CONSTITUTIONAL COURT DECISIONS

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Preface

The publication of this volume is aimed at introducing to foreign readers important cases decided from January 1, 2015 to December 31, 2015 by the Constitutional Court of Korea.

This volume contains two full texts and 26 summaries of the Court's decisions in 26 cases.

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

December 23, 2016

Kim Yong-Hun
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.

TABLE OF CONTENTS

I. Full Opinions

1. Adultery Case

[27-1(A) KCCR 20, 2009Hun-Ba17 · 205, 2010Hun-Ba194, 2011Hun-Ba4, 2012Hun-Ba57 · 255 · 411, 2013Hun-Ba139 · 161 · 267 · 276 · 342 · 365, 2014Hun-Ba53 · 464, 2011Hun-Ka31, 2014Hun-Ka4(consolidated), February 26, 2015] ····· 1

2. Case on the 'Act on Special Measures for National Integrity' authorizing the infringement of the right to collective bargaining and right to collective action based on the Presidential State Emergency Rights above the Constitution

[27-1(A) KCCR 226, 2014Hun-Ka5, March 26, 2015] ····· 36

II. Summaries of Opinions

1. Adultery Case

[27-1(A) KCCR 20, 2009Hun-Ba17 · 205, 2010Hun-Ba194, 2011Hun-Ba4, 2012Hun-Ba57 · 255 · 411, 2013Hun-Ba139 · 161 · 267 · 276 · 342 · 365, 2014Hun-Ba53 · 464, 2011Hun-Ka31, 2014Hun-Ka4(consolidated), February 26, 2015] ····· 44

2. Case on Sexual intercourse by force with a female child or juvenile

[27-1(A) KCCR 112, 2013Hun-Ba107, February 26, 2015] ····· 51

3. Case on the 'Act on Special Measures for National Integrity' authorizing the infringement of the right to collective bargaining and right to collective action based on the Presidential State Emergency Rights above the Constitution

[27-1(A) KCCR 226, 2014Hun-Ka5, March 26, 2015] ····· 58

4. Identity Verification of a Person Intending to Use Materials Harmful to Juveniles on the Internet Case

[27-1(A) KCCR 312, 2013Hun-Ma354, March 26, 2015] ····· 63

5. Case on Internet Game Authentication

[27-1(A) KCCR 342, 2013Hun-Ma517, March 26, 2015] ····· 68

6. Limits on the Period and Method of Election Campaign Case

[27-1(A) KCCR 407, 2011Hun-Ba163, April 30, 2015] ····· 77

7. Case on "Pro-Enemy" Clauses of the National Security Act

[27-1(A) KCCR 453, 2012Hun-Ba95 · 261, 2013Hun-Ba77 · 78 · 192 · 264 · 344, 2014Hun-Ba241, 2013Hun-Ka26, 2015Hun-Ka7, 2014Hun-Ba100 (consolidated), April 30, 2015] ····· 85

8. Constitutionality of Article 844 Section 2 of the Civil Act

[27-1(B) KCCR 107, 2013Hun-Ma623, April 30, 2015] ····· 94

9. Korean Teachers and Education Workers' Union Case

[27-1(B) KCCR 336, 2013Hun-Ma671, 2014Hun-Ka21, May 28, 2015]100

10. Restriction on the scope of practice performed by dentists who advertise their dental specialties

[27-1(B) KCCR 361, 2013Hun-Ma799, May 28, 2015] ····· 109

11. Case on Production, Distribution, etc. of Virtual Child or Juvenile Pornography

[27-1(B) KCCR 402, 2013Hun-Ka17 · 24, 2013Hun-Ba85 (Consolidated), June 25, 2015] ····· 115

12. Case on Non-Disclosure of Bar Examination Scores

[27-1(B) KCCR 513, 2011Hun-Ma769, 2012Hun-Ma209 · 536(consolidated), June 25, 2015]

····· 123

13. Case on the order to publish a written apology against unfair election report

[27-2(A) KCCR 1, 2013Hun-Ka8, July 30, 2015] ····· 130

14. Determination of Maritime Boundary Case

[27-2(A) KCCR 54, 2010Hun-Ra2, July 30, 2015] ····· 135

15. Administrative Fine for Failure to Issue Cash Receipt Case

[27-2(A) KCCR 85, 2013Hun-Ba56 · 401 · 420, 2014Hun-Ga26, 2014Hun-Ba176 · 469 · 470 · 471, 2015Hun-Ga6 · 10 · 12, 2015Hun-Ba76 · 114 · 115 (consolidated), July 30, 2015] ····· 141

16. Registration of personal information of sex offenders

[27-2(A) KCCR 370, 2014Hun-Ma340 · 672, 2015Hun-Ma99 (consolidated), July 30, 2015]

