designated by that detainee or his/her attorney.

In the instant case, it can be regarded that almost all of the court proceedings had been completed without detention, with only the court's sentencing remaining, because the complainant had appeared before the judge without detention until he failed to attend the court on the date of sentencing. In addition, the complainant was given sufficient time for attorney consultation and advice since a new trial date was scheduled on June 19, 2009, eighteen (18) days after June 1, 2009 when his attorney was appointed by the court. More importantly, it is hard to conclude that the complainant in exercising his right to defense suffered any disadvantages from not being allowed attorney consultation on Memorial Day, as the complainant was allowed attorney consultation two days later on June 8, 2009 and there remained more than 10 days until the new trial date.

2. Concurring Opinion of Three Justices

Rather than disallowing attorney consultation on holidays or weekends without any exception, the government needs to allow a pre-conviction detainee attorney consultation even on holidays and weekends as much as possible, as the right to assistance of counsel of a pre-conviction detainee should be specially respected, absent special circumstances. The burden of allowing attorney consultations on a holiday, such as

increase in budget and personnel costs can be relieved by the following ways: shortening visiting hours for an attorney consultation on holidays and weekends; limiting the number of holiday attorney consultation allowed per pre-conviction detainee; or allowing the initial attorney consultation in principle and thereafter allowing such consultation only if it is recognized to be necessary.

In order to guarantee the right of pre-conviction detainee assistance of counsel as an important basic right under the Constitution, the current practice of disallowing a pre-conviction detainee's consultation with his/her attorney in correctional institutions only because it is holidays or weekends needs to be corrected.

9. Case on Restrictions on Invitation to Election Broadcasting Debate

[23-1(B) KCCR 237, 2010Hun-Ma451, May 26, 2011]

In a vote of 7 (constitutional) to 2 (unconstitutional), the Constitutional Court held that the part of 'election of local constituency member of the National Assembly' of Article 82-2, Section 4, Item 3 ("the Instant Provision") of the Public Official Election Act ("POEA"), which sets forth certain restrictions on the qualification to be invited to an election broadcasting debate hosted by the National Election Broadcasting Debate Commission for candidates running for the National Assembly of local constituency, is not incompatible with the Constitution.

Background of the Case

The complainant, who had run for reelection of local constituency member of the National Assembly, was excluded from the list of candidates to participate in election broadcasting debate for not meeting the qualifications which the Instant Provision sets forth. The complainant filed this case with the Constitutional Court arguing that his right to equality was infringed and thus the Instant Provision is unconstitutional.

Provision at Issue

Public Official Election Act (revised by the Act No. 9974 on January 25, 2010)

Article 82-2 (Interviews or Debates hosted by the National Election Broadcasting Debate Commission)

(4) When the an Election Broadcasting Debate Commission of each level holds interviews or debates referred to in paragraphs (1) through (3), it shall hold them by inviting the candidates falling under any one of the following sub-paragraphs. In such cases, candidates who are invited by the Election Broadcasting Debate Committee of each

level to the interviews and debates shall participate therein unless justifiable grounds exist that make it impossible for them to do so.

1. The presidential election:

(a) Candidates recommended by the political parties having five or more National Assembly members belonging thereto;

(b) Candidates recommended by the political parties that have obtained 3/100 or more votes of the total number of nationwide valid ballots in the immediately preceding presidential election, the election of the proportional representative City/Do council members or the election of proportional representative autonomous Gu/Si/Gun council members; and

(c) Candidates who occupy 5/100 or more support ratios averaging the results of public opinion poll conducted and publicized by the press under the conditions as set by the National Election Commission Regulations during the period from 30 days before the beginning date of election to one day before the beginning date of election.

3. The election of National Assembly members of local constituency and the election of the head of local governments:

(a) Candidates recommended by the political parties falling under subparagraph 1(a) or (b);

(b) Candidates who have obtained 10/100 or more votes of the total number of valid ballots by running for a presidential election, the election for National Assembly members of local constituency or the election for the heads of local governments (including the special elections, etc.) conducted within 4 years (including cases where the district of constituency was altered and the altered district overlaps with the district of immediately preceding election); and

(c) Candidates whose support ratio averaging the results of public opinion poll referred to in subparagraph 1(c) is 5/100 or more.

Summary of Decision

1. Court Opinion

If there is no restriction on candidates' qualification to be invited to election broadcasting talks or debates, such talks or debates can be degraded to hustings rather than effective talks or debates, and

comparison of the candidates in terms of their qualifications or political capabilities would probably be impossible. In addition, transmission resources are limited. Therefore, a certain restriction on the candidates to be invited to talks or debates is based on the legislature's reasonable considerations such as above.

Also only candidates meeting a certain standards, considering such factors as recommendation of major parties, chances of winning the election and popularity with the public, should be invited so that their talks and debates on policies can be effective and practical. The Instant Provision, which allows the candidates falling under any of the followings to be invited to the debate, cannot be regarded to be particularly arbitrary or excessively strict: candidates recommended by the political parties having five or more National Assembly members belonging thereto, or by the political parties that have obtained 3/100 or more votes of the total number of nationwide valid ballots in the immediately preceding election; candidates who have obtained 10/100 or more votes of the total number of valid ballots by running for elections within 4 years; or candidates who occupy 5/100 or more support ratios averaging the results of public opinion poll conducted and publicized by the press during the period from 30 days before the beginning date of election to one day before the beginning date of election. Furthermore, a provision is set out to allow separate interviews and debates for the uninvited candidates, providing them with an opportunity to use broadcasted debates for their election campaigning For the foregoing reasons, the Instant Provision should be considered reasonable since it strikes a balance between the conflicting interests, the public interest in inviting an adequate number of candidates to vitalize election talks or debates and the private interest in guaranteeing equal opportunity to election campaigns. Therefore, the different treatment of candidates under the Instant Provision is not an arbitrary discrimination and does not infringe on their right to equality.

2. Dissenting Opinion of Two Justices

Because an Election Broadcasting Debate Commission is a governmental institution that is established under each level of the

Election Administration Commission, it, like Election Commissions, bear the constitutional duty to ensure equal opportunity in election campaigning under Article 116, Section 1 of the Constitution. Election campaigning via broadcasting can be one of the most effective means for election campaigns, while it plays a major role in helping voters to recognize and compare the candidates' positions and policies all at once. Besides, broadcasted talks or debates hosted by an Election Broadcasting Debate Commission constitutes a great part of campaigning since other forms of public speeches are prohibited under the POEA.

The Instant Provision, nevertheless, imposes restrictions on the candidate qualification to be invited to the debates, resulting in direct incompatibility with the purpose of Article 116, Section 1 of the Constitution, which emphasizes equal opportunity in election campaign. The provision of the POEA stating that a separate interview or debate can be held for uninvited candidates cannot alleviate the unconstitutionality of the Instant Provision, as such separate debate is only another form of discriminatory action sustaining the original discrimination by the Instant Provision. Furthermore, not allowing some candidates to participate in the election campaigning via broadcasting can lead to a critical impact on election results because voters may develop a perception that distinguishes invited candidates from uninvited candidates. In this case, it is difficult for the candidates uninvited to the election broadcasting debate to find ways to overcome such discriminatory effect.

As such, the Instant Provision did not give the complainant, who was not invited to the election broadcasting debate, an equal opportunity to election campaign, violating Article 116, Section 1 of the Constitution.

10. Constitutionality of the Police Action Blocking Passage to Seoul Plaza

[23-1(B) KCCR 457, 2009Hun-Ma406, June 30, 2011]

The Constitutional Court held that the exercise of public power by the chief of the National Police Agency, which totally blocked passage through Seoul Plaza of the Seoul Metropolis on grounds that a rally or a protest might be held there, is unconstitutional by infringing on the general freedom of action of complainants as citizens of the Seoul Metropolis.

Background of the Case

On May 23, 2009 when former President Roh Moo-hyun passed away, a memorial altar was set up in front of Daehanmoon of Deoksugung Palace which is located near Seoul Plaza. In response, the head of the National Police Agency, the respondent in this case, completely blocked anyone from passing through the Plaza by completely surrounding the Seoul Plaza with police buses, based on his determination that the people visiting the memorial altar might hold an unlawful and violent demonstration or rally in the plaza.

Complainants, who tried to pass through the Seoul Plaza but failed due to the wall of police buses on June 3, 2009, filed this constitutional complaint with the Constitutional Court claiming that the aforementioned conduct of the head of the National Police Agency infringes on their rights including general freedom of action.

Subject Matter at Issue

Whether the exercise of public power by the head of the National Police Agency which totally blocked the complainants from passing through Seoul Plaza of the Seoul Metropolis on June 3, 2009 (hereinafter, the "Passage Blockade") infringes on the complainants' basic rights.

Summary of Decision

In a vote of 7 to 2, the Constitutional Court held that the Passage Blockade is unconstitutional.

1. Court Opinion

A. Basic rights involved

Individual's passage through Seoul Plaza or spare time activities and cultural activities in Seoul Plaza which is open to the public, is guaranteed as a sort of general freedom of action.

Complainants' freedom of residence and right to move at will is not deemed to be restricted because Seoul Plaza constitutes neither residence nor a place to stay. We also cannot find that the complainants' right to file a petition to use public property is restricted by the Passage Blockade because that right cannot be derived from the right to pursue happiness.

B. Whether the general freedom of action is infringed

(1) Since the Passage Blockade completely banned every rally which may be held in Seoul Plaza and prohibited even ordinary citizen's passage, it is considered to be such a total, far-reaching and extreme measure that it should be the last means to be permitted only in occasions where there exists an imminent, evident and serious danger which cannot be prevented by conditional permission of demonstration or individual ban or dissolution of rally.

In the instant case, the Passage Blockade was based only on the fact that a lot of people had gathered to pay their respects to former President Roh who belonged to a political party other than the current ruling party, and that some citizens had previously committed an illegal violence. We cannot find any such imminent and evident danger for the head of the National Police Agency to maintain the

Passage Blockade until 4 days after the so-called date of violence. We, thus, conclude that the Passage Blockade was not the least necessary means in light of the circumstances.

(2) Despite the need to prevent a broad and full-scale rally, there might have been less restrictive means which could considerably have achieved the goals the respondent pursued while at the same time, not leading to an excessive restriction on the citizens' passage, leisure or cultural activities. Examples may include a restriction while making several passage ways to allow citizens to pass through, or permitting citizens to pass through during either the morning rush hours or during the time when a massive unlawful or violent demonstration is not likely to occur. Nevertheless, the respondent carried out the Passage Blockade and, consequently, ended up totally blocking all citizens' passage through Seoul Plaza, not complying with the rule against least restrictiveness.

(3) Public interest in protecting the citizens' life and property through preventing a massive unlawful and violent demonstration or rally, of course, is very important. However, the necessity of that prevention and effects of the Passage Blockade are more or less hypothetical, and the public interest could have been substantially achieved by less restrictive means. We cannot ascertain that such public interest weighs more than the actual and existing disadvantages which the ordinary citizens suffered. The Passage Blockade, thus, failed to balance the legal interests concerned.

(4) For the foregoing reasons, the Passage Blockade violates the rule against excessive restriction, infringing on the complainants' general freedom of action.

2. Concurring Opinion of Two Justices

Every governmental restriction on the citizen's basic right is unconstitutional unless it is prescribed by law but the Passage Blockade in this case is not based on any statutory provision at all.

Since it cannot be deemed that there existed a 'civil disturbance' in Seoul Plaza or an 'imminence' of crime, Article 5 Section 2 and Article 6 Section 1 of the Act on the Performance of Duties by Police Officers (hereinafter, the "PDPO") shall not be the legal basis for the Passage Blockade because those Articles require 'civil disturbance' and 'imminence.'

Meanwhile, there is an argument that Article 3 of the Police Act and Article 2 of the PDPO, which, as provisions of establishing the police, prescribe the duties or the scope of performance of police officers, are such sorts of 'general enabling statutes' that we can apply as a basis of police action that actually restricts on or deprives of the people's basic rights. We, however, do not agree with such argument based on the followings: i) the 'law,' which allows a restriction on the people's basic rights under the Constitution, shall be functional statutory provision applicable to the individual or specific matters at issue and thus, does not include organizational statutory provisions; ii) if we allow a comprehensive provision on police enforcement authority, it would be inconsistent with the legislative intent because, in setting forth detailed individual provisions in terms of requirements for police enforcement and activity and its limits, the legislative intended to allow the use of police enforcement authority only when those strict requirements are satisfied; iii) it is not in compliance with the principle of administration by the rule of law if we approve a general provision enabling police enforcement authority police officer's authority which we do not allow in other institutions; and iv) even if we approve a general provision enabling police enforcement authority, its indefiniteness could not avoid violating the rule of clarity.

For the reasons above, lacking any legal basis, the Passage Blockade violates the principle of statutory reservation and therefore infringes on the complainants' basic rights.

3. Dissenting Opinion of Two Justices

Article 3 of the Police Act and Article 2 of the PDPO stipulate as one of the police officers' duties the 'maintaining of peace and security

of the public and public order' and thus, can be a legal basis for the Passage Blockade which was intended to achieve the above-mentioned purpose. For the effective exercise of police power in a timely manner, there is a practical need for general provisions enabling police enforcement authority. Moreover, because the courts are to control the exercise of the police power under those provisions, there is no danger of abuse of police power.

In the instant case, considering the circumstances where a large number of small-scale rallies to honor the late President were held, there existed a risk that massive rally or protests may occur. In our view, the Passage Blockade shall not be deemed to be a strikingly unreasonable exercise of governmental power because, if a massive unlawful and violent demonstration or rally is held in Seoul Plaza, which is near the major public institutions, the disorder and danger to society would be significant. In addition, the Passage Blockade cannot be an excessive restriction because it is a temporary restriction and restricted only on the general usage of a limited place, the Seoul Plaza. In light of the circumstances, we cannot consider the examples of less restrictive means which the Court suggested to be practical means and thus, we think that it is unreasonable that the Court found a violation of the rule of the least restrictive means based on those examples. The Passage Blockade also strikes a balance between the legal interests concerned because, while public interest in protecting the citizens' life, body and property from unlawful and violent demonstrations is significantly important, discomforts from the Passage Blockade such as being temporarily prohibited from passage or spare time activities in Seoul Plaza are minimal.

Therefore, the Passage Blockade does not infringe on the complainants' general freedom of action and thus the complainant's claim should be denied.

11. Land Expropriation for Construction of Golf Course Case

[23-1(B) KCCR 288, 2008Hun-Ba166, 2011Hun-Ba35(consolidated), June 30, 2011]

The Constitutional Court held in a vote of 8 to 1 that one of two provisions at issue, which prescribes 'sports facilities' as a kind of 'infrastructure' subject to urban planning but delegates the authority to determine the type of facilities to the Presidential Decree, violates the rule against blanket delegation. A decision of incompatibility was rendered to prevent a legal vacuum or confusion caused by excluding even those sport facilities which must be included in an urban planning project. In addition, the Court held in a vote of 7 to 2 that the other provision which permits a private company, as an operator of urban planning project, to expropriate land necessary to implement that project, is constitutional.

Background of the Case

On May 21, 2007, the Governor of Gyeonggi-do finalized and made a public announcement on the Urban Management Planning for Anseong-si, which includes land owned by the petitioners. Subsequently, the mayor of Anseong-si approved and made a public notification of the implementation schedule of an urban planning project for the construction of a golf course on the aforementioned land.