····· 146

17. Case on Immediate Appeal Filing Period under the Habeas Corpus Act

[27-2(A) KCCR 461, 2013Hun-Ka21, September 24, 2015] ····· 152

18. Travel Ban for Criminal Defendant Case

[27-2(A) KCCR 514, 2012Hun-Ba302, September 24, 2015] ····· 155

19. Profanity Against the Nation Case

[27-2(A) KCCR 700, 2013Hun-Ka20, October 21, 2015] ····· 160

20. Limitation of Period of Special Cases Allowing Children of a Korean Mother to Obtain Korean Nationality

[27-2(B) KCCR 206, 2014Hun-Ba211, November 26, 2015] ····· 164

21. Case Concerning Number and Time of Prisoner Visit by Legal Counsel in Civil Case

[27-2(B) KCCR 306, 2012Hun-Ma858, November 26, 2015] ····· 171

22. Case on Unclaimed Corpses Offered to Medical School as Cadavers

[27-2(B) KCCR 335, 2012Hun-Ma940, November 26, 2015] ····· 178

23. Chemical Castration Case

[27-2(B) KCCR 391, 2013Hun-Ka9, December 23, 2015] ····· 181

24. Change of Resident Registration Number Case

[27-2(B) KCCR 480, 2013Hun-Ba68, 2014Hun-Ma449 (consolidated), December 23, 2015]

····· 187

25. Case Concerning Constitutional Complaint against Article 45 Section 1 of the Political Funds Act

[27-2(B) KCCR 511, 2013Hun-Ba168, December 23, 2015] ····· 193

26. Advance Notice of Dismissal Case

[27-2(B) KCCR 553, 2014Hun-Ba3, December 23, 2015] ····· 200

Appendix

THE CONSTITUTION OF THE REPUBLIC OF KOREA ····· 207

I. Full Opinions

1. Adultery Case

[27-1(A) KCCR 20, 2009Hun-Ba17 · 205, 2010Hun-Ba194, 2011Hun-Ba4, 2012Hun-Ba57 · 255 · 411, 2013Hun-Ba139 · 161 · 267 · 276 · 342 · 365, 2014Hun-Ba53 · 464, 2011Hun-Ka31, 2014Hun-Ka4(consolidated), February 26, 2015]

Requesting Courts: 1. Uijeongbu District Court (2011Hun-Ka31)
2. Suwon District Court (2014Hun-Ka4)

Requesting Petitioner: Park O-Mi (2014Hun-Ka4)

Petitioners: Park O-Soon, et al.

Underlying Cases: listed in the Appendix

Decided: February 26, 2015

Holding

Article 241 of the Criminal Act (enacted as Act No. 293 on September 18, 1953) violates the Constitution.

Reasoning

I. Introduction of the Case

The petitioners, who were prosecuted on a charge of adultery or fornication, filed the motion to request for the constitutional review on Article 241 of the Criminal Act, alleging the unconstitutionality of the aforementioned provision. After the motion was denied, the petitioners

filed the constitutional complaint. The defendant of case 2011Hun-Ka31 was prosecuted for and was convicted of adultery at the trial court. Upon the appeal of the defendant, Uijeongbu District Court requested, *sua sponte*, for the constitutional review of Article 241 of the Criminal Act for reasonable doubts on the unconstitutionality of the aforementioned provision on August 26, 2011. The requesting petitioner of case 2014Hun-Ka4 was also prosecuted for and convicted of adultery at the trial court. The requesting petitioner appealed against the decision and filed a motion to request for the constitutional review of Article 241 Section 1 of the Criminal Act. Suwon District Court, the requesting court of this case, granted the motion and requested for the constitutional review on the aforementioned provision on March 13, 2014.

II. Subject Matter of Review

The petitioners of 2012Hun-Ba255 and 2013Hun-Ba161 and the requesting court of 2014Hun-Ka4 filed the constitutional complaints or requested the constitutional review on Article 241 Section 1 of the Criminal Act. Nonetheless, Article 241 Section 2 of the Criminal Act is inseparable from Article 241 Section 1 of the Criminal Act in that Section 2 of the provision provides that adultery is a crime subject to victim's complaint and a spouse who condones or pardons the adultery cannot accuse his/her spouse of adultery. Accordingly, the subject matter of review is the constitutionality of Article 241 of the Criminal Act (enacted as Act No. 293 on September 18, 1953) and its contents are listed below:

Provision at Issue

Criminal Act (enacted as Act No. 293 on September 18, 1953)

Article 241 (Adultery) (1) A married person who commits adultery shall be punished by imprisonment for not more than two years. The

same shall apply to the other participant.