State Wilshire, the operator company of the urban planning project, tried to make compensation agreements with the petitioners for the expropriation of their lands but failed. State Wilshire filed a request for a decision of land expropriation with the Gyeonggi-do Committee on Local Land Expropriation, which made a disposition in favor of State Wilshire on June 23, 2008. The petitioners filed a claim for the revocation of that disposition with the Suwon District Court and, while the case was pending, they also moved the court to file a request for constitutional review of the statutes arguing that the provisions at issue of the National Land Planning and Utilization Act violate Article 23 Section 3 and Article 37 Section 2 of the Constitution. Upon dismissal, the petitioners filed this constitutional complaint with the Court.

Provisions at Issue

National Land Planning and Utilization Act (enacted by Act No.6655 on February 4, 2002)

Article 2 (Definitions) The definitions of terms used in this Act shall be as follows:

6. The term "infrastructure" means the following facilities and the kind of facilities shall be determined by Presidential Decree:

(d) Public, cultural and sports facilities, such as schools, playgrounds, public offices, cultural facilities, and sports facilities, etc.

Article 95 (Expropriation and Use of Land, etc.)

(1) The operator of urban planning facility project may expropriate or use any of the following goods or rights necessary for the urban planning facility project:

1. Land, buildings, or any goods fixed on such land;

2. Rights, other than ownerships of land, buildings, or any goods fixed on such land.

Article 86 (Operator of Urban Planning Facility Projects)

(7) Where a person, other than those stipulated under the following, intends to be designated as an operator of an urban planning project under paragraph (5), he/she shall meet the requirements prescribed by Presidential Decree concerning the size of the land in his/her possession in the area subject to the urban planning facility project (excluding any State or public land) and the agreement ratio by landowners.

Summary of Decision

The Court held that the part of "sports facilities" of Article 2 Section 6 Item (d) (hereinafter the "Definition Provision") of the National Land Planning and Utilization Act (hereinafter the "NLPUA"), which allows land expropriation for the construction of "spots facilities" prescribed by the Presidential Decree, is incompatible with the Constitution, and that the provision that permits a private company, as an operator of urban planning facility project, to expropriate property including the land necessary for that project (the part of "the

operator of urban planning facility project" of Article 95 Section 1 of NLPUA which is subject to Article 86 Section 7 of NLPUA; hereinafter the "Expropriation Provision") is constitutional based on the followings.

1. Court Opinion

A. Regarding the Definition Provision

(1) Whether the Definition Provision violates the rule against blanket delegation

The Definition Provision, which stipulates sports facilities as a sort of 'infrastructure,' is closely connected with property restriction because it determines the scope of the property subject to the exercise of the expropriation power for the implementation of the urban planning facility project (hereinafter the "Project"). In terms of public necessity required for land expropriation, sports facilities vary in a wide range from those that are readily available to ordinary citizens to those that charge a certain amount of admission fees or those that are established only for public interest regardless of the admission fees charged. Thus, unlike other kinds of infrastructure subject to the NLPUA whose public necessity is recognized in themselves such as transportation facilities and essential services of gas, water and electricity, in order to delegate the authority to determine the type and scope of sports facilities that come under infrastructure of the NLPUA to the Presidential Decree, those sports facilities should be limited to those that have public necessity.

In the instant case, however, the Definition Provision delegates that authority to the Presidential Decree without any limitations on the type and scope of sports facilities which leads to the entire delegation of the authority to determine the type and scope of sports facilities that come under infrastructure to the administration. For the foregoing reasons, we conclude that the Definition Provision is incompatible with the Constitution violating the principle against blanket delegation, because it all-inclusively delegates the authority to the Presidential Decree without any consideration of the nature and public interest of individual sports facilities.

(2) Reason for the Court's rendering the decision of incompatibility with the Constitution

If this Court holds the Definition Provision unconstitutional, that provision will lose its effect from the date of the Court's pronouncement of that holding and thus, it would lead to a legal vacuum and confusion caused by excluding even those sport facilities which must be included for an urban facility planning project. Therefore, it is desirable for the Court to hold the Definition Provision incompatible with the Constitution rather than to hold that provision unconstitutional, making the Definition Provision to be tentatively applied until a new legislation removes the unconstitutionality of that provision.

B. Whether the Expropriation Provision infringes on the petitioners' property rights

The Project in itself satisfies the requirement of public necessity. The Expropriation Provision has the legitimate purpose of setting forth for the smooth operation of the Project. Private companies, under certain conditions, may also exercise the constitutional authority to expropriate land for public use, and the Expropriation Provision enables the operator of the Project to work on the Project without friction; thus, the provision is a proper means to achieve the legislative purpose mentioned above. In addition, we do not find that the Expropriation Provision violates the rule of least restrictiveness considering that: i) if the Project operator is not granted the authority of expropriation, the fulfillment of public interest through implementing the Project would be interrupted or delayed by the unilateral intent of the people who do not agree with the compensation; ii) the process up to the expropriation is proceeded under the lawful procedure of NLPUA; iii) the operator of the Project is required to pay proper compensation to the owners of land subject to the expropriation; and iv) an effective remedy such as the right to file an administrative suit is available for the case where there is a deficiency in an expropriation disposition. Furthermore, in light of the role urban planning facilities play in our communities, the Expropriation Provision cannot be deemed to have failed in balancing between the public interest and the private interest. Therefore, the Expropriation Provision

does not infringe on the petitioners' property rights either by not satisfying the requirement of public necessity of Article 23 Section 3 of the Constitution or by violating the rule against excessive restriction.

2. Concurring Opinion of One Justice

The Definition Provision stipulates "sports facilities" as a sort of "infrastructure" of NLPUA and the Court quotes an instance of a "golf course," which is set forth by the regulation rather than the statute, as the ground for the unconstitutionality of that provision. By doing this, in my view, however, the Court causes confusion in the reasoning of unconstitutionality in a constitutional complaint under Article 68 Section 2 of the Constitutional Court Act where the Court is required only to consider the unconstitutionality of "statutes." By delivering its judgment of incompatibility with the Constitution, the Court confuses the legislative both about the grounds of unconstitutionality of the Definition Provision or about up to which part of that provision is unconstitutional. This leads to a weakening effect on the binding force and effectiveness of the Court's decision of incompatibility.

3. Dissenting Opinion of One Justice

In my view, if a private entity becomes main agent of the expropriation, it is hard to ensure profit from that expropriation is reverted to the benefit of the entire community and thus, expropriation by a private entity shall be constitutionally justified only after we establish such an elaborate systematic regulation that would guarantee the duration of public necessity of expropriation and revert the profit of such expropriation to the benefit of entire community. The instant case, however, lacks such elaborate systemic regulation, and thereby violates the principle of equality and infringes on the petitioners' property rights.

4. Dissenting Opinion of One Justice

Even though the Definition Provision prescribes sport facility as

coming under infrastructure without any conditions, such sport facility shall be one that serves the public interest, justifiably designated as a urban planning facility in course of deciding the specific urban planning facility project. If, a sport facility that lacks public interest is determined to be a part of the Project facilities, it is the decision process where the review and determination was erroneous that shall be redressed. Thus, it does not appear to me that the Definition Provision itself is unconstitutional.

Public necessity for the construction of a golf course which is open to members only cannot be considered to be significant. Therefore, in my view, the Expropriation Provision that grants the authority of land expropriation to private entities that construct golf courses for members only, violates Article 23 Section 3 of the Constitution.

12. Case on Discriminatory Assistance for the Bereaved Family of Patient Suffering from Potential Aftereffects of Defoliants

[23-1(B) KCCR 430, 2008Hun-Ma715, 2009Hun-Ma39·87(consolidated), June 30, 2011]

In this case, the Constitutional Court held that Article 2 of the Addenda to the Act on Assistance, etc. to Patients Suffering from Actual or Potential Aftereffects of Defoliants (revised by Act No.8793 on December 21, 2007), which stipulates that educational and employment assistance under the Act be applied only to the bereaved family of the patient who died after the effective date of the Act, is against the Constitution because it discriminates against the complainants, the bereaved family of the patient who died prior to the effective date, without any reasonable grounds and therefore infringes on their right to equality.

Background of the Case

Complainants are the children of those who, after serving in Vietnam and being discharged from military service, were found to have a malignant tumor and assessed to have high degree impairment by the Minister of Patriots and Veterans Affairs and then died prior to December 21, 2007.

By adding the part of 'assistance for education and employment shall continue even where the patient suffering from potential aftereffects of defoliants is deceased,' Article 7 Section 9 of the Act on Assistance, etc. to Patients Suffering from Actual or Potential Aftereffects of Defoliants revised by Act No.8793 on December 21, 2007, sets forth that, unlike the prior version which required the patient be alive for their families to receive assistance, even the bereaved family members of the patient are eligible for educational and employment assistance. However, Article 2 of the Addenda (hereinafter the "Instant Provision) limits those who are eligible for such assistance by stipulating that the revised Article 7 Section 9 of

the Act shall apply to patients suffering from actual or potential aftereffects of defoliants who died after December 21, 2007, the date when the Instant Provision entered into force.

In response, the complainants filed this constitutional complaint, asserting that the Instant Provision differently treats the patients according to the date of death and thus, infringes on their right to equality by excluding the complainants from the benefit of the revised Article 7 Section 9 of the Act.

Provision at Issue

Addenda to the Act on Assistance, etc. to Patients Suffering from Actual or Potential Aftereffects of Defoliants (revised by Act No.8793 on December 21, 2007)

Article 2 (Applicability of Assistance for Education and Employment where Patients Suffering from Potential Aftereffects of Defoliants are deceased)

The amended provisions of Article 7 Section 9 shall apply to patients suffering from actual or potential aftereffects of defoliants who have died after this Act enters into force.

Summary of Decision

In a 7 (unconstitutionality) to 2 (incompatibility) vote, the Court held the Instant Provision unconstitutional.

1. Court Opinion

The expansion of the scope of assistance by the revised Article 7 Section 9 of the Act amounts to a gradual improvement of system as the provision, unlike the prior version which provided assistance for family members of patients only for the duration of the patient's life, was amended on December 21, 2007 to allow the bereaved family members of such patient to be eligible for educational and employment assistance. The limiting itself of the eligibility to that assistance cannot

be an issue of infringement on the right to equality but, in such case, there must be a reasonable ground to set such limits so that it does not violate the equality right of those excluded from the benefits.

The Instant Provision prescribes that the benefit eligibility shall be decided by the date of death of patient suffering from potential aftereffects of defoliants. Such dates of death, however, vary depending upon nothing but accidental coincidence because the date and severity of disease transmission or the progress of disease may differ according to the types of aftereffects of defoliants. The justifiable criteria for assistance eligibility of the bereaved family should be the degree of personal sacrifice and contribution of the patient, the extent of hardships of life or the differences in the need for assistance for the family of the deceased. The date of death of the patient is not related to any of those criteria. Thus, we conclude that a different treatment among the families of the deceased based only on the date of death of patients shall not be deemed to be a differential treatment with reasonable grounds, infringing the complainants' right to equality.

While the Instant Provision only confines the scope of beneficiaries, the provision for the assistance to the bereaved family separately exists. Thus, there is no need for concern that any legal vacuum or confusion would be caused by the Court's decision of unconstitutionality of the Instant Provision because the benefits provision will not disappear for those who have been receiving such benefits. Thus, there is no need for the Court to particularly hold a decision of incompatibility with the Constitution and therefore we hold the Instant Provision unconstitutional in order to immediately restore the complainants' right to equality infringed by the provision.

2. Dissenting Opinion of Two Justices

The Instant Provision contains two legislative intents: i) to limit those, among the bereaved families, eligible to the assistance and ii) as a concrete means to realize it, to establish the criteria for such eligibility under which only the bereaved family of the patient who died after December 21, 2007, the effective date of the Instant

Provision, is eligible for the assistance. Because only the latter one appears to be unconstitutional due to its infringement on the complainants' right to equality, the entire legislative resolution shall be considered to be a combination of constitutional and unconstitutional parts. If the Court delivers a decision of unconstitutionality of the Instant Provision, the former legislative intent aforementioned, which is constitutional as a legitimate exercise of legislative discretion in considering insufficient state resources, would lose its effect because, following the Court's holding of unconstitutionality of the Instant Provision, the government would have to provide all of the bereaved families with that assistance. In our view, the Court shall hold the Instant Provision incompatible with the Constitution and thus, allow the legislative to retain the constitutional part of the Instant Provision, the limiting of the scope of beneficiaries, and to revise the part of unconstitutional criteria so that it sets up reasonable criteria that would be constitutional.

13. Case on Criminal Punishment of Those Who Issued a Check but Failed to Pay

[23-2(A) KCCR 65, 2009Hun-Ba267, July 28, 2011]

The Constitutional Court held that Article 2 Section 2 of the Illegal Check Control Act, which imposes criminal punishment on a person who has issued or drawn up a check but fails to pay the check by the specified date due to shortage of deposits, suspension of transactions, or cancellation or termination of a check contract, is not against the Constitution because that provision violates neither the rule against excessive restriction nor the principle of equality. The Court also held that the provision does not amount to be an infringement on the dignity of human beings because it does not compel the issuer or the drawer to discharge debts on security of his or her body.

Background of the Case

Petitioner was charged with violating the Illegal Check Control Act (hereinafter, the "Act") and thereafter convicted because, although the check he had issued was legally presented to be paid, he failed to pay the check due to suspension of transactions.

Against the Court's conviction, the petitioner filed an appeal with the Jeju District Court and, while the case was pending, moved the court to file a request with the Constitutional Court for a constitutional review of the provision at issue, Article 2 Section 2 of the Illegal Check Control Act (hereinafter, the "Instant Provision"), but the Court denied that request. In response, on October 9, 2009, the petitioner filed this constitutional complaint.

Provision at Issue

Illegal Check Control Act (revised by Act No.1747 on February 26, 1966, but before revised by Act No.10185 on March 24, 2010)
Article 2 (Criminal Responsibility of Issuer of Illegal Checks)

(2) Section(1) shall also apply in cases where a person who has issued or drawn up a check fails to pay the check by the specified date due to shortage of deposits, suspension of transactions, or cancellation or termination of a check contract.

Summary of Decision

1. Court Opinion

The decisions on what kind of conduct constitutes a crime or what penalty shall be imposed are basically questions of legislative policy so that wide legislative discretion or legislative policy-making power in making those decisions shall be recognized. We find that the Instant Provision is considered to be a proper means to achieve legitimate purposes of the Act because the Provision aims to stabilize national economic life and secure the functions of checks by restricting the conduct which betrays public trust on a check as a negotiable instrument and by securing payment thereof. In addition, it is hard to regard the legislative's determination as arbitrary when, in light of the reality where the number of crimes violating the Act is more than ten thousand cases per year, the legislature may rightly consider that a mere imposition of light punishments such as a charge of fine or financial sanctions is not sufficient to achieve the aforementioned legislative purposes. Moreover, the public interest aims of the Instant Provision - securing the functions of checks and stabilizing national economic life by securing payment of checks - is very important, while the private interests to be restricted do not appear to be significant. Therefore, the Instant Provision does not violate the rule against excessive restriction.

Petitioner asserts that the Instant Provision discriminates against the issuer of check by favoring the issuer of a promissory note. However, a check in its nature of negotiable instrument as a substitute for cash, is inherently different from a promissory note and thus, the issuer of a check and the issuer of a promissory note shall not be treated as the same group or, even in the instance where they can belong to the

same group, a different treatment between them shall be deemed to have reasonable grounds.

On the other hand, the petitioner argues that the application of the Instant Provision to the check issued for credit purposes not only goes beyond the scope necessary to achieve the purposes of the Act but also violates the principle of equality. However, the Court disagrees with this argument because it is almost impossible for ordinary people to tell whether a check has been issued for credit purposes since such check cannot be differentiated from the other ordinary checks in appearance. Moreover, those checks issued for credit purposes can always be circulated. For the foregoing reasons, this Court concludes that there is still a reasonable basis to treat a check issued for credit purposes the same as the ordinary checks.

We also cannot accept the petitioner's contention that the Instant Provision either infringes on the dignity of human beings or violates international law because that provision is not for compelling the payment of debt on security of the petitioner's body but only for ensuring the primary function of a check by punishing the conduct which betrays the public's trust on a check as a negotiable instrument.

2. Dissenting Opinion of Two Justices

The language of the Instant Provision is so vague in itself that we can hardly determine whether the conduct required to be the element of the crime is either 'the act of issuing or drawing a check' or 'the act of failing the payment by the specified date,' when the crime is deemed committed, what constitutes criminal intent, or when that criminal intent should exist. Furthermore, even with the assistance of the interpretation of the Supreme Court, the individuals subject to the provision, from the wording of the Instant Provision, can hardly foresee what acts will make him or she criminally liable.

By prescribing suspension measures as one of the elements of the crime even though the criminal intent of the issuer of the suspended check cannot be involved in such measures, the Instant Provision,

which is to punish intentional offences, increases the vagueness in terms of its interpretation.

In light of other countries' legislation, it is rare that an issuer of a check is criminally liable only because his or her check has bounced and, even in the case when he/she is to be punished, the provision for such punishment is very strict and clear.

For the foregoing reasons, in our view, the Instant Provision violates the rule of clarity and therefore, is against the Constitution.

14. Case on Prohibition of Transfer of Cash Cards etc. and Criminal Punishment of its Violation

[23-2(A) KCCR 95, 2010Hun-Ba115, July 28, 2011]

In this case, the Constitutional Court unanimously held that the parts of two provisions at issue, the part of 'transfer of access devices' of Article 6 Section 3 of the former Electronic Financial Transactions Act which prohibits the transfer of access devices, such as cash cards, and the part of 'transfer of means access devices' of Article 49 Section 5 Item 1 of the above Act which imposes punishment on the violators of Article 6 Section 3 of that Act, are not against the Constitution. The Court found that the former provision does not infringe on the freedom of contract, the rights to property or equality of the owners of the access devices and that the latter provision does not go beyond the limits of legislative discretion in defining crimes and selecting statutory sentences for those crimes.

Background of the Case

Petitioner received a summary order for violation of the Electronic Financial Transactions Act (hereinafter, the "Act") by transferring access devices for electronic financial transactions to others when, around August 21, 2008, he opened nine savings books and from banks including ○○NH Bank and sold them, as well as the cash cards to an anonymous person. The petitioner applied for a formal trial and, while the case was pending, moved the court to file a request with the Constitutional Court for a constitutional review of the provisions at issue, Article 6 Section 3 of the above Act which prohibits the transfer of access devices, such as cash cards and Article 49 Section 5 Item 1 of the Act which imposes punishment on the violators of the Article 6 Section 3 of the Act. Upon the court's dismissal, the petitioner filed this constitutional complaint.

Provision at Issue

Former Electronic Financial Transactions Act (revised by Act No.7929 on April 28, 2006, but before revised by Act No.9325 on December 31, 2008)

Article 6 (Selection, Use and Management of Means of Access)

(3) No one shall transfer or acquire the means of access or provide for the means of access subject to a right of pledge unless specifically provided for in other: Provided, that the same shall not apply to cases where such transaction is necessary in order to transfer or offer as security the electronic pre-paid payment device under Article 18 or electronic cash.

Article 49 (Penal Provisions)

(5) Any person who falls under any of the following subparagraphs shall be punished by imprisonment of not more than one year or by a fine not exceeding ten million won:

1. Any person who has transferred or acquired the means of access, or provided for the means of access subject to a right of pledge in violation of Article 6 Section 3.

Summary of Decision

The Court unanimously held that the parts of two provisions at issue, the part of 'transfer of access devices' of Article 6 Section 3 (hereinafter, the "Prohibition Provision") of the former Electronic Financial Transactions Act which prohibits the transfer of access devices and the part of 'transfer of access devices' of Article 49 Section 5 Item 1 (hereinafter, the "Punishment Provision") of the former Act which imposes punishment on the violators of the Article 6 Section 3 of the former Act, are not against the Constitution.

1. Decision on the Prohibition Provision

A. Whether the Prohibition Provision infringes on the freedom of contract or the right to property

For the aim of promoting financial conveniences for people and developing the national economy by ensuring the soundness and reliability of electronic financial transactions, the Prohibition Provision, in principle, bans transferring of access devices which is more likely to be used to commit crimes such as wire fraud. These purposes are legitimate and the means to achieve them is considered to be proper. The means also satisfy the least restrictiveness principle since the transfer of access devices is permitted when such transfer is necessary for the transfer or the offer as security of the electronic pre-paid payment device or electronic cash, or when the transfer is allowed by legislation out of necessity or otherwise. The Prohibition Provision, in addition, balances the interests concerned. While it pursues the national public interest in preventing any harm to the stability or reliability of electronic financial transactions, the transfer of access devices is merely to gain private profits and thus, does not constitute an essential right of individuals. Therefore, we cannot find that the Prohibition Provision infringes on the freedom of contract or right to property of the owners of the access devices.

B. Whether the Prohibition Provision infringes on the right to equality

Electronic prepayment means or electronic currencies are means of payment by electronic methods, so transferring access devices or providing for access devices subject to a right of pledge is necessary in order for the electronic prepayment means or electronic currencies to be transferred or be offered as security. Therefore, in such instances, the transfer or the offer of the access devices as security is permitted under the agreement with the issuer. Moreover, if the access device is transferred or provided for subject to a right of pledge to the same person to whom the electronic prepayment means or electronic

currencies is transferred or offered as security, there is no fear of harm to the stability or reliability of electronic financial transactions. On the contrary, there is a great concern that the allowance of transfer of access devices without any restriction would damage the stability or reliability of electronic financial transactions because the transfer can be used in crimes such as wire fraud and thus, such transfer shall not be permitted unless any other statutory provision specifically requires. The Prohibition Provision, therefore, is not deemed to infringe on the petitioner's right to equality because, unlike the instances where an electronic prepayment means or electronic currencies are to be transferred or offered as security, there is a reasonable ground for its prohibition when there is no other statutes requiring otherwise.

2. Decision on the Punishment Provision

It would be difficult for those who violate the Prohibition Provision by transferring access devices to avoid criticism that they damage the stability or reliability of electronic financial transactions and disturb the order of transaction only for the sake of their own interests. The situation is not different even in cases where the transfer is due to a serious economic hardship. In reality, the persons to whom the access devices are transferred commit bank fraud including so-called voice phishing and the number of victims is growing so much that, a mere imposition of administrative punishments such as a charge of fine, cannot be expected to have any regulatory effect on the transfer of access devices. In light of the nature of crime, it is also hard for the Court to conclude that the Punishment Provision strikingly is off balance under the criminal justice system, because the statutory punishment prescribed by the provision – imprisonment of "not more than" one year or a fine "not exceeding" ten million won – is not too severe considering the nature of the crime and the responsibilities of violators. Therefore, we cannot regard that the Punishment Provision goes beyond the limits of legislative discretion in defining a crime and choosing a punishment because that provision does not violate the principle of proportionality between punishment and responsibility.

15. Case on the Disclosure of Others' Conversation Illegally Obtained Under the Protection of Communications Secrets Act

[23-2 (A) KCCR 286, 2009Hun-Ba42, August 30, 2011]

The Constitutional Court decided that the part of 'the substances of conversations' of Article 16 Section 1 Item 2 of the Protection of Communications Secret Act that imposes punishment for disclosing or leaking the substance of conversations learned from recording or eavesdropping on undisclosed conversations between other individuals, does not violate the Constitution.

Background of the Case

The complainant, through an unknown channel, obtained the so-called 'X-File of Agency for National Security Planning' that recorded a conversation between Lee ○-Soo, then chief secretary to the chairman of Samsung Group, and Hong ○-Hyun, then chairman of JoongAng Media Network, wiretapped by the agents of the National Security Planning on September 1997. The complainant, a member of the National Assembly, published the substances of the conversation in a press release at the National Assembly Member's Office Building on August 18, 2005 and posted them on the Internet, and was indicted on charges of violating the Protection of Communications Secret Act that prohibits the disclosure of undisclosed conversations of others, learned through ways not stipulated by the Act. While being tried at the Seoul Central District Court, the complainant filed a motion to request for a constitutional review on Article 16 Section 1 Item 2 of the Protection of Communications Secret Act, which was dismissed by the court that also found him guilty on February 9, 2009. The complainant filed this constitutional complaint on March 10, 2009.

Provision at Issue

The issue is whether the part of 'the substances of conversations' of Article 16 Section 1 Item 2 of the Protection of Communications

Secret Act (hereinafter, the 'Instant Provision') is unconstitutional, and the provision at issue is as follows:

The Protection of Communications Secret Act (revised by Act No. 6546 on December 29, 2001)
Article 16 (Penal Provisions)
(1) Any person falling under any of the following subparagraphs shall be punished by imprisonment with prison labor for not more than 10 years or by suspension of qualification for not more than 5 years:
1. A person who has censored any mail, wiretapped any telecommunications or recorded or eavesdropped on any conversations between other individuals in violation of Article 3;
2. A person who has disclosed or leaked the substances of communications or conversations he or she has learned in a manner referred to in subparagraph 1.

Summary of Decision

In a vote of 7 (constitutional) : 1 (limited unconstitutional), the Constitutional Court decided that the Instant Provision that punishes any person who has disclosed or leaked the substance of conversations he or she has learned from recording or eavesdropping on undisclosed conversations between other individuals, does not violate the Constitution. The summary of the decision is as follows:

1. Court Opinion

A. Whether the freedom of expression is infringed

The Instant Provision that punishes a person who has disclosed illegally obtained conversations of others may be enforced to appropriately protect the freedom of expression of the violator by applying the general provision of circumstances precluding wrongfulness of Article 20 (Justifiable Act) of the Criminal Act. Therefore, the absence of a special provision of circumstances precluding wrongfulness,

as stipulated in criminal defamation, cannot be deemed to be in violation of the principle of proportionality in restricting the basic rights.

B. The principle of proportionality between punishment and responsibility

The Instant Provision imposes the same statutory punishment (imprisonment less than 10 years and suspension of qualification less than 5 years) on the person who has disclosed or leaked the substances of illegally obtained conversations he or she has learned of, as the person who has illegally acquired the undisclosed substances of conversations of others. The reason for this is because the disclosure of illegally obtained conversations would severally invade the privacy of conversations, depending on manner, time, scope of the disclosure, as much as the act of illegally obtaining contents of conversations. Considering the gravity of damages, nature of crime, protected interests, our history and culture, values and legal sense of the people, and crime survey and criminal policy of preventing the crime, the punishment the Instant Provision imposes is not excessive beyond the reasonable degree to achieve its purpose, even if the Instant Provision imposes the same statutory punishment on the person who has disclosed or leaked the substances of illegally obtained conversations he or she has learned of, as the person who has illegally acquired undisclosed substances of conversations of others, and that it does not provide optional pecuniary punishment.

C. Whether the principle of equality is violated

The Instant Provision intends to protect privacy through protecting the secrecy of private conversations, regardless of damages of defamation. Therefore, the nature of the Instant Provision that prohibits disclosure of conversations is not identical enough to the nature of criminal defamation to warrant a comparison between them. Even if they are comparable, the necessity of punishment through the Instant Provision is different from the one of criminal defamation in that the conduct punished by the Instant Provision is disclosing illegally obtained conversations, which invades the privacy of conversations

between individuals in private space. Therefore, it would be not unreasonable discrimination compared to criminal defamation, to omit the special provision of circumstances precluding wrongfulness for the person who disclosed conversations,.

2. Opinion of Limited Unconstitutionality by One Justice

The Instant Provision does not provide the special provision of circumstances precluding wrongfulness for the disclosure of information that was generated through illegal wiretapping, but legally obtained, even if the information is true and the disclosure is solely for the public interest. It would be unconstitutional to the extent that the Instant Provision excessively protects the right of secrecy of communications whereas it neglectfully protects or abandons the freedom of expression, among the two conflicting basic rights. The unconstitutional part would be removed by the construction of limited unconstitutionality. Therefore, the Instant Provision is unconstitutional to the extent that it is applied where the information, which is true, that was generated through illegal wiretapping, but legally obtained without any wrongfulness, has been disclosed or leaked solely for the public interest.

16. Challenge against Act of Omission Involving Article 3 of "Agreement on the Settlement of Problem concerning Property and Claims and the Economic Cooperation between the Republic of Korea and Japan"

[23-2(A) KCCR 366, 2006Hun-Ma788, August 30, 2011]

In this case, the Court found unconstitutional respondent's failure to resolve, under Article 3 of the "Agreement on the Settlement of Problem concerning Property and Claims and the Economic Cooperation between the Republic of Korea and Japan," the dispute over interpretation of whether the damage claims filed by the complainants against Japan, in the capacity of comfort women, have been extinguished by Article 2 Section 1 of the same Agreement.

Background of the Case

The complainants in this case are victims so-called "comfort women," who were forced into sexual slavery by the Japanese military during World War II.

On June 22, 1965, the Republic of Korea concluded "Agreement on the Settlement of Problem concerning Property and Claims and the Economic Cooperation between the Republic of Korea and Japan (Treaty No. 172, hereinafter the "Agreement")" with Japan. According to Article 2 Section 1 of the Agreement, Japan shall provide the Republic of Korea with a specific amount of aid or loan not confined to any particular purpose, but this shall serve as a full and final settlement of issues related to the properties, rights and interests of the two parties and their peoples (including juridical persons), as well as claims between the two parties and their peoples.

The problem concerning comfort women victims has been seriously raised since 1990. Japan has insisted that every right to claim damages against the country pursuant to the aforementioned clause (Article 2 Section 1 of the Agreement) has been extinguished and has

continuously refused to pay damages to the complainants, whereas the Korean government has expressed its position that "illegal acts against humanity" involving state power, such as the comfort women issue, are not considered to have been resolved by the Agreement and the Japanese government should therefore be held legally accountable in this regard.

Against this background, the complainants filed this constitutional complaint challenging the respondent's failure to act, arguing that the respondent's omission to take action in addressing the dispute over interpretation of Article 2 Section 1 of the Agreement as mentioned above infringed on their fundamental rights and is therefore unconstitutional.

Subject Matter of Review

In this case, the subject matter of review is whether the complainants' fundamental rights have been violated by the respondent, who failed to act under Article 3 of the Agreement in resolving the Korean-Japanese dispute over interpreting whether the complainants' damage claims as comfort women against Japan have been terminated by Article 2 Section 1 of the Agreement.

Summary of Decision

In a vote of 6 to 3, the Court ruled the omission to act by the respondent in this case unconstitutional for the reasons stated below.

1. Court Opinion of Six Justices

According to the Preamble, Article 10 and Article 2 Section 2 of the Constitution and Article 3 of the Agreement, the respondent's duty to pursue dispute settlement procedures under Article 3 of the Agreement stems from the constitutional request to assist and safeguard, in successful filing of claims against Japan, the people whose dignity and value were seriously compromised by Japan's

organized, continuous unlawful acts. As the fundamental rights of the complainants may be significantly undermined if the respondent fails to fulfill its duty to proceed with dispute resolution, the respondent's obligation to act in this case originates from the Constitution and is stipulated in law.