(2) The crime in the preceding section shall be prosecuted only upon the accusation of the victimized spouse. If the victimized spouse condones or pardons the adultery, accusation can no longer be made.

III. Arguments of Petitioners and Reasoning of Request of Constitutional Review of the Requesting Courts

A. Arguments of Petitioners

The Provision at Issue restricts the right to sexual self-determination and privacy, violating the principle against excessive restriction. It is also against the principle of proportionality between responsibility and punishment to stipulate the punishment by imprisonment as the only statutory punishment. In addition, it violates Article 36 Section 1 of the Constitution in that the accusation of adultery assumes divorce, which results in the failure of family. The nature as a crime prosecutable upon a complaint would lead to the discrimination by violators' economic status; a violator whose spouse condones or pardons the affair would not be punished; and a spouse who filed a divorce suit is vested with the accusation of adultery, suggesting the violation of the principle of equality.

B. Reasoning of Request for Constitutional Review of the Requesting Court

The Provision at Issue has legitimate purposes that are the protection of good sexual culture and practice and the promotion of marital fidelity between spouses. Nonetheless, it fails to achieve the appropriateness of means and least restrictiveness for considering the reality where the public recognition has changed along with the propagation of individualism and sexual liberalism; the nature of sexual life which

should not be subject to criminal punishment, but subject to sexual morality for self-governing of society; and little efficiency of criminal punishment against adultery. While the Provision at Issue hardly serves the public interests of protecting marriages and spousal obligation of faithfulness, it excessively restricts the right to sexual self-determination and to privacy through the punishment on the private sexual life, thereby loosing the balance of interests and violating the Constitution.

IV. Comparative Law and Precedents

A. Comparative Law

The global trend with regard to adultery is decriminalization. The crime of adultery was abolished in Denmark, Sweden, Japan, Germany, France, Spain, Switzerland, Argentina and Austria in 1930, 1937, 1947, 1969, 1975, 1978, 1990, 1995 and 1996, respectively.

B. Discussion for Revision

The Ministry of Justice suggested the abolishment of adultery crime in its revision draft of the Criminal Act preannounced on April 8, 1992, reflecting the global trend of decriminalization of adultery, the inappropriateness for law to intervene the individual sexual life belonging to the intimate domain of private life, the possibilities of misusing the accusation of adultery for threatening and alimony, the weakened effects as a means of criminal punishment as accusations are mostly canceled in the investigation or trial proceeding, little efficiency for deterrence or re-socialization, or the protection for family and women. Afterwards, the Minister of Justice finalized the Criminal Act Revision composed of 405 articles on May 27, 1992, embracing the opinion that it is premature to abolish the adultery crime. Instead, it suggested to reduce the statutory punishment by lowering the terms of

imprisonment to 1 year or less and by adding fines less than 5,000,000 Won. Nevertheless, this final revision was not legislated.

C. Precedents

The Constitutional Court has decided that the Provision at Issue was not unconstitutional in the Decision of Case 89Hun-Ma82, September 10, 1990, with the dissenting opinion of Justice Han Byong-Chae and Justice Lee Si-Yoon (Incompatibility with the Constitution) and the dissenting opinion of Justice Kim Yang-Kyoon (Unconstitutional). The Decision of Case 90Hun-Ka70, March 11, 1993 followed the 89Hun-Ma82. Afterwards, the court opinion of the Decision of Case 2000Hun-Ba60, October 25, 2001 also maintained the decision of the 89Hun-Ma82, pointing out that the Legislature should consider the abolishment of adultery crime, with the dissenting opinion of Justice Kyon Sung. In the Decision of Case 2007Hun-Ka17, et al., October 30, 2008, the majority, consisting of the opinion of Justice Kim Jong-Dae, Justice Lee Dong-Heub, Justice Mok Young-Joon, and Justice Song Doo-Hwan (Unconstitutional) and the opinion of Justice Kim Hee-Ok (Incompatibility with the Constitution) found the unconstitutionality of the Provision at Issue. Nonetheless, it was decided that the Provision at Issue was constitutional as the quorum fell short of six persons required for a decision of unconstitutionality in the Constitution.

V. Judgment

A. Opinion of Justice Park Han-Chul, Justice Lee Jin-Sung, Justice Kim Chang-Jong, Justice Seo Ki-Seog and Justice Cho Yong-Ho (Unconstitutional)

(1) Article 10 of the Constitution promotes the right to personality and right to pursue happiness, assuming the right to self-determination. The

right to self-determination connotes the right to sexual self-determination that is the freedom to choose sexual activities and partners, implying that the Provision at Issue restricts the right to sexual self-determination of individuals. In addition, the Provision at Issue also restricts the right to privacy protected under Article 17 of the Constitution in that it restricts activities arising out of sexual life belonging to the intimate private domain.