Although the Korean government did not directly violate the fundamental rights of comfort women victims, the government is still liable for causing disruption in settling the payment of claims by Japan and in restoring the victims' dignity and value in that it signed the Agreement without clarifying details of the claims and employing a comprehensive concept of "all claims." Taking note of such responsibility on the part of the Korean government, it is hard to deny that the government has the specific duty to pursue elimination of the disrupted state in settlement of claims.

In fact, the claims of comfort women victims against far-reaching anti-humanitarian crimes committed by Japan constitute the property rights guaranteed by the Constitution. And the payment of claims would imply post-facto recovery of dignity, value and personal liberty of those whose rights had been ruthlessly and constantly violated. In this sense, preventing the settlement of claims would not just be confined to the issue of constitutional property rights but would also directly concern the violation of dignity and value as human beings. Hence the resulting infringement of fundamental rights is of great implication. At the same time, the victims of comfort women are all aged, which means, if there is additional delay in time, it may be permanently impossible to do justice to history and recover the victims' dignity and value as human beings through settlement of claims. Therefore, considering that the victims' claims serve as a desperate remedy for violation of fundamental rights and given the background and circumstances of signing the Agreement as well as domestic and foreign developments, it is not so unlikely that this case may result in an effective judicial remedy.

Even if the nature of diplomacy that requires strategic choices based on understanding of international affairs is taken into account,

"possible elevation to an exhaustive legal dispute" or "uneasiness in diplomatic relations," which are very unclear and abstract reasons set forth by the respondent as rationale for omission to act, can barely suffice as reasonable causes or national interests that need serious consideration, for disregarding remedy for the complainants faced with critical hazard of fundamental rights violation.

All the aforementioned factors considered, pursuing dispute settlement under Article 3 of the Agreement would be the only rightful exercise of power consistent with the state's responsibility to protect fundamental rights of citizens. As the failure of the respondent to intervene has resulted in serious violation of fundamental rights, the omission to act is in violation of the Constitution.

2. Dissenting Opinion of Three Justices

Firstly, the state's duty to guarantee the fundamental rights of citizens as provided in Article 10 of the Constitution and the state's duty to protect citizens residing abroad as prescribed by Article 2 Section 2 of the Constitution as well as the Preamble of the Constitution, simply proclaim the general and abstract duty of the state toward the public or the basic order of value of the nation, and therefore the provisions in themselves do not stipulate a specific duty of action toward the citizens. And this is also an established precedent of the Court.

Second, the Agreement simply enforces the obligations between Japan and the Republic of Korea as parties to the pact, and so the "Korean government's duty to act on behalf of the complainants" cannot be derived from Article 3 of the Agreement, which does not stipulate any "mandatory" actions either. Furthermore, the Court has set a precedent in its prior case that the call for diplomatic resolution and referral to arbitration in the Agreement falls within the "scope of diplomatic discretion" of the Korean government (KCCR 98Hun-Ma206, Mar. 30, 2000), but the majority opinion of this case eventually leads to a decision contrary to the precedent.

16. Challenge against Act of Omission InvolvingArticle 3 of "Agreement on the Settlement of Problem concerning Property and Claims and the Economic Cooperation between the Republic of Korea and Japan"

The "responsibility to pursue diplomatic resolution" as provided in Article 3 of the Agreement falls within the area of highly political actions where objective standards can rarely be applied to making judicial judgments on by whom, how, to what extent and how far the diplomatic resolution is to be carried out. In this context, although such an area involving diplomatic resolution is subject to judicial review of the Court, it is to be admitted that judicial restraints are also required.

Indeed, it is all of our common and sincere hope that every possible state action be taken in light of the desperate need for remedy of fundamental rights of the complainants who were mobilized as comfort women against their will by Japan and were completely deprived of their human dignity and value. Yet diplomatic resolution cannot be forced upon the respondent beyond the permissible boundary of the Constitution, laws and interpretation of constitutional principles. This boundary is a constitutional limit that has to be observed by the Court in accordance with the principle of separation of powers.

17. Conscientious Objector Case (Establishment of Homeland Reserve Forces Act)

[23-2(A) KCCR 132, 2007Hun-Ka12, 2009Hun-Ba103(consolidated), August 30, 2011]

The Constitutional Court held that the part of 'a person who fails to receive training without any justifiable ground' of Article 15 Section 8 of the Establishment of Homeland Reserve Forces Act, which imposes criminal punishment on a person subject to reserve forces training upon failure to take part in the training, is not against the Constitution. The Court found that such part does not infringe on the freedom of conscience of conscientious objector.

Background of the Case

All of the defendants at the requesting court are Jehovah's Witnesses. The defendants, subject to reserve forces training, were accused of violating the Establishment of Homeland Reserve Forces Act when they were called up for a reserve forces training but failed to attend such training. While the case was pending, the court filed a request with this Court for a constitutional review of the Statute, arguing that the part of 'a person who fails to receive training under 6(1) without any justifiable ground' of Article 15 Section 8 of the former Establishment of Homeland Reserve Forces Act (hereinafter, the "Instant Provision") infringes on the defendants' freedom of conscience.

Provision at Issue

Establishment of Homeland Reserve Forces Act (before revised by Act No. 9945 on January 25, 2010)

Article 15 (Penal Provisions)

(8) A person who fails to receive training under 6(1) without any justifiable ground shall be punished with imprisonment with prison labor for not more than one year, by a fine not exceeding two million won, by detention, or by a non-penal fine.

Summary of Decision

The Constitutional Court held that the Instant Provision is constitutional.

1. Court Opinion

The criminal conduct punished by the provision at issue is not 'the refusal to take part in the reserve force training during the entire term of reserve forces service' but 'the failure to attend a specific reserve force training of which the person has been notified, without any justifiable ground.' Thus, even though a court's conviction against a conscientious objector refusing service training is finalized, that decision is for his refusal to attend the particular reserve force training of which he has received notice, such that he may be punished in cases where he refuses newly imposed training. Therefore, we do not find that the Instant Provision violates the prohibition against double jeopardy.

By compelling reserve force training, which is part of the duty of national defense, the Instant Provision intends to maintain military strength of the reserve forces and equitability or fairness in fulfilling military duties, which is to ultimately ensure national security, a constitutional interest. These purposes are legitimate and the means adopted by the Instant Provision is proper to achieve those purposes since it compels the fulfillment of reserve force drills by imposing criminal punishment on persons disobeying the order to attend those drills.

The issue of whether we should adopt the system of alternative service in terms of reserve service duty is a question of whether the introduction of that system would hinder the accomplishment of a significant public interest – national security or not. A careful consideration, thus, should be given to the adoption of the system of alternative service and thus, the entire national defense including active service and reserve service must be examined in terms of national security.

It is hard for us to find that the adoption of alternative service will

not hamper the accomplishment of significant public interests of national security and fairness in imposition of military duties, considering the following: the unique security situation of our nation; loss of military forces which could be caused by adopting an alternative service system; difficulties in determining whether a refusal of reserve service training is based on genuine conscience; a concern that an introduction of alternative service system against public opinion would likely hinder social integration and thus, seriously undermine overall national capacity; and the fact that certain prerequisites required by the case laws on this subject matter of this Court still have not been met.

We, thus, cannot conclude that the Instant Provision, notwithstanding the fact that it prescribes criminal punishment against those who refuse training for reserve troops without adopting an alternative service system, either violates the rule of the least restrictive means or fails to balance the interests concerned. Therefore, the Instant Provision does not infringe on the defendants' freedom of conscience.

On the other hand, the Instant Provision uniformly regulates any refusal to reserve force training, whether or not that refusal is based on conscience or whether or not that conscience is religious, and therefore, it does not discriminate people based on conscience or religion, not violating the principle of equality.

We cannot find that the Instant Provision imposing criminal penalties on those refusing to have reserve service training violates Article 6 Section 1 of the Constitution, which declares the principle of respect for generally recognized international law, because of the following: we find it difficult to consider that the right to conscientious objection is automatically recognized under the International Covenant on Civil and Political Rights, which our country signed on April 10, 1990, or the Covenant created legally binding obligation as to conscientious objection; there have been no international treaties for human rights which expressly recognize the right to conscientious objection; and in our country, the right to conscientious objection cannot be recognized as a generally recognized rule of international

law because we cannot deem that a customary international law guaranteeing that right has been established, although certain countries including some European countries protect that right.

2. Concurring Opinion of One Justice

All citizens shall have the duty of national defense under the conditions as prescribed by statute and, in such case, a different treatment based on sex, physical conditions, or educational background may occur. If that different treatment is to be deemed not violating the right to equality guaranteed by the Constitution, the burden of the national defense duty should be fairly distributed to all citizens by providing an institutional framework where the restraints on basic rights caused by the enforcement of military service duties are relieved or the compensations for the loss caused by the restraints are offered.

In my view, however, it is hard to regard that national defense duties are impartially distributed among people as a whole considering many statutory provisions stipulating the details of national defense duty. Besides, we do not have any such framework mentioned above.

In light of the current situation where no compensation for the loss caused in fulfilling military service duty is provided, adoption of the alternative service for the reason of freedom of conscience could not only tear apart the system of universal conscription adopted by our nation but also hamper social integrity and thus, cause serious damage to the national capacity as a whole.

For the reasons stated, I would hold that the Instant Provision punishing conscientious objectors is not against the Constitution unless a system such as appropriate compensation for carrying out military duties is offered in order to alleviate the discriminatory treatment caused by the fulfillment of those duties.

3. Concurring Opinion of One Justice

The Instant Provision is a provision imposing the duty of national defense and thus, the Court must apply the standard of constitutional review for cases where the Constitution imposes basic duties on citizens. The purposes of the imposition of the duty in the instant case are legitimate and the details of such imposition are also reasonable and appropriate as they sufficiently respect other constitutional values which the legislature in its imposition of basic duties should consider. We can also recognize the fairness of the imposition of such duties. Accordingly, I would like to conclude that, without any further review on the issue of restriction on the defendants' basic rights, which are inevitably caused by the Instant Provision, the Instant Provision does not violate the Constitution.

4. Dissenting Opinion of Two Justices

When the constitutional norms such as basic rights and citizen's duties guaranteed or imposed by the Constitution confront and conflict with each other, the Court has to construe the statutory provisions in a way to pursue harmony among those norms rather than to select one and discard the others. In the instant case where the freedom of conscience and the duty of national defense conflict with each other, the Instant Provision shall be interpreted in a way to balance those norms as we stated above. The Court, thus, must construe the part of 'justifiable ground' of the Instant Provision such that it realizes and harmonizes those norms to the best in proportion to their constitutional values – between freedom of conscience sought by the defendants based on their sincere and dire conscience and the duty of national defense under the Constitution. In their case laws, however, the Court and the Supreme Court have construed the Instant Provision as meaning that the refusal of reserve service training cannot be a 'justifiable ground' under the Instant Provision. As a result, criminal penalties, the most severe form of governmental sanction, are imposed on the defendants who did not take the trainings of reserve service duty based on their conscience and, moreover, those penalties are imposed repeatedly, more than 10 times according to the times of

those training duties imposed. For the foregoing reasons, we find that the Instant Provision seriously infringes on the human dignity and value of the defendants and is such an excessive measure that it violates the basic ground for imposing criminal penalties, the rule of proportionality between criminal conduct and responsibility.

The examples of many other countries which have adopted and operated alternative service system for conscience objectors suggest that our concern about the increase of the number of pseudo-conscience objectors who would refuse to take the reserve service training is not accurate. If, by providing prior screening and follow-up control, we set out and operate the system of alternative service in a way that we can detect genuine conscience objectors from those who are not, it would be a great help in establishing and developing national defense and liberal democracy as well as freedom of conscience of the conscientious objectors. In our view, consequently, the Instant Provision is unconstitutional as far as the Court interprets the part of 'justifiable ground' of that provision as to not include a person's refusal of reserve service training based on his conscience.

18. Conscientious Objector Case (Military Service Act)

[23-2(A) KCCR 174, 2008Hun-Ka22, 2009Hun-Ka7 · 24, 2010Hun-Ka16 · 37, 2008Hun-Ba103, 2009Hun-Ba3, 2011Hun-Ba16(consolidated), August 30, 2011]

In this case, the Constitutional Court held that Article 88 Section 1 Item 1 of the former Military Service Act, which imposes criminal punishment on those who are subject to the draft but evade their required military service, is not against the Constitution because that provision does not infringe on the conscientious objector's freedom of conscience.

Background of the Case

All of the defendants at the requesting court are Jehovah's Witnesses. They were accused of violating the Military Service Act when they received a notice of enlistment but failed to report even after 3 days from the due date of enlistment for active duty service. While the case was pending, the court filed a request with the Constitutional Court for a constitutional review of the statute, contending that Article 88 Section 1 Item 1 of the former Military Service Act (hereinafter, the "Instant Provision") infringes on the freedom of conscience of conscience objectors.

Provision at Issue

Military Service Act (before revised by Act No. 9754 on June 9, 2009)

Article 88 (Evasion, etc. of Enlistment)

(1) Any person who has received a notice of enlistment for active duty service or a notice of call (including a notice of enlistment through recruitment) but fails to enlist in the military or to comply with the call, even after the expiration of the following report period from the date of enlistment or call without justifiable grounds, shall be punished by imprisonment for not more than three years: Provided,

That where a person who has received a notice of check-up to provide a call for wartime labor under Article 53(2) is absent from the check-up at the designated date and time without justifiable grounds, he shall be punished by imprisonment for not more than six months, or by a fine not exceeding two million won, or with penal detention:

1. Three days for enlistment for active duty service;

Summary of Decision

The Constitutional Court held that the Instant Provision is not against the Constitution.

1. Court Opinion

A. Whether the Instant Provision infringes on the conscientious objector's freedom of conscience

By compelling the fulfillment of national defense duties of citizens, the legislature intended the Instant Provision to secure military resources and retain equity or fairness in the allocation of military duties, ultimately to ensure national security, which is a constitutional interest. These purposes are legitimate and the means adopted by the Instant Provision is proper to achieve them since it compels the fulfillment of active service duty by imposing criminal punishment on those avoiding the draft.

In addition, the matter of whether we should adopt the system of alternative service in terms of active service duty comes down to the question whether the introduction of that system would interfere with the accomplishment of significant public interest - national security - or not. Thus, it is hard for us to find that the permission of alternative service would not hamper the accomplishment of significant interests, national security and fairness in imposition of military duties, considering the following: the unique security situation of our nation; loss of military forces which could be caused by adopting an alternative service system; difficulties in determining whether a refusal

of military service is based on genuine conscience; a concern that an introduction of alternative service system against public opinion would likely hinder social integration and thus, seriously undermine overall national capacity; and the fact that certain prerequisites required by the case laws of this Court still have not been met.

For the foregoing reasons, we cannot conclude that the Instant Provision, notwithstanding the fact that it prescribes criminal punishment against those who refuse to join the military while not adopting alternative service system, either violates the rule of the least restrictive means or fails to balance the interests concerned. Therefore, the Instant Provision does not infringe on the defendants' freedom of conscience.

B. Whether the Instant Provision violates the principle of equality

The Instant Provision uniformly regulates the evasion of military service whether or not that evasion is based on conscience or whether or not that conscience is religious, and therefore, it does not discriminate people based on conscience or religion, not violating the principle of equality.

C. Whether the Instant Provision violates Article 6 Section 1 of the Constitution which declares the principle of respect for generally recognized international law

We cannot conclude that the Instant Provision imposing criminal penalties on conscience objectors is inconsistent with Article 6 Section 1 of the Constitution, which declares the principle of respect for generally recognized international law, because of the following: we find it difficult to consider that the right to conscientious objection is automatically recognized under the International Covenant on Civil and Political Rights, which our country signed on April 10, 1990, or the Covenant created legally binding obligation as to conscientious objection; there have been no international treaties for human rights which expressly recognize the right to conscientious objection; and in our country, the right to conscientious objection cannot be recognized

as a generally recognized rules of international law because we cannot deem that a customary international law guaranteeing that right has been established, although certain countries including some European countries protect that right.

2. Concurring Opinion of One Justice

Every citizen shall have the duty of national defense under the conditions as prescribed by the statutes and, in such case, a different treatment based on sex, physical conditions, or educational background may occur. If that different treatment is deemed as non-discriminatory, not violating the right to equality guaranteed by the Constitution, the burden of the national defense duty should be fairly distributed to all citizens by providing an institutional framework where the restraints on basic rights caused by the enforcement of military service duties are relieved or the compensations for the loss caused by that restraints are offered. However, I believe that it is hard to regard that national defense duties are impartially distributed among people as a whole considering many statutory provisions stipulating the details of national defense duty. Besides, we do not have any such framework mentioned above.

Considering the current situation where no compensation for the loss caused in fulfilling military service duty is provided; adoption of alternative service for the reason of freedom of conscience could not only tear apart the system of universal conscription adopted by our nation but also hamper social integrity and thus, cause serious damage to national capacity as a whole. Therefore, I would hold that the Instant Provision punishing conscientious objectors is not against the Constitution unless a system such as appropriate compensation for carrying out military duties is offered in order to alleviate the discriminatory treatment caused by the fulfillment of those duties.

3. Concurring Opinion of One Justice

The Instant Provision is a provision imposing the duty of national defense and thus, the Court must apply the standard of constitutional

review for the cases where the Constitution imposes basic duties on citizens. The purposes of the imposition of the duty in the instant case are legitimate and the details of such imposition are also reasonable and appropriate as they sufficiently respect for other constitutional values which the legislature in its imposition of basic duties should consider. We can also recognize the fairness of the imposition of such duties. Accordingly, I would like to conclude that, without any further review on the issue of restriction on the defendants' basic rights, which are inevitably caused by the Instant Provision, the Instant Provision does not violate the Constitution.

4. Dissenting Opinion of Two Justices

For the cases where the constitutional norms such as basic rights and citizen's duties guaranteed or imposed by the Constitution confront and conflict with each other, the Court must interpret the statutory provisions in a way to pursue harmony among those norms rather than to select one while setting aside the others. Since the freedom of conscience and the duty of national defense conflict with each other in this case, the Instant Provision shall be interpreted in a way to balance between those norms as we stated above. The Court, thus, must construe the part of 'justifiable ground' of the Instant Provision such that it realizes and harmonizes those norms to the best in proportion to their constitutional values – between freedom of conscience sought by the defendants based on their sincere and dire need and the duty of national defense under the Constitution. Through their case laws, however, the Court and the Supreme Court have construed the Instant Provision as meaning that the refusal of military service duty cannot be a 'justifiable ground' under the Instant Provision. As a result, criminal penalties, the most severe form of governmental sanction, were imposed on the defendants who did not join the military based on their conscience, and even more, those penalties were heavy ones, namely imprisonment for one and a half years or more. For the reasons stated, we find that the Instant Provision severely infringes on the human dignity and value of the defendants and is such an excessive measure that overly violates the basic ground for imposing criminal penalties, the rule of proportionality between

criminal conduct and responsibility.

The concern that the number of pseudo-conscience objectors dodging of draft would increase if we adopt alternative service system is not accurate, considering the examples of many other countries which have adopted and operated alternative service system for conscience objectors. If we set out and operate the system of alternative service in a way that we can detect a genuine conscience objector from those who are not by providing prior screening and follow-up control, it would contribute greatly to the establishment and development of the national defense and liberal democracy as well as freedom of conscience of the conscientious objectors. We, consequently, conclude that the Instant Provision is unconstitutional as far as the Court interprets the part of 'justifiable ground' of that provision as to not include a person's refusal to accept the draft based on his conscience.

19. Competence Dispute Between the Speaker and Member of National Assembly regarding Opposition Debate Case

[23-2(A) KCCR 220, 2009Hun-Ra7, August 30, 2011]

The Constitutional Court held that, the respondent, the Speaker of the National Assembly, by not permitting an opposition debate lawfully requested by the plaintiff without having any resolution process to leave out that debate and pushing ahead with vote on those bill proposals, announcing that those proposals are adopted, infringed on the right to consider and vote a bill proposal of the plaintiff, a member of the National Assembly. However, the Court rejected the plaintiff's claim for invalidation of the respondent's announcement approving the bill proposals at issue.

Background of the Case

Plaintiff is a member of the National Assembly and respondent is the Speaker of the National Assembly. During the 12th main conference of the 281th special session held on March 3, 2009, the respondent proceeded with consideration and votes on the bill proposals, which had passed the review of standing committees, including one for partial amendment of the Act on Monopoly Regulations and Fair Trade, one for the Korean Finance Corporation Act, and one for complete revision of the Use and Protection of Credit Information Act. Plaintiff attended the main conference and requested an opposition debate by submitting an application orally as well as in writing. Respondent, however, did not permit an opposition debate and pushed ahead with the vote on those bill proposals, thereby announcing that those proposals are adopted. In response to that announcement, the plaintiff filed this competence dispute case with the Court, arguing that her right to consider and vote on a bill proposal is infringed.

Subject Matter at Issue

The subject matter at issue is whether the respondent's conduct of announcing approval of the bill proposals, item 66 on the agenda for the Korean Finance Corporation Act and item 56 on the agenda for complete revision of the Use and Protection of Credit Information Act (hereinafter, the "Instant Bill Proposals"), at the 12th main conference of the 281th special session infringes on the plaintiff's right to consider and vote a bill proposal and, furthermore, whether the respondent's announcement of approval of the Instant Bill Proposals is invalid or not.

Summary of Decision

The Constitutional Court unanimously held that the respondent's refusal to permit an opposition debate requested by the plaintiff infringed on the plaintiff's right to consider and vote a bill proposal but the Court rejected the plaintiff's claim for invalidation of the respondent's announcement approving the Instant Bill Proposals.

1. Court Opinion

Although the plaintiff's requests of an opposition debate on the Instant Bill Proposals were all made in an one-page application form, it is proper that the requests should be regarded as a lawful notice to the respondent because: there is no provision limiting the forms of request for an opposition debate in the National Assembly Act; it is hard to consider that there exists an established practice as to the forms of request for an opposition debate; and each agenda item and its essential contents, were specified in her application form. We also find that the plaintiff's oral requests for an opposition debate on the Instant Bill Proposals should be deemed to have been lawfully notified to the respondent.

Basically, even though the Instant Bill Proposals had been examined by the committees, a resolution of the plenary session is required in

order to omit the opposition debate lawfully requested by the plaintiff (the proviso of Article 93 of the National Assembly Act). In the instant case, the respondent, however, did not permit that debate and put the Instant Bill Proposals to the vote without having any resolution process for omitting the debate. This amounts to an infringement on the plaintiff's right to consider and vote on a bill proposal violating the proviso of Article 93 of the National Assembly Act.

However, an announcement of approval of bill proposal shall not be automatically regarded to be void unless it is a clear violation of the constitutional provisions on legislative procedure. The Constitution prescribes the 'majority rule' in Article 49 and the 'rule of open session' in Article 50 as the basic principles for the decision-making procedure of the National Assembly and thus, the validity of the respondent's announcement approving the bill proposals should be decided depending on whether that announcement has an obvious defect in its legislation procedure in terms of the constitutional provisions mentioned above. The considering and voting procedure for the Instant Bill Proposals in this case did not violate any provision of the National Assembly Act and we cannot find that the procedure violated any principles for the decision-making procedure of the National Assembly sessions stipulated by the Constitution, including the 'majority rule' in Article 49 and the 'rule of open sessions' in Article 50. Therefore, we deny the plaintiff's claim for invalidation of the respondent's announcement approving the Instant Bill Proposals.

2. Concurring Opinion of One Justice as for the Plaintiff's Claim for Declaration of Invalidity

In my view, it is inappropriate for the Court, in its decision on competence dispute among members of the National Assembly, to make a finding of revocation or invalidation according to Article 66 Section 2 of the Constitutional Court Act, ending up making a formative decision on the validity of a disposition. Rather, in light of the special constitutional position, authority and political policy-making power of the legislature, the Court in its review on competence dispute must basically make a decision only on whether a disposition at issue

violates the Constitution or Statutes so that the legislature itself may restore the constitutional order of authorities by following the Court's binding decision to be in conformity with the Constitution.

3. Concurring Opinion of One Justice as for the Plaintiff's Claim for Declaration of Invalidity

Considering the doctrine of separation of powers, the institutional purpose of competency dispute review and the purpose of Article 113 Section 1 of the Constitution prescribing the quorum for the Court's decision of unconstitutionality, I believe that, in principle, the Court's affirmative decision of invalidation, revocation, or omission of act in terms of conducts related to the legislation shall not be made. However, in cases where the infringement on rights is such a grave one that it basically denies constitutional values, a person may file a claim for finding of revocation or invalidation of a disposition with the Court unless that infringement was caused by his or her own fault.

20. Case on Placing Limitation on Number of Transfer of Workplace by Foreign Workers

[23-2(A) KCCR 623, 2007Hun-Ma1083, 2009Hun-Ma230·352(consolidated), September 29, 2011]

In this case, the Constitutional Court held that Article 25 Section 4 of the former 'Act on the Employment etc. of Foreign Workers' (hereinafter the 'Act') and Article 30 Section 2 of the Enforcement Decree of the Act (hereinafter the 'Enforcement Decree'), which limits foreign workers with employment permit from transferring their workplaces not more than three times and allows only one additional transfer if there is any exceptional ground specified by the Enforcement Decree, is constitutional and not in violation of the complainants' fundamental rights.

Background of the Case

Complainants are foreign workers who entered Korea with legitimate employment permit pursuant to the Act. The complainants, after transferring their workplaces three times following the procedures stipulated in the Act, became unable to transfer their workplace any more due to Article 25 Section 4 of the Act (hereinafter, the 'Instant Provision of the Act') and Article 30 Section 2 the Enforcement Decree (hereinafter, the 'Provision of the Decree'), whereupon they filed this constitutional complaint, arguing that the provisions at issue violate their freedom of occupation, etc.

Provisions at Issue

Former Act on the Employment, etc. of Foreign Workers (enacted by Act No. 6962 on August 16, 2003 before being revised by Act No. 9798 on October 9, 2009)

Article 25 (Permission for Transfer to Another Business or Place of Business)

(4) Any foreign worker's transfer to another business or place of

business under paragraph (1) shall not, in principle, exceed three times during the period of time prescribed in Article 18 (1): Provided, That the foregoing sentence shall not apply if there is any inevitable ground specified by Presidential Decree.

Former Enforcement Decree of the Act on the Employment, etc. of Foreign Workers (enacted by Presidential Decree No. 18314 on March 17, 2004 before being revised by Presidential Decree No. 22114 on April 7, 2010)

Article 30 (Permission for Transfer to Another Business or Place of Business)

(2) pursuant to the proviso of Article 25 Section 4 of the Act, the head of employment security office may allow additional transfer to another business or place of business only once when a foreign worker transfers

Summary of the Decision

1. Court Opinion

A. Decision on the Instant Provision of the Act

(1) The freedom to choose a workplace at issue in this case, among types of the freedom of occupation, is closely related to the right to pursue happiness as well as human dignity and value and therefore, should not be regarded as a right reserved exclusively for citizens but as a right guaranteed to all mankind. As such, foreigners shall enjoy the freedom to choose a workplace, even if limitedly so. Given the fact that the status of a legitimate workforce in our society has already been granted to the complainants who lawfully obtained employment permit, legally entered Korea and have been maintaining a regular life in our country, the complainants should be regarded as the bearers of the freedom to choose a workplace.

(2) The Instant Provision of the Act was enacted to protect local workers' employment opportunities and to contribute to the balanced development of national economy through effective supply and demand

of human resources for small or medium sized companies by systematic employment management of foreign workers, and the Act allows foreign workers to transfer workplaces up to three times during the three years of their stay in Korea for certain reasons stipulated in the Act and an additional transfer is possible if there is any exceptional ground specified by the Enforcement Decree. Therefore, the Instant Provision does not seem clearly unreasonable beyond the extent of discretion granted to the legislature, and does not infringe upon the complainants' freedom to choose a workplace.

(3) As the decision whether to increase the number of possible workplace transfers should be made in consideration of many aspects of the local labor market such as employment opportunities for local workers and the demand and supply of human resources for small or medium sized companies, this case falls into a case where the requirements of concreteness and clarity for delegated rule-making need to be relaxed. Also, considering the legislative purposes and overall intent of the Act, it is possible to predict that matters to be specified in the Presidential Decree by the delegation of the proviso of the Instant Provision would be the specific conditions under which additional transfer of the workplace is exceptionally allowed and the possible number of such additional transfers. Therefore, the proviso of the Instant Provision does not violate the principle against blanket delegation.

(4) The proviso of the Instant Provision stipulates "Provided, that the foregoing sentence shall not apply if there is any inevitable reason specified by Presidential Decree." But given the facts that unless additional transfers are unlimitedly allowed, delegation of the possible number of additional transfers to the Enforcement Decree is naturally required; and that pursuant to the principle of presumption of constitutionality, the proviso of the Instant Provision can be interpreted as 'Provided, that ··· if there any inevitable reason as the Presidential Decree stipulates,' which conforms to the Constitution, it is proper to consider that the Instant Provision also delegate the relevant specifics related to the possible number of additional transfer to be determined by the Enforcement Decree. Therefore, the Instant Provision of the

Enforcement Decree does not violate the principle of statutory reservation, as regulating matters delegated to it by its parental Act without deviating from the scope of delegation.

B. Decision on the Provision of the Enforcement Decree

Given the facts that the Provision of the Decree was provided to allow extra transfer of workplace in addition to the provision which allows foreign workers to transfer their workplaces up to three times during the three years of their stay in Korea; that the provision of the Enforcement Decree extensively stipulates almost all possible grounds for additional transfer of workplace not upon foreign workers' own initiative; and that the systemic management of foreign workers for maintaining national security and social order and the period of adjustment to the culture and language for the foreign workers are required, it can be concluded that the provision of the Enforcement Decree is neither excessively arbitrary without any reasonable cause nor in violation of the complainants' freedom to choose a workplace.

C. Conclusion

The Instant Provision and the Provision of the Decree neither infringe on the complainants' right to choose a workplace nor violate the principle against blanket delegation and the principle of statutory reservation.

2. Concurring Opinion and Dissenting Opinion by Two Justices

(1) Five Justices argue that foreigners are also entitled to the freedom to choose a workplace. But, as the right to choose a workplace is related more to the freedom reserved for 'citizens' than for 'all human beings', it does not extend to foreign nationals. Rather, the Instant Provision restricts the complainants' freedom of employment contract, which being closely related to foreign nationals' survival and human value and dignity, shall extend to foreigners. Therefore, the complainants are entitled to the freedom of employment contract.