(2) Legitimacy of Legislative Purpose

The Provision at Issue, which intends to promote the marriage system based on good sexual culture and practice and monogamy and to preserve marital fidelity between spouses, has a legitimate legislative purpose.

(3) Appropriateness of Means and Least Restrictiveness

① Change in Public's Legal Awareness

The marital fidelity of married people has been established by our traditional ethics as monogamy and marital fidelity between spouses have also been respected as ethical standards. Nonetheless, in recent years, the growing perception of the Korean society has changed in the area of marriage and sex with the changes of the traditional family system and family members' role and position, along with rapid spread of individualism and liberal views on sexual life. Sexual life and love is a private matter, which should not be subject to the control of criminal punishment. Despite it is unethical to violate the marital fidelity, it should not be punished by criminal law. Also, the society is changing into one where the private interest of sexual autonomy is put before the social interest of sexual morality and families from the perspective of dignity and happiness of individuals.

Accordingly, there is no longer any public consensus regarding the

appropriateness of criminalization of adultery, which means the criminal punishment against sexual activities with a person except his/her spouse, along with the change of public recognition on social structure, marriage, and sex and the spread of an idea to value sexual self-determination.

② Appropriateness of Criminal Punishment

Whether to regulate certain acts for being illegal and constituting a crime by exercising the State' authority over criminal punishment or simply rely on moral law is a matter that inevitably varies by time and consensus depending on the Society and its members. Some in our domain of life should be left to morality although others are to be directly regulated by law. It is hardly possible to punish all unethical actions by criminal punishment.

Individuals' sexual life belonging to the intimate domain of privacy should be subject to the individual's self-determination, refraining from State's intervening and regulation, for its nature. The exercise of criminal punishment should be the last resort for the clear danger against substantial legal interests and should be limited at least. It belongs to a free domain of individuals for an adult to have voluntary sexual relationships, but it may be regulated by law when it is expressed and it is against the good sexual culture and practice. It would infringe on the right to sexual self-determination and to privacy for a State to intervene and punish sexual life which should be subject to sexual morality and social orders.

The tendency of modern criminal law directs that the State should not exercise its authority in case an act, in essence, belongs to personal privacy and is not socially harmful or in evident violation of legal interests, despite the act is in contradiction to morality. According to this tendency, it is a global trend to abolish adultery crimes.

③ Effectiveness of Criminal Punishment

The interest to be protected by the Provision at Issue is the marital

system based on monogamy. Yet, the Provision at Issue by no means can help maintain marriage life once the act of adultery occurs. Under the Criminal Act, adultery is prosecuted only upon the accusation of the victimized spouse, and an adultery accusation shall not be made unless the marriage is void or divorce action is instituted. For this reason, existing families face breakdown with the invoking of the right to file an accusation. Even after cancellation of the accusation, it is difficult to hope for emotional recovery between spouses. Therefore, the adultery crime can no longer contribute to protecting the marital system or family order. Furthermore, there is little possibility that a person who was punished for adultery would remarry the spouse who had made an accusation against himself/herself. It is neither possible to protect harmonious family order because of the intensified conflict between spouses in the process of criminal punishment of adultery.

All considered, protecting marital system through criminal punishment on adultery is nothing more than preventing a married person from committing adultery beforehand for fear of criminal punishment. However, it is doubted whether such psychological deterrence is effective.

The motivation of adultery may be classified into two cases: the case arising out of affection or the case not arising out of affection. In the former case, the marriage relationship based on the affection and trust between spouses would have been broken, implying the question in terms of necessity of maintaining the broken marriage by fear through punishment. For this case, the efficiency of deterrence of adultery would be hardly recognized because they would commit adultery despite of criminal punishment. Even the latter case hardly expects the deterrence effects of criminal punishment in adultery for the various types of prostitution and its public recognition. We do not have the empirical evidence to prove the general deterrence effect for adultery through the empirical analysis of law and practice, neither.

The rate of punishing adultery has been dramatically decreased. The statistic suggest that the filing and accusation of adultery have been

decreased, indicating that the rate of prosecution in custody is less than 10% of prosecution for adultery and most cases are concluded with no power to prosecute or dismissal of prosecution because of cancellation of accusation during investigation or trial. It implies that the punishment rarely functions.

There is a view to concern the disorder in sexual morality or increase of divorce due to adultery in case of abolition of adultery. Nonetheless, any statistics to support the disorder of sexual morality or the increase of divorce after the abolition of adultery is not found in countries where adultery is repealed. Rather, the degree of social condemnation for adultery has been reduced due to the social trend to value the right to sexual self-determination and the changed recognition on sex, despite of the punishment of adultery. Accordingly, it is hard to anticipate a general and special deterrence effect for adultery from the perspective of criminal policy as it loses the function of regulating behavior.