(2) As the Instant Provision was enacted to protect local workers' employment opportunities and to contribute to the balanced development of national economy through effective supply and demand of human resources for small or medium sized companies, its legislative purpose is legitimate and the means to achieve the purpose is appropriate. Also, considering that the Instant Provision allows foreign workers to transfer workplaces up to three times during the three years of their stay in Korea for certain reasons stipulated in the Act and an additional transfer is possible if there is any exceptional ground specified by the Enforcement Decree, it neither violates the principle of least restrictive means nor breaks the balance between legal interests.

(3) As the provision of the Enforcement Decree not only stipulates the details of 'inevitable reason' delegated by the Act but also limits the number of additional transfer to 'one time' even when a case falls into one of the inevitable reason specified in the Enforcement Decree, it violates the principle of statutory reservation, deviating from the scope of delegation. Also, the provision of the Enforcement Decree includes some reasons for which foreign workers are not responsible such as a financial problem of workplace which count as a workplace transfer. And as it allows only one additional transfer in any case without exception, it fails to observe the principle of least restrictive means, and to keep the balance between the protected public interests and limited private interests. Therefore, the provision of the Enforcement Decree infringes upon the complainants' freedom of employment contract.

3. Dissenting Opinion by One Justice on the Provision of the Enforcement Decree

Even foreigners, if they have lawfully obtained employment permit, legally entered Korea and have been maintaining a regular life in our country, should be regarded as the bearers of the freedom to choose a workplace as long as lawfully staying in Korea, since it is required that they should be entitled to enjoy the freedom to choose means to make a living and maintain a regular life while guaranteed human

value and dignity. Therefore, the complainants' freedom to choose a workplace should be recognized and the provision of the Enforcement Decree infringes upon the complainants' freedom to choose a workplace, in violation of the principle of statutory reservation and the rule against excessive restriction.

4. Dissenting Opinion by One Justice (Opinion of Dismissal)

Fundamental rights, along with fundamental duties, are constitutional rights entitled only to Korean citizens as holders of sovereignty. Foreigners' rights can be protected as prescribed by laws and treaties but they are not entitled to file a constitutional complaint as a remedy for the infringement of fundamental rights pursuant to Article 68 Section 1 of the Constitutional Court Act. Thus, this constitutional complaint should be deemed unjusticiable.

21. Invalidation of Election upon Conviction of Spouse Case

[23-2(A) KCCR 692, 2010Hun-Ma68, September 29, 2011]

In this case, the Constitutional Court held that the provision at issue, Article 265 of the Public Official Election Act, which invalidates the election of a candidate of constituency in the instances where that candidate's spouse is sentenced to a fine exceeding three million one for committing election crimes, neither infringes the complainant's right to hold public office nor violates the rule against guilt-by-association.

Background of the Case

Article 265 of the Public Official Election Act (hereinafter, the "Instant Provision") is a provision invalidating the election of a candidate in the case where the spouse of that candidate or a person intending to become a candidate commits an election-related crime and thereafter is sentenced to a fine exceeding three million won. Complainant plans to run for the 19th general election for members of the National Assembly in his constituency, Gangdong-Kab election district, which is to be held on April 11, 2012. However, his spouse was sentenced to a fine of five million won for making an unlawful contribution. When he found himself placed in a situation where his election would be invalidated in accordance with the Instant Provision even if he wins a seat in the general election mentioned above, the complainant filed this constitutional complaint on February 2, 2010, contending that the Instant Provision infringes on his basic rights including the right to hold public office.

Provision at Issue

Public Official Election Act (revised by the Act No. 9974 on January 25, 2010)

Article 265 (Invalidity of Election due to Election Offense by Election Campaign Manager, etc)

If an election campaign manager, person in charge of accounting……

or candidate or lineal ascendant or descendant and spouse of the candidate, has committed a crime related to a contribution from among Articles 230 through 234, or 257(1), or a crime of illegal giving or receiving of the political funds provided for in Article 45(1) of the Political Funds Act, and is sentenced to imprisonment or a fine exceeding three million won…… the election of the candidate of the constituency …… shall become invalidated.

Summary of Decision

In a vote of 4 to 4, the Court held that the Instant Provision neither infringes the complainant's right to hold public office nor violates the rule against guilt-by-association based on the grounds below.

1. Court Opinion

A. The term of 'the pertinent election' of the Instant Provision refers to a specific election for which a person intends to be a candidate at the time his or her spouse commits an election crime. That election can be reasonably recognized if we consider objective indicators including the candidate's position, people in contact with him or her, or his or her word and behavior. The recognition of the election at issue is to be finally decided by the criminal court that tries the spouse's illegal contribution for which the candidate's election is invalidated. For the foregoing reasons, it is hard for us to find that the term of 'the pertinent' election of the Instant Provision is inconsistent with the rule of clarity.

B. Moreover, the Instant Provision neither amounts to a guilt-by-association forbidden by Article 13 Section 3 of the Constitution nor is incompatible with the principle of personal responsibility because it imposes joint liabilities on the candidate based on his or her spouse's actual position and role as a person sharing inseparable common destiny with that candidate: the spouse, as a person sharing daily life with the candidate, is bound to frequently discuss the

election with the candidate; the spouse carries out various activities to make the candidate win the election by intimately sharing responsibilities with the candidate; and the spouse can, in effect, give directions to a campaign manager or a person in charge of accounting in a campaign office.

C. Considering that the spouse who committed an election crime is to be given a procedural guarantee – a court proceeding – and that the adoption of a separate process to effectuate an invalidity of election has its merits and faults, we also cannot find that the Instant Provision violates due process only because the candidate is not granted a separate procedural guarantee that offer an opportunity to make an excuse or a defense.

D. The public interest sought by the Instant Provision is a clean and fair election, a very important value which forms the core of democracy. On the contrary, the crime subject to control under the Instant Provision is a serious election crime which is at the heart of voter bribing. We also cannot look upon a candidate's winning an election as fair if an illegal election campaign influences the election to a certain extent. Moreover, it is an undeniable reality of our election culture that, in not a small number of cases, the family members of a candidate secretly and systematically share the role in committing illegal acts and wrongdoings. Therefore, we conclude that the Instant Provision does not violate the rule against excessive restriction and thus, does not infringe on the plaintiff's right to hold public office.

2. Dissenting Opinion of Four Justices

In our view, the Instant Provision is incompatible with the rule against guilt-by-association set forth by Article 13 Section 3 of the Constitution as it invalidates the election of a candidate in the cases where his or her spouse has only been sentenced to a fine exceeding three million won for committing an election crime, regardless of whether that candidate himself or herself is found to have liability because of his or her intent or managerial or supervisory relationships

with the spouse, leaving no possibility that the candidate would be exempted from the liability.

For due process prescribed by Article 12 Section 1 of the Constitution not to be violated, a certain process shall be provided for the very person suffering the disadvantage. The Instant Provision, however, neither gives the candidate any chance to go through a judicial process nor guarantees the candidate's right to take part in the criminal proceedings where his or her spouse is tried. For the reasons stated, the Instant Provision violates due process.

22. Installation of CCTV at Solitary Confinement Cell in Detention Center Case

[23-2(A) KCCR 726, 2010Hun-Ma413, September 29, 2011]

The Constitutional Court held that the installation of a closed-circuit television (CCTV) at the solitary confinement of the complainant, a post-conviction inmate, in order to guard and prevent the complainant from suicide, does not infringe the privacy right of the complainant.

Background of the Case

While the complainant was detained in ○○ Detention Center, the warden of that center installed a CCTV at the jail cell of the complainant and guarded the complainant by using that CCTV. The complainant, on July 5, 2010, filed this constitutional complaint contending that such 24 hour surveillance of him by using a CCTV amounts to an infringement on his basic rights guaranteed by Article 10 and Article 17 of the Constitution.

Summary of Decision

CCTV surveillance may be necessary to effectively keep an eye on an inmate with a higher risk of hurting himself or committing suicide and to prevent accidents in order to maintain order in correctional facilities. CCTV surveillance, however, shall be used only when necessary and should be a least restrictive means in accordance of Article 37 Section 2 of the Constitution as CCTV surveillance continues to watch and record an inmate's every movement 24 hours a day and thereby amounts to a restriction on that inmate's privacy right.

In the instant case, the CCTV surveillance purported to secure the safety of the complainant's life and health and this purpose is legitimate. Also, CCTV surveillance is deemed as a proper means to achieve that purpose because an observation only by a prison guard's

eyes creates a temporal and spatial vacuum in the prevention of prison accidents including suicide and self-injury.

In light of the Act on the Execution of Sentence and the Treatment of Prisoners (revised by Act No. 8728 on December 21, 2007 and enforced on December 22, 2008, hereinafter "ESTP") and its enforcement decree, various provisions regulating CCTV installation and operation are set forth in order to minimize the harm to inmates caused by the CCTV surveillance so that the restraint on the complainant's privacy is imposed in the least restrictive manner. Moreover, it would be difficult to find a more effective means than a continuous watch on the complainant's actions by the installation of CCTV for an immediate response to an emergency of suicidal attempt, considering the reality that it is impossible to provide sufficient personnel for a continuous, uninterrupted, direct monitoring. For the foregoing reasons, we find that the CCTV surveillance satisfies the element of least restrictive means.

Moreover, CCTV surveillance of the instant case strikes the balance between the interests related because the public interest in protecting the complainant's life and health and maintaining security and order in correctional facilities is no less important than the private interest in protecting the complainant's privacy right even though that surveillance substantially restricts on the complainant's privacy.

Therefore, we conclude that the CCTV surveillance of the instant case did not infringe on the complainant's privacy rights in violation of the rule against excessive restriction.

23. Case on Joint Liability Imposed on De facto Representative of a Corporation

[23-2(A) KCCR 884, 2010Hun-Ba307, October 25, 2011]

In this case, the Constitutional Court held that the part of a provision of the former Tourism Promotion Act, which automatically imposes criminal penalty on the corporate body for the offence committed by one of its employees in relation to the business, is unconstitutional. The Court, however, held that the other part of the same provision of the same Act, which punishes a corporate body for the offence committed by its representative, is not against the Constitution.

Background of the Case

Petitioner, a corporate body established for the purpose of attracting foreign tourists and acquiring foreign currency, has been operating a casino. The Jeju District Court convicted the petitioner of "not observing the regulations for casino operators since Chung ○○, the petitioner's vice president who is actually responsible for the management of that casino, allowed nationals to enter that casino and to gamble in that place." The petitioner filed an appeal with an appeals court (Jeju District Court, 2009No361) and, while the case was pending, also moved the court to request a constitutional review of the provision at issue, Article 80 of the former Tourism Promotion Act (hereinafter, the "Instant Provision"). Upon dismissal, the petitioner filed this constitutional complaint pursuant to Article 68 Section 2 of the Constitutional Court Act.

In the instant case, the petitioner contends that its vice president, Chung ○○, is 'an agent, an employee or other servant' of the petitioner and thus, only the part 'an agent, an employee or other servant of corporate body' of the Instant Provision requires the Constitutional Court's determination for the judgment on the original case and that the part is against the Constitution. The appeals court in charge of the petitioner's original case, however, rejected the petitioner's

motion to request for the Constitutional Court's review on the same part of the Instant Provision stated above on the ground that the part does not satisfy that relevance requirement (That court appears to have regarded that vice-president, Chung ○○, as 'the representative' of petitioner).

Summary of Decision

The Court, in a 7 to 1 opinion, held that the part of 'an agent, an employee or any other servant of a corporate body' of Article 80 of the former Tourism Promotion Act (hereinafter, the "Part of Employee of Instant Provision"), which imposes the same penalty on the corporation when its 'servant or others' violates Article 78 Section 7 of the same Act in relation to the business, is unconstitutional. However, the Court, in a 5 to 3 opinion, found that the part of 'the representative of corporate body' of Article 80 of the former Tourism Promotion Act (hereinafter, the "Part of Representative of Instant Provision"), which imposes the same penalty on the corporation when its 'representative' violates Article 78 Section 7 of the same Act in relation to the business, is constitutional based on the grounds below.

1. Part of Employee of the Instant Provision

A. Court Opinion

It is inconsistent with the rule of law and the rule of responsibility in criminal punishment derived from the principle of *nulla poena sine lege* for the government, without setting forth any provision on the structure of decision-making or action that would justify the blame on the corporation, i.e., without stipulating any responsibility attributed to the corporation for the effect of the wrongdoing committed by the servant or others, to inflict criminal punishment on that corporate body simply because its employee, etc. committed a crime related to his or her duties, which is imposing criminal penalty for another person acts regardless of responsibility in the crime.

B. Dissenting Opinion of One Justice

In my view, it is compatible with the principle of statutory interpretation in conformity with the Constitution if we interpret the Part of Employee of the Instant Provision as a criminal punishment that can be imposed only when a vicarious or supervisory negligence is made. Under the premise stated above, the Part of Employee of the Instant Provision cannot be regarded as a violation of the rule of responsibility in criminal punishment.

2. Part of Representative of the Instant Provision

A. Court Opinion

A corporate body acts through its organization and thus, once it appoints a representative, the legal effect of conduct of that representative shall belong to that corporate body so that it must be liable for any illegal act committed by its representative. The corporate body's liability for its representative's violation of regulations shall be considered to be one for its own violation of that regulation, namely a direct liability, and thus, that entity should be liable for an intentional offence if its representative intentionally commits an offence, and also be liable for negligence if its representative negligently violates a regulation. The Part of Representative of Instant Provision, therefore, is not inconsistent with the rule of responsibility in criminal punishment because it requires the responsibility of the representative to punish to corporation. In this case, the 'representative' of a corporate body includes a person in charge of actual management of business of the corporate body at issue who represents that entity regardless of his or her official title.

B. Dissenting Opinion of Three Justices

The Majority considers a criminal offense committed by a representative as one committed by the corporate body. This, however, not only is at odds with our legal system which makes a distinction between an individual and a corporate body, but also disregards the

independent decision-making process and the ways of action of such corporate body. According to the majority opinion, a person in charge of actual management of the business and representing a corporate body, regardless of his or her official title, should be deemed 'representative' of such corporate body. But it follows that the person's conduct must be deemed as the corporate body's conduct even when that person commits an offence for his or her own private interest and also by ignoring the requirements under the law as to the decision-making process and ways of action of the legal entity. This would lead to the unfair consequence of making the corporate body, a victim, liable for the offence. Furthermore, if the corporate body is held responsible for intentional wrongdoings, through the intentional wrongdoings of the representative, this would effectively admit that a corporation is capable of committing intentional crimes.

24. Case on 'Important Meeting' of Residents Association for Housing Redevelopment and Reconstruction

[23-2(A) KCCR 744, 2010Hun-Ka29, October 25, 2011]

The Constitutional Court held that the part of 'an important meeting' of Article 81 Section 2 of the former Act on the Maintenance and Improvement of Urban Areas and Dwelling Conditions for Residents associated with Article 86 Item 7 of the same Act, is unconstitutional because it violates the rule of clarity and the principle of punishment by statute. The above provision requires residents associations, which carry out housing redevelopment, reconstruction projects or rearrangement projects, to make stenographic records, audio recordings or video footage when an 'important meeting' is held, and imposes punishment on the executive directors of those residents associations upon failure to make such records, etc.