On the other hand, the adultery of a spouse would conform to a ground of judicial divorce (Article 840 Item 1 of the Civil Act), and a person who committed adultery has a duty to compensate the victimized spouse for the property and psychological damages (Article 843, 806 of the Civil Act). The Court may give a person who committed adultery disadvantages in deciding custody and the restriction or exclusion of visitation rights.

It is doubtful whether the criminal punishment can protect the faithfulness between spouses, besides the civil compensation as stated above. The protection of the obligation to remain faithful between spouses would be effectively achieved by ethics of individuals and society, and affection and trust between spouses, instead of criminal punishment.

It is true that the existence of adultery crimes in the past Korean society served to protect women. Women were socially and economically underprivileged, and acts of adultery were mainly committed by men. Therefore, the existence of an adultery crime acted as psychological adultery deterrence for men, and, furthermore, enabled female spouses to

receive payment of compensation for grief or divided assets from the male spouse on the condition of cancelling the adultery accusation.

However, the changes of our society diluted the justification of criminal punishment of adultery. Above all, as women's earning power and economic capabilities have improved with more active social and economic activities, the premise that women are the economically disadvantaged does not apply to all married couples. Additionally, as the Civil Act was revised on January 13, 1990, both husband and wife have become entitled to claim for division of assets in case of divorce, and the parental authority is equally guaranteed to men and women without discrimination. In other words, the wife's right to claim property division is now recognized under the Civil Act, and family chores of housewives are recognized as contribution to asset formation. This has established a system that provides women with living foundation after divorce, the right to claim damages through receipt of compensation for grief in case of divorce, and the feasibility of raising children through claim for child support.

Even though it is assumed that the economic status of married women is inferior to that of married men, the existence of an adultery crime does not necessarily protect the female spouse. Divorce is a prerequisite for filing accusations for adultery, so married women without economic and earning abilities may rather be reluctant to filing accusations. As such, the female protective function of the adultery ban has weakened greatly.

Today's prohibition of adultery has come to punish only a very small number of adulterers, so it only massively produces potential criminals and restricts their basic rights but has become ineffective in protecting the marital system and duty to remain sexually faithful. The maintenance of marriage and family should depend on the free will and affection of individuals, which should not be controlled by criminal punishment. Therefore, the Provision at Issue would be not an effective means to achieve the purpose to protect the marriage system based on monogamy and family orders.

④ Side Effects of Criminal Punishment

The adultery crime may be exploited for other purpose than to protect wholesome marital system and obligation to remain sexually faithful between spouses. It is only the spouse of the adulterer who can file or cancel accusations against the adulterer and fornicator, and the adultery crime is indictable upon an accusation. This means that whether the prosecutors will prosecute the case and the court will reject the indictment depends on whether or not the accusation is cancelled. The legal fate of fornicators would solely depend on the victimized spouse. As a result, filing adultery accusations or cancellation thereof is a means to facilitate divorce between spouses who are in effect facing breakdown as well as to blackmail socially prominent figures or temporarily delinquent housewives. It frequently leads to abuse of swindling money out of fornicators.

⑤ Sub-Conclusion

With the comprehensive considerations, the Provision at Issue, which punishes adultery for the good sexual culture and practice, the marriage system based on monogamy, and the marital fidelity between spouses, fails to achieve the appropriateness of means and least restrictiveness

(4) Balance of Interests

As stated above, it is difficult to see that the Provision at Issue can any longer serve the public interests of protecting the monogamy-based marriage system and the obligation to remain sexually faithful between spouses. Since the Provision at Issue excessively restricts people's sexual autonomy and privacy rights by criminally punishing the private and intimate domain of sexual life, the Provision at Issue can be said to have lost the balance of interests.

(5) Conclusion

Therefore, the Provision at Issue violates the Constitution for infringing on the right to sexual self-discrimination and secrecy and freedom of privacy under the principle against excessive restriction by failing the appropriateness of means and least restrictiveness and losing the balance of interests.

B. Opinion of Justice Kim Yi-Su (Unconstitutional)

I am of the opinion that the Provision at Issue is unconstitutional as the conclusion of the majority opinion, but with different reasons, as stated below:

(1) Case of a Person Who Committed Adultery

(A) A married couple shall endeavor to achieve the common purpose and value of life through cooperation and consideration within the community in terms of psychological, physical and economical combination. Marriage is a social system to establish, maintain and develop the marriage community.