Background of the Case

Defendant at the requesting court is the chairman of a residents association for housing reconstruction project. He was indicted for violating Article 86 Item 7 of the former Act on the Maintenance and Improvement of Urban Areas and Dwelling Conditions for Residents (hereinafter, the "ACT") when he failed to make stenographic records, audio recordings or video footage of an emergency meeting of the board of directors held on December 26, 2008. The requesting court filed with the Constitutional Court for a constitutional review of statutes, asserting that the part of 'an important meeting' of Article 81 Section 2 of the ACT violates the rule of clarity.

Provision at Issue

The former Act on the Maintenance and Improvement of Urban Areas and Dwelling Conditions for Residents (revised by Act No.8785 on December 21, 2007, but before being revised by Act No.9444 on February 6, 2009)

Article 86 (Penal Provisions)

Any person who falls under one of the following subparagraphs shall be punished by imprisonment for not more than one year or a fine not exceeding ten million won:

(7) The chairperson of the promotion committee or executive directors of the resident association for a reconstruction or development project who have failed to prepare the stenographic records, etc. or to keep the relevant data until the time of liquidation, in violation of Article 81(2)

The former Act on the Maintenance and Improvement of Urban Areas and Dwelling Conditions for Residents (acted by Act No.6852 on December 30, 2002, but before revised by Act No.9444 on February 6, 2009)

Article 81 (Disclosure, Preservation, etc. of Relevant Data)

(2) The chairperson of the promotion committee, the executive directors of the resident association for a reconstruction or development project or the representative of company specialized in a rearrangement project shall prepare stenographic records, audio recordings or video footage in cases when the general meeting or an important meeting is held, and keep them until the time of liquidation.

Summary of Decision

The Court unanimously held that the part of 'an important meeting' of "Article 81 Section 2" of the ACT (hereinafter, the "Instant Provision") associated with Article 81 Section 2 of the ACT is against the Constitution based on the reasons below.

From the language of 'an important meeting' of the Instant Provision, we cannot figure out whose 'meeting' shall be subject to that provision, and the term 'important' itself cannot independently serve as a standard of review. Therefore, it is even unpredictable whether the agenda of that meeting or the outcome actually decided from that meeting determines whether a meeting is 'important' or not.

It is impossible to foresee which items on the meeting agenda will

be disputed and there is no other provision regulating the interpretation of an 'important meeting' of the Instant Provision. Even in light of the purpose of the Instant Provision and relevant provisions, it is impossible for us to find an objective and clear standard that is helpful for the interpretation of the term of 'an important meeting' of the Instant Provision. In addition, the agenda of general meeting also cannot guide the interpretation of 'important meeting' of the Instant Provision when the Instant Provision sets forth 'the general meeting or an important meeting,' listing the general meeting and an important meeting in parallel form.

The possible subjects of the Instant Provision are the chairperson of the promotion committee, the executive directors of the resident association for reconstruction or development project or the representative of company specialized in a rearrangement project. But even these people cannot be deemed to have expertise in figuring out the scope of 'important meeting' of the Instant Provision in the present circumstances where no standard of interpretation of 'important meeting' is offered. Furthermore, even government institutions are in disagreement on their interpretations of such 'important meeting.' For the foregoing reasons, we find that, even to those subject to the Instant Provision, it is also unforeseeable which meeting amounts to an 'important meeting' of the Instant Provision.

In conclusion, the part of 'an important meeting' of the Instant Provision is too abstract and vague that an ordinary reasonable individual cannot reasonably foresee from the text of the relevant provision, and this is not appropriate for a law defining crime and prescribing penalty. Therefore, the part of 'an important meeting' of the Instant Provision violates the rule of clarity under the principle of *nulla poena sine lege*.

25. Case on Criminal Punishment on Those Who Violate Their Obligation Not to Operate a Motel

[23-2(B) KCCR 1, 2010Hun-Ba384, October 25, 2011]

The Constitutional Court unanimously held the part of 'a motel' of Article 6 Section 1 Item 13 of the School Health Act referred in Article 19 of the same Act in connection with the part of 'middle schools' of Article 2 of the Elementary and Secondary Education Act, is not against the Constitution because it neither infringes on the petitioner's freedom to perform his occupation and his property right nor violates the rule of proportionality between punishment and reponsibility.

Background of the Case

Petitioner was charged with operating a motel in the environmental sanitation and cleanup zone of a school and while the case was pending, the petitioner moved the court to file a request with the Constitutional Court for a constitutional review of the statute, the part of 'a motel' of Article 6 Section 1 Item 13 of the School Health Act referred in Article 19 of the same Act in connection with the part of 'middle schools' of Article 2 of the Elementary and Secondary Education Act. Upon the Court's dismissal,, on October 4, 2010, the petitioner filed this constitutional complaint.

Provision at Issue

School Health Act (revised by Act No.8678 on December 14, 2007)

Article 19 (Penal Provision)

Any person who commits any act or builds facilities prohibited in the environmental sanitation and cleanup zone of the school in violation of Article 6 (1) shall be punished by imprisonment for not more than two years or by a fine not exceeding 20 million won.

Summary of Decision

The Court unanimously held that the part of 'a motel' of Article 6 Section 1 Item 13 of the School Health Act referred in Article 19 of the same Act in connection with the part of 'middle schools' of Article 2 of the Elementary and Secondary Education Act (hereinafter, the "Instant Provision") is not against the Constitution based on the reasons below.

1. Whether the Instant Provision infringes on the petitioner's freedom to perform his occupation or the right to property

The purpose of the Instant Provision is to protect middle school students from various harmful environments created by a motel and this legislative purpose is legitimate. The prohibition of motel operation in an environmental sanitation and cleanup zone of a school is an effective and proper means to achieve that legislative purpose.

Also, the Instant Provision is compatible with the rule of the least restriction considering the followings: operation of a motel can be permitted if, through the review of the Committee for Environmental Sanitation and Cleanup of School, it is recognized that such operation does not have a bad influence on the education and health and hygiene at school; the building owner can utilize his or her building for uses other than motel operation, and therefore a private use suitable for the function of the building is still available; and the respective five-year grace periods are to be given twice for the motel owners violating the Instant Provision to minimize the infringement on their property rights and allow time to close the motel business. Moreover, the Instant Provision strikes a balance between the legal interests concerned since the negative effects on middle school education caused by allowing motel operation is likely to be much larger than the disadvantages from the prohibition of motel operation to be suffered by the building owners or the motel operators. Therefore, the Instant Provision does not violate the freedom to conduct one's occupation and property right.

2. Whether the Instant Provision violates the rule of proportionality between punishment and responsibility

Given the nature of a motel as a harmful environment to the students, the legislation of the Instant Provision does not appear to be arbitrary or go beyond the scope of the legislature's discretion when it chose a criminal penalty, rather than an administrative measure or administrative punishment, considering that the legislative purpose could not ultimately be achieved only by the latter. The Instant Provision, furthermore, allows judges to exercise broad discretion in determining the punishment because it provides them with the statutory penalty options of imprisonment and fine but does not set a lower limit except for putting the maximum penalties - imprisonment for not more than two years or a fine not exceeding 20 million won. Thus, it is difficult to say that the Instant Provision is an excessively severe punishment in light of the legislative intent stated above. The Instant Provision, therefore, does not violate the rule of proportionality that the punishments should be proportional to the crime committed.

26. Permission of Re-appeal against Court's Ruling on Petition for Adjudication Case

[23-2(B) KCCR 455, 2008Hun-Ma578, 2009Hun-Ma41·98(consolidated), November 24, 2011]

In this case, the Constitutional Court held that Article 262 Section 3 of the Criminal Procedure Act, which sets forth that the court's examination on a case of petition for adjudication, in principle, shall be conducted behind closed doors, and Article 262-2 of the same Act, which does not permit an inspection or a copy of relevant documents or evidence during the court's review on that request, do not infringe on the complainants' rights to trial. However, the Court held that the part of 'no objection may be raised against the ruling' of Article 262 Section 4 of the Criminal Procedure Act is unconstitutional in violation of the petitioner's rights to trial and equality as long as 'objection' against the ruling is to be interpreted to include 're-appeal' of Article 415 of the same Act.

Background of the Case

After the prosecutor's disposition of non-prosecution, the complainants, who are the accusers in respective cases, filed a petition for adjudication by the court following an appeal to the prosecution, but thereafter such request was denied.

Complainants could not re-appeal against that court's ruling because an objection to the court's decision of denial is not allowed in accordance with Article 262 Section 4 of the Criminal Procedure Act, and 're-appeal' of Article 415 of the same Act is construed as one of such objection. Complainants, in response, filed this constitutional complaint with the Court, asserting that the full text of Article 262 Section 4 of the Criminal Procedure Act mentioned in the above paragraph, Article 262 Section 3 of the Criminal Procedure Act, which prescribes the rule of nondisclosure to the public for the court's examinations of a petition for adjudication and Article 262-2 of the

Criminal Procedure Act, which does not permit an inspection or a copy of relevant documents and evidence during the court's examination or hearing on such request, infringe on their rights to trial and equality.

Summary of Decision

While the Court unanimously held that Article 262 Section 3 and Article 262-2 of the Criminal Procedure Act do not infringe on the complainants' rights to trial, the Court, in a 7 (limited unconstitutionality) to 1 (constitutionality) opinion, found that the part of 'no objection shall be raised against the ruling' of Article 262 Section 4 of the Criminal Procedure Act is unconstitutional in violation of the petitioner's rights to trial and equality as long as 'objection' against the ruling is to be interpreted to include 're-appeal' of Article 415 of the same Act., based on the grounds below.

1. Article 262 Section 3 and Article 262-2 of the Criminal Procedure Act

Article 262 Section 3 of the Criminal Procedure Act stipulates that the court's examination on a petition for adjudication by the court shall not be open to the public and the Article 262-2 of the same Act does not allow a person to inspect or copy a relevant document or the evidence related. We find that the legislative purposes of those Articles stated above appear to be reasonable because they are intended to prevent the invasion of privacy of the accused, an obstruction to the secrecy of investigation and the overuse of petition for adjudication by the court to influence civil cases. In addition, Article 262 Section 3 of the Criminal Procedure Act allows the court's examination on such request to be open to the public if there is an extraordinary reason and, in accordance with the proviso of Article 262-2 of the same Act, courts may permit a person to inspect or copy all or part of documents prepared in the examinations of evidence. For the foregoing reasons, we conclude that the legislature is reasonable in exercising its discretion when it enacted the Articles mentioned above and thus those Articles do not infringe on the complainants' rights to trial.

2. The part of "no objection shall be raised against the ruling" of Article 262 Section 4 of the Criminal Procedure Act

A. Court Opinion

The prohibition of re-appeal against the ruling on petition for adjudication by the court is not only incompatible with the purpose of Article 107 Section 2 of the Constitution, which is to ensure uniformity in the construction of statutes by granting the Supreme Court power to review the constitutionality or legality of administrative decrees, regulations or actions, but is also an excessive restriction on the right to trial of a person filing a petition for adjudication by the court in light of the circumstances where a court ruling is not subject to a constitutional complaint for review by the Constitutional Court. Furthermore, Article 415 of the Criminal Procedure Act, unlike Article 402 of the same Act, allows an immediate appeal on the ground of violation of laws without any exception. Article 2 Item 1 of the Act on the Court Proceedings for Small Claims and Article 4 Section 1 of the Special Act on the Appeal Proceedings also stipulate that an appeal or re-appeal to the Supreme Court against a lower court's judgment or disposition shall be allowed in a case where there is an issue about whether that judgment or disposition violates the Constitution or the laws. Compared with the Articles mentioned above, the disallowance of re-appeal on the ground of alleged violation of laws does not comply with the legal nature of the court's decision of denial to a petition for adjudication by the court when we acknowledge that the court's decision of denial to that request is a decision as to whether the prosecutor's non-prosecution violates the Constitution or the laws. Also the Civil Procedure Act permits not only a re-appeal (Article 332) but also a special appeal for the reason of alleged violation of the Constitution or laws to the Supreme Court against a judgment or an order against which no objection is allowed (Article 449).

For the foregoing reasons, we conclude that, as long as 'objection' against the ruling is to be interpreted to include 're-appeal' of Article 415 of the same Act, the provision, which does not allow an

objection to a court's decision of denial, infringes on not only the complainants' right to trial but also their right to equality because it, without any reasonable reason, differently treats a person who filed with the High Court a petition for adjudication by the court but received that High Court's decision of denial from others who received other decisions of that High Court and are allowed to file a re-appeal set forth by Article 415 of the Criminal Procedure Act.

B. Dissenting Opinion of One Justice

In light of the legislative intent, the textual interpretation of the term of 'objection' of the provision at issue, the hierarchy between the provision prohibiting any objection and Article 415 of the Criminal Procedure Act, and the way of setting forth the rules in the Criminal Procedure Act, the provision at issue, which does not allow an objection against a court's decision of denial in a case of petition for adjudication by the court, shall be deemed to be not allowing a re-appeal under Article 415 of the Criminal Procedure Act.

In my view, the provision at issue not-allowing an objection against the court's decision of denial which prohibits the re-appeal of Article 415 of the Criminal Procedure Act does neither excessively infringes on the complainants' right to trial without any reasonable ground, nor infringes on the complainants' right to equality by unreasonably discriminating a person, who files a request of petition for adjudication by the court, from others who receive other kind of decisions of the High Court against which an appeal is allowed. The reasons are as follows: the nature of the examination on the petition for adjudication by the court; the process up to the court's decision on that request and the jurisdiction over the decision on petition for adjudication; the necessity of prompt relief of many innocently accused people involved in cases where there is a petition for adjudication by the court from their unstable status; the increase of workload of the Supreme Court and prolonged unstable status of the accused expected in the instances where re-appeal of Article 415 of the same Act is allowed; the fact that an objection against the court's decision on that request is also not permitted in Germany; and that the disallowance of re-appeal

against the court's denial of that request cannot be deemed to be inconsistent with the purpose of Article 107 of the Constitution, which allocates authorities between the Constitutional Court and the Supreme Court.

Aftermath of the Case

After the decision of the Constitutional Court, those who file for petition for adjudication by the court but is denied, may re-appeal to the Supreme Court where there is an issue about whether the court's ruling violates the Constitution or laws

27. Prohibition of Internet Use for Political Expression and Election Campaign

[23-2(B) KCCR 739, 2007Hun-Ma1001, 2010Hun-Ba88, 2010Hun-Ma173 · 191(consolidated), December 29, 2011]

This case concerns interpretation of the language "the like" in Article 93 Section 1 of the Public Official Election Act (hereinafter "Instant Provision"). Article 93 Section 1 and Article 255 Section 2 Item 5 of the Public Official Election Act prohibit and punish the act of distributing or posting, with the intention to influence the election, of documents and pictures the content of which support, recommend or oppose a political party or candidate, or refer to the name of a political party or candidate, during the period of 180 days before the election day. The Constitutional Court held that interpreting "the like" to include "the act of posting writings, videos or other information on Internet websites or forums, or transmitting electronic mails" infringes on the freedom of political expression and the freedom of election campaign in violation of the principle against excessive restriction, and thus is unconstitutional.

Background of the Case

1. 2007Hun-Ma1001

When the National Election Commission announced its regulatory standards on December 19, 2008, which included User Created Content (UCC) among regulated matters under the Instant Provision, the complainants brought this constitutional complaint on September 5, 2007, arguing that the Instant Provision infringes on their freedom to express political opinions.

2. 2010Hun-Ba88

The complainant was brought to court for his alleged violation of the Instant Provision because he posted writings online on numerous

occasions, opposing a certain candidate for the Presidential election held on December 19, 2007. Pending the case, the complainant requested to the court that it seek the Constitutional Court's review of the statute. Upon the court's dismissal, the complainant filed this constitutional complaint on February 11, 2010, arguing that the Instant Provision infringes on the complainant's freedom of speech.