We adopt the marriage system based on monogamy. Under monogamy, the essential nature of marriage would be the married couple's will to maintain their sexual cohabitation exclusively and sustainably. Married couples would enjoy the freedom of sexual cohabitation as self-realization with the burden of sexual fidelity for spouses, after the choice of marriage based on free and true will.

The essence of adultery is the intentional breach of sexual faith between spouses by a person who chose marriage based on his/her free will. Adultery committed by a married person would result in or threat marriage as it is against the nature of exclusiveness and continuity of sexual cohabitation.

The Provision at Issue intends to protect the marriage system based on

monogamy through the promotion of sexual faith between spouses.

(B) The Provision at Issue restricts the right to sexual self-determination.

Nonetheless, the right to sexual self-determination of a married person, restricted by the Provision at Issue, has an inherent limitation that it should be exercised with the consideration of the exclusiveness and continuity of sexual cohabitation established by the self-determination to choose marriage. Adultery can be hardly justified by the right to sexual self-determination in that it is unethical beyond its inherent limitation.

Law can contribute to the effectiveness of the least morality to maintain social orders. Despite the various modes of immoral sexual deviation, including adultery, bestiality, promiscuity or incest, criminal law focuses on adultery for its punishment. It assumes adultery as the unethical deviation to destroy the marriage system based on monogamy and, further, harm peaceful orders of coexistence of the law community. In this sense, it coerces the prohibition of adultery for the promotion of the least morality.

(C) The legal interests protected by the criminal law include the most fundamental value for the existence of human beings as well as the specific and practical value which is necessary for social life. Therefore it would depend on the trend of entire legal orders and empirical perception of members of our society to decide whether certain behaviors should be regulated by the State's criminal punishment as the infringement of legal interests or should be regulated by moral rules, being subject to moral condemnation, reprimand, wrath or repentance.

The criminalization of adultery has been controversial since the Criminal Act was enacted. Since then, there have been arguments to abolish or repeal the adultery crime. The Constitutional Court has produced four precedents confirming its constitutionality. Nonetheless, there were always dissenting opinions to support its unconstitutionality. Especially in the fourth precedent, five Justices presented the opinion of unconstitutionality, including the opinion of incompatibility with the

Constitution. Most criminal law scholars support the abolishment of adultery crime.

The modes of adultery can be roughly classified into three cases: a liable spouse to have extramarital intercourse merely for sexual pleasure despite his/her spouse (mode 1), a spouse falling in love with a person more attractive than his/her spouse, being skeptical about his/her current marriage (mode 2), and a sexual relationship with new love under circumstances where the existing marriage is *de facto* dissolved, such as separation for a long time, despite the existing marriage has not been dissolved actually or a law suit/complaint for divorce has not been filed (mode 3).

In the case of mode 1 and 2, the adultery would be substantially criticized, compared to mode 3, and the existing marriage should be protected. For these cases, most people would agree that criminal punishment is still necessary.

Also, the general deterrence effects would be still recognized in mode 1 and 2 for the authority of criminal punishment based on the leaning effects of the punishment against adultery for a long time, the burden during the criminal procedure, including investigation and trial, for providing imprisonment as a sole statutory punishment, or concerns for the loss of job.

Further, adultery crime may be effective in leading the sincere regret or self reflection of a person who committed adultery. If a violator presented such regret or reflection, the accusation could be cancelled or nullified, recovering the broken marriage.

The criminalization of adultery can be useful in protecting a victim as the economically underprivileged even if the marriage would be dissolved. An economically underprivileged husband or wife may secure the means for life after dissolving the marriage by filing a claim for division of property or claim for alimony under the Civil Act with a claim for divorce. Nonetheless, the current system and practice under civil laws do not suffice in protecting the underprivileged. The justification of criminalization of adultery can still be found in protecting

the economically underprivileged.

On the contrary, mode 3 of adultery is rarely reproachable or anti-social. In this case, the punishment of adultery would not contribute to the recovery or maintenance of marriage. It would be the excessive restriction on the right to self-determination to coerce *de facto* failed marriage couples into the nominal sexual faith by the authority of criminal punishment, despite little appropriateness or effectiveness.

The common legal sense of our society would consider that it is not appropriate to punish mode 3 of adultery as other modes just because the specious marriage legally exists.

In this regard, the Supreme Court recently held that the marital cohabitation, the essence of marriage, would not be retained if it is impossible to recover the marital cohabitation despite the marriage has not ended in divorce yet. Accordingly, it would not constitute torts to have affairs with a married person as it does not infringe on the marital cohabitation, interrupt the maintenance of cohabitation, or cause damages to infringe on the rights relating to marriage cohabitation (Supreme Court 2011Meu2997 en banc decision, November 20, 2014). It reflects the common legal sense, presenting that the State should not intervene the mode 3 of adultery for not being reproachable or anti-social as the mode 3 of adultery would not expect the sexual fidelity for the lack of the marriage cohabitation which is essential in marriage.