3. 2010Hun-Ma173

The complainant became subject to investigation for his alleged violation of the Instant Provision after posting on his own blog writings about potential candidates for Seoul Mayor in the local election of June 2, 2010. The complainant filed this constitutional complaint arguing that the Instant Provision violates the complainant's right to election and freedom of press and publication.

4. 2010Hun-Ma191

When the National Election Commission announced its regulatory standards, which includes Twitter within the meaning of Article 83 Section 1 of the Public Official Election Act, in relation to the local elections held on June 2, 2010, the complainants filed this constitutional complaint, arguing that the Instant Provision infringes on freedom of expression and freedom of election campaign.

Summary of Decision

The Constitutional Court ruled, by a vote of 6 (limitedly unconstitutional) to 2 (constitutional), that applying the Instant Provision to the act of posting writings, videos or other information on Internet websites or forums, or transmitting electronic mails, via the information and communication networks (hereinafter "the Internet") is unconstitutional. The Court's reasoning is summarized as follows.

1. Court Opinion of Six Justices

A. The principle of free expression and the limitations on its restrictions

Freedom of press and publication is a means with which people can freely manifest their personality, formulate reasonable and constructive opinions, and discover truth. It is a fundamental right that is indispensable to the existence and development of a democratic country. Because the freedom of political expression fully functions only when citizens can freely express and exchange their political opinions during elections, the tenet of "freedom in principle, restriction as exception," rather than "restriction in principle, permission as exception," must govern political expression and election campaigns.

Therefore, even when the legislature has no choice but to limit freedom of political expression during elections and freedom of election campaign, in order to ensure fair elections and to prevent elections being corrupted by illegal activities or money driven influence, the means adopted must have concrete and clear relevance to the achievement of the legislative purpose and have the least restrictive effect.

B. Whether the principle against excessive restriction is violated

(1) Legitimacy of the purpose

The Instant Provision, premised upon the principle of equal opportunity in election campaigning under Article 116 Section 1 of the Constitution, intends to avoid unfair competition in election campaigns, ill-effects of disparities in economic power among candidates, and any consequential harm to peace and fairness of elections. It thereby aims to achieve a common interest shared among election authorities, voters of the election districts, and the entire citizens, by ensuring freedom and fairness of elections. This legislative purpose is legitimate.

(2) The appropriateness of the means

Because the Internet is a medium easily accessible to anybody and incurs no or a relatively very low cost for its use, it is recognized as a political space where the expenditure on election campaigns can be dramatically reduced.

A defamatory statement or publication of false information against a candidate is directly prohibited and punished under provisions of the Public Official Election Act. Because these provisions set penalties more severe than the penalty under the Instant Provision, the effect is that only those political expressions not containing false information or defamatory statement remain subject to punishment under the Instant Provision. Furthermore, in case of using the Internet, receipt of information does not occur against the recipient's will; rather, it requires the recipient's voluntary and active act of selection. In this regard, prohibiting the use of the Internet for political expression concerning election or for election campaigning during 180 days before the election day cannot be deemed to be an appropriate means to achieve the legislative purpose, which is to avoid unfair competitions attributed to disparities in economic power among candidates or use of negative publicity and to prevent any consequential harm to peace and fairness of elections.

(3) The least restrictiveness

The Instant Provision prohibits using the Internet for political expression concerning election or for election campaigning during 180 days before the date of election. Considering the reality that Presidential elections, National Assembly elections, and local elections successively take place at short intervals from each other, the total period can be excessively long for a fundamental right to be restricted. Further, preventing expression of support or opposition to the principles or policies of political parties may silence citizens from criticizing against political parties or governmental policies and thereby weaken the ideological basis of the representative democratic system. Separate laws are in place as preliminary measures to deter prohibited persons, as

specified by law, from engaging in online election campaigning and avert spread of defamatory statements or false information. For example, the election commissions regularly run cyber election monitoring teams and may request deletion of any material that is in violation of the Public Official Election Act. In addition, the National Election Commission, which is the main body that manages elections, has indicated a plan to allow regular use of online campaigning. Finally, the fact that political expression and election campaigning may carry negative features including defamatory statements and false information cannot justify the complete ban and punishment of online campaigning for a certain period of time. The ban and punishment is excessive and therefore fails to satisfy the requirement of least restrictiveness.

(4) Balance of legal interests

In determining whether the Instant Provision strikes a balance among legal interests, we must consider not only the balance between the restriction on fundamental rights and the public interest in fairness and peace, but also the public interest in developing democracy and advancing democratic legitimacy through citizens' participation in elections. While fairness of elections achieved from implementation of the Instant Provision by banning online political expression and election campaigning is neither clear nor concrete, the disadvantage caused by the complete ban of using the Internet for political expression and election campaigning for such a long period of time, 180 days to the election day, is great, especially considering the reality that communication through the Internet has become common and that various elections take place with frequency. Therefore, the Instant Provision fails to satisfy the requirement of balance among legal interests.

C. Conclusion

Accordingly, interpreting the language "the like" in the Instant Provision to include the Internet and thereby prohibiting and punishing its use infringes on the complainants' freedom of political expression

and freedom of election campaign in violation of the principle against excessive restriction.

2. Dissenting Opinion by Two Justices

When the legislators have determined that restriction on election campaigning is necessary after comprehensively reviewing the overall conditions, including the level of political and social development of the nation, civil maturity, and the election climate in the past, this decision must be respected to a great extent.

The Instant Provision has a legitimate legislative purpose, which is to guarantee freedom and fairness of election by avoiding ill-effects of unfair competitions and disparities in economic power among candidates, as well as any consequential harm to peace and fairness of elections. Even in online election campaigning, such disparity is very likely to appear among candidates in their mobilizing capacity and economic power. Moreover, the harm to peace and fairness of election can be greater if expressions affecting outcome of the election, including false information, defamatory statements, and exaggerated propaganda, are limitlessly released by general voters, as well as political parties, candidates and related groups, from the election campaign period until day of election. Therefore, the appropriateness of the means is found.

Additionally, the current scheme for election management and monitoring, including punishment of publication of false information and defamatory statements under Articles 110, 250, and 251 of the Public Official Election Act, correctional measures by the election commissions, and operation of cyber election monitoring team, is insufficient to prevent such ill-effects illustrated above. This means that there is virtually no other alternative to effectively achieve the legislative purpose other than banning the act of expression itself that affects the election. Therefore, the restriction on fundamental rights is limited to the least.

Further, compared to the public interest in achieving peace and fairness of elections by ensuring equal opportunity in election campaigns

and avoiding overheated competitions among candidates, the disadvantage of being prevented from engaging in acts of expression that, having the effects comparable to election campaigning, use non-permitted media or other means before the start of the election campaigning period, is not substantial. The requirement to strike balance among legal interests is thus satisfied.

Hence, the Instant Provision, in restricting freedom of political expression, does not violate the principle against excessive restriction. The holding of limited unconstitutionality is improper also because it leaves out the possibility to regulate online expressions and election campaigning by taking into account the characteristics of the Internet, including its anonymity, speedy transmission of information and far-reaching effects.

Aftermath of the Case

Upon this decision, the political parties and the civil society uniformly expressed positive responses. The National Grand Party released a comment stating that it "hopes the decision will become a momentum to turn the Internet and Social Network Service into a lively venue to communicate healthy criticisms and alternatives on the basis of a mature sense of citizenship." The Democratic United Party, welcoming the Court decision, stated that "it believes that the decision will become a momentum to overcome the unfairness in reality in which election laws have been misused to interfere with citizens' free expression of opinions, rather than serving as a foundation for democratic elections." Additionally, scholars commented that "the decision showed the quintessence of constitutional adjudication in that it allowed a dramatic turn to an aspect of the Constitution which was beyond the imagination of the constitution drafters by reflecting the spirit of the contemporary era." (Yonhap News, December 29, 2011; Hankyoreh, January 9, 2012; and others).

28. Prohibition on Pre-trial Detainees' Attending Religious Ceremonies etc Case

[23-2(B) KCCR 840, 2009Hun-Ma527, December 29, 2011]

The Constitutional Court, in this case, held that the chief of detention center infringed on pre-trial detainees' freedom of religion and therefore violated the Constitution when he forbade the detainees from attending a religious ceremony or service held within the center.

Background of the Case

Complainant was accused of fraud and other charges and detained at Daegu Detention Center on June 1, 2009. He was thereafter tried and convicted on October 9, 2009 and then transferred to Daegu Prison on November 30, 2009. On May 25, 2011, the complainant was released from prison on completion of his sentence. Complainant filed this case with the Constitutional Court on September 14, 2009, alleging that his basic right was infringed by the chief of the Daegu Detention Center when the chief prohibited him from attending religious services accommodated at that center during the period of his detention- from June 1, 2009 to October 8, 2009 (hereinafter the "Prohibition"). Meanwhile, until that time, the chief of the Daegu Detention Center had uniformly prohibited all pre-trial detainees from attending religious gatherings on the ground that they encounter an accomplice and destroy evidence or otherwise that the meeting place for the religious events within the detention center was too small.

Summary of Decision

The Court unanimously held that the chief of the Daegu Detention Center violated the Constitution by infringing on the complainant's freedom of religion, when he prohibited the complainant from attending religious ceremonies or service held at that center based on the following grounds.

1. Whether a constitutional clarification is necessary

On October 9, 2009, the legal status of the complainant changed from a pre-trial to a post-conviction detainee and thus the complaint has become moot and may be unjustified. However, the chief of the Daegu Detention Center against whom the complainant filed this case presently still forbids most of pre-trial detainees except for ones accused of negligence from attending religious events held at that center and therefore, the infringement on basic rights by a similar or same treatment is likely to be repeated. Moreover, a constitutional clarification about the Prohibition has not been provided so far. For the reasons stated above, we find there is a justiciable interest because a constitutional review has significant implications for protection and maintenance of constitutional order.

2. Whether the detainee's freedom of religion was infringed

Religion has a positive function in supporting the mental stability of inmates and therefore, guaranteeing pretrial detainees, who, being suddenly isolated from society, are mentally unstable and disheartened, to attend religious events would contribute to the security of detention center and the maintenance of its order by preventing accidents such as suicides. In addition, Article 45 of the Act for Execution of Sentence and Improvement of Treatment for Detainees prescribes "persons in a detention center or a prison' as the persons who may attend events such as religious gatherings and thereby does not make a distinction between inmates and pre-trial detainees. Furthermore, the restrictions on the basic rights of detainees to which the principle of presumption of innocence should apply must be more relaxed than those on the inmates who have been already sentenced to a certain penalty including imprisonment. In the instant case, however, the chief of the Daegu Detention Center, by uniformly forbidding a pre-trail detainee, who has not yet been sentenced, from attending religious gatherings, restrains the freedom of religion of pre-trial detainees even more strictly than other detainees.

The chief of Daegu Detention Center expresses a concern that a

detainee might use the opportunity of religious events to meet an accomplice and settle false testimonies. However, he did not consider using a less restrictive means, including, separating accomplices or other persons related to the same case from each other when they attend religious events. Thus, we cannot find that the Prohibition in this instant case satisfies the requirement of least restrictiveness.

On the other hand, it is hard to conclude that the public interest gained from prohibiting pre-trial detainees from attending religious events as in this case is greater than the disadvantages of the constraint on their freedom of religion suffered by the detainees from that prohibition. Therefore, we conclude that, in the instant case, the prohibition of attendance at religious events infringes on the complainant's freedom of religion.

Notes on Translation

※ Y.S.Y. : Constitution Researcher Ye Seung Yeon
C.S.H. : Constitution Researcher Cho Soo Hye
K.J.H. : Constitution Researcher Kim Ji hye
C.J.U. : Choi Jie Un, International Affairs Division
C. J. : Researcher Cho Jin

□ Full Opinions

	Title	Translator
1	Case on Prohibition of Filing a Complaint against Lineal Ascendants	Y.S.Y.
2	Confiscation of Property Awarded for Pro-Japanese Collaboration During Japanese Occupation Case	C. J.
3	Constitutionality of the Police Action Blocking Passage to Seoul Plaza	C. J.
4	Case on the Disclosure of Others' Conversation Illegally Obtained Under the Protection of Communications Secrets Act	C.S.H.
5	Challenge against the Act of Omission Involving Article 3 of "Agreement on the Settlement of Problem concerning Property and Claims and the Economic Cooperation between the Republic of Korea and Japan"	C.J.U.
6	Case on Placing Limitation on Number of Transfer of Workplace by Foreign Workers	Y.S.Y.

□ Summaries of Opinions

	Title	Translator
1	Case on Prohibition of Filing a Complaint against Lineal Ascendants	C. J.
2	Case on Imposing Obligation on Online Service Providers to Disable Unauthorized Transmitting of Original Works	C. J.
3	Article 47 of the Former Military Criminal Act Case	C. J.
4	Case on Determination of Pro-Japanese and Anti-National Activities	C. J.
5	Confiscation of Property Awarded for Pro-Japanese Collaboration During Japanese Occupation Case	C. J.
6	Case on Restoration of Returned Electoral Deposit and Campaign Expenses By Candidate Whose Election is Invalidated	C. J.
7	Suspension of Performing Duties of Head of Local Government During his Detention Prior to Final Judgment	C. J.
8	Case on Disallowance of Pre-conviction Detainee's Attorney Consultation on a Holiday	C. J.
9	Case on Restrictions on Invitation to Election Broadcasting Debate	C. J.
10	Constitutionality of the Police Action Blocking Passage to Seoul Plaza	C. J.
11	Land Expropriation for Construction of Golf Course Case	C. J.

	Title	Translator
12	Case on Discriminatory Assistance for the Bereaved Family of Patient Suffering from Potential Aftereffects of Defoliants	C. J.
13	Case on Criminal Punishment of Those Who Issued a Check but Failed to Pay	C. J.
14	Case on Prohibition of Transfer of Cash Cards etc. and Criminal Punishment of its Violation	C. J.
15	Case on the Disclosure of Others' Conversation Illegally Obtained Under the Protection of Communications Secrets Act	C.S.H.
16	Challenge against the Act of Omission Involving Article 3 of "Agreement on the Settlement of Problem concerning Property and Claims and the Economic Cooperation between the Republic of Korea and Japan"	C.J.U.
17	Conscientious Objector Case (Establishment of Homeland Reserve Forces Act)	C. J.
18	Conscientious Objector Case (Military Service Act)	C. J.
19	Competence Dispute Between the Speaker and Member of National Assembly regarding Opposition Debate Case	C. J.
20	Case on Placing Limitation on Number of Transfer of Workplace by Foreign Workers	Y.S.Y.
21	Invalidation of Election upon Conviction of Spouse Case	C. J.
22	Installation of CCTV at Solitary Confinement Cell in Detention Center Case	C. J.

	Title	Translator
23	Case on Joint Liability Imposed on De facto Representative of a Corporation	C. J.
24	Case on 'Important Meeting' of Residents Association for Housing Redevelopment and Reconstruction	C. J.
25	Case on Criminal Punishment on Those Who Violate Their Obligation Not to Operate a Motel	C. J.
26	Permission of Re-appeal against Court's Ruling on Petition for Adjudication Case	C. J.
27	Prohibition of Internet Use for Political Expression and Election Campaign	K.J.H.
28	Prohibition on Pre-trial Detainees' Attending Religious Ceremonies etc Case	C. J.