(D) Therefore, the criminal punishment against the mode 1 and 2 of adultery would not be the excessive restriction against the right to sexual self-determination as it is justified by the appropriateness and effectiveness of the punishment and the proper purpose to protect the fundamental orders of social ethics, including the marriage system based on the marital fidelity between spouses at the least degree.

On the contrary, the criminal punishment of mode 3 of adultery, which lacks condemnation and anti-sociality, should not be granted as an excessive punishment in that the extramarital affairs would not infringe on the marital fidelity or interrupt the marriage system in the case that

the marriage is *de fact* dissolved.

(2) Case of a Participant of Adultery

Adultery requires a joint action of two persons: a married person who has a spouse and a participant. In punishing this type of crime, our criminal law may punish the two persons equally (in case of adultery), punish the persons under the different statutory punishment (in case of bribery), or punish just one person (in case of distribution, sale or lease of obscene materials). From the perspective of comparative law, a group of states of the U.S. punish a married person only, excluding a participant who does not have a spouse from punishment, among the states of the U.S. where adultery is criminalized, despite the punishment is nominal. Considering the attitude of our criminal law and the comparative law, it is not necessary to punish a married person who committed adultery and a participant, together, under the equal statutory punishment.

If a participant is married, the essence of the act would be indifferent from adultery in terms of violation of fidelity between spouses, except that the legal position of a person who committed adultery depends on the accusation which is the requisite to maintain the prosecution. As stated in case of a person who committed adultery, it would be unauthorized excessive punishment for the Provision at Issue to punish fornication of a participant whose marriage is *de facto* dissolved.

The entire structure of our criminal law indicates that the state does not regulate sexual activities between unmarried people, reaching at a certain age, based on free will, whereas criminalizing adultery. Our criminal law also states adultery in the chapter of ‘crime regarding sexual culture and practice’, which relates to social interests, whereas it indicates adultery for an offense subject to accusation and it allows the substantial disposition of legal interests through connivance or pardon.

The essence of adultery is the intentional breach of sexual faith between spouses by a person who chose marriage based on his/her free

will.

Considering the essence of adultery, an unmarried person who fornicated with a married person (including unmarried, divorced, or separated by death) would not assume the existence and violation of sexual fidelity between spouses and the duty regarding such fidelity with regard to a person who committed adultery and his/her victimized spouse. Therefore, the State should refrain from the control and regulation over the exercise of the right to sexual self-determination regarding whom and how to have sexual activities of an unmarried participant of adultery for the nature of the right and freedom. The right to sexual self-determination of an unmarried participant of adultery should be protected more broadly, compared to a married person who committed adultery.

It results in the conclusion that the exercise of criminal punishment of the State should be refrained with regard to fornication of an unmarried participant of adultery. It would be sufficiently effective and enough to inquire into appropriate liability corresponding to the action through ethical or moral criticism or civil tort liability. The criminalization of adultery only means that the State settles the revenge against a spouse who committed adultery. It would be the unauthorized excessive punishment as it excessively restricts the right to sexual self-determination of an unmarried participant of adultery.

Provided, an unmarried participant who fornicated with a married person leads to fornication by active provocation or temptation, beyond the mere knowledge of adultery of a person who committed adultery, it would be justifiable to exercise the State's authority for criminal punishment for its significant reprehensibility and anti-sociality, in that it threatens the other's marriage by malicious and intentional harm. In this case, the exercise of criminal punishment against adultery would be constitutionally granted in that the significance of public interests to be achieved by criminal punishment of fornication, exceptionally, overweighs the disadvantaged private interests to restrict the right to sexual self-determination of an unmarried participant of adultery.

(3) Conclusion

Adultery or fornication where a person who committed adultery and a married participant of adultery do not assume the sexual fidelity for spouses due to the de facto dissolution of marriage, and fornication of an unmarried participant of adultery, except a case of active provocation or temptation, should be subject to ethical or moral criticism for its lack of reprehensibility or anti-sociality.

The Provision at Issue provides that all modes of adultery and fornication shall be uniformly punished without any consideration of singularities and specificities, according to the types of a person who committed adultery or fornication and specific styles of action. It would violate the Constitution for excessive exercise of State's criminal punishment authority in that it excessively restricts the right to sexual self-determination, overstepping its limited role in achieving the purpose and function of criminal punishment.

C. Opinion of Justice Kang Il-Won (Unconstitutional)

I consent to the conclusion of the majority opinion and the opinion of Justice Kim Yi-Su. Nonetheless, my opinion is supported by different reasons as stated below:

(1) Constitutionality of Prohibition and Criminalization of Adultery

Adultery of a married person becomes a major threat to monogamy and causes social problems including an abandonment of his/her spouse and family members. It justifies legal regulation despite adultery or fornication falls into the domain of intimate privacy according to the self-determination of individuals, if it destructively affects the marital relationship, beyond the level of ethics and morality.

It has been more than 60 years since the Provision at Issue was enacted. The general perception of sexual morality has dramatically

changed according to the rapid change of our society, affecting the social meaning of the marriage system. There have been many cases where the criminal punishment of adultery has been misused to obtain financial benefits. Since adultery presumes the dissolution of marriage as it is an offense subject to accusation, it does not properly serve the legislative purpose to protect family. Most adultery cases are concluded by the cancellation of accusation during investigation or trial, implying the punishment function or deterrence effect has been significantly reduced. The global trend to abolish adultery crime reflects such reality.

Nonetheless, it is not confirmed that the Provision at Issue punishing adultery is significantly separated from the general perception of our society. The misuse of adultery in practices would be led by the side effects in that only imprisonment is provided for a statutory punishment. The issues surrounding the Provision at Issue, including the insufficiency to achieve the purpose to protect family and the decreased deterrence effect, would be resolved though the revision of the legislation. Such problems may be resolved by abolition of adultery crime as found in the comparative law study. Nonetheless, the Legislature should decide the legislative policy to resolve the problems.

A certain type of adultery or fornication may become a major threat to cause or likely cause the dissolution of marriage and family life. Accordingly, it would be agreeable that legal means is desirable for preventing adultery in advance. It would not be unconstitutional for the Legislature to adopt criminal punishment as sanction, in addition to sanctions other than criminal sanctions or regulation under civil laws, against adultery or fornication.

(2) Principle of Clarity

The elements of crime should be clearly stated in a provision of the Statute, which is the formal law. If a provision stating elements of crime is excessively abstract or vague and it is excessively broad or ambiguous in terms of substances and application, the principle of clarity is violated

in that arbitral exercise of criminal punishment of the State would not guarantee the freedom and right of the people (2011Hun-Ba75, February 26, 2004). The circumstances precluding wrongfulness and prosecution conditions as well as the elements of crime shall be clearly stated in terms of meanings and requirements under the principle of clarity, providing the ground that the people subject to laws can predict the scope and limitation of the exercise of state authority.

Article 241 Section 2 of the Criminal Act provides that "if the victimized spouse condones or pardons the adultery, accusation can no longer be made" in the provision for the nature of an offense subject to accusation. The term of 'condone' implies the *ex ante* consent to adultery in that it means suggestion or inducement. The terms of 'pardon' implies the *ex post* consent to adultery in that it means forgiveness. If the victimized spouse condones or pardons the adultery, the adultery action is not subject to the criminal punishment. However, it is not clear whether the adultery is condoned or pardoned. It would not be easy to prove or admit the inner mind of the accuser, which is against the accusation, with regard to whether the person who accused his/her spouse for adultery condones prior to adultery or pardons after adultery.

The Supreme Court held that if the consent to divorce is clearly presented during the proceedings of the divorce suit or divorce by agreement, it would amount to the 'condone' because the will to maintain the marriage relationship is not found (Supreme Court 90Do1188, March 22, 1991; Supreme Court 2008Do3599, July 10, 2008, etc.). On the contrary, if a temporary and provisional decision for divorce is presented with conditions the other spouse is liable for the dissolution of marriage, despite a divorce suit is filed by a spouse or both spouses, it would not amount to the term of 'condone' (Supreme Court 89Do501, September 12, 1989; Supreme Court 2008Do984, July 9, 2009, etc.). If a civil tort suit is filed against a spouse and a partner of adultery, any illegality would not be constituted in a case where the marriage relationship is *de facto* dissolved and the third party has a

sexual relationship with a spouse of the dissolved marriage. The legal relationship would be also applicable for a case that a divorce suit is not filed yet (Supreme Court 2011Meu2997 en banc decision, November 20, 2014).

With the comprehensive understandings of the cases, the clear consent to divorce would amount to the term of 'condone', whereas the provisional or conditional consent to divorce would not amount to the term of 'condone'. Nonetheless, it is still unclear whether there is a clear consent to divorce or provisional or conditional express for divorce. It is also ambiguous whether adultery is committed whereas illegality is not founded, in that *de facto* breakdown of marriage would not assume the illegality of affair of a spouse and his/her partner of affair. If adultery is not founded, it would be uncertain how to interpret the precedents, providing that the clear consent to divorce only amounts to the term of 'condone', harmoniously. If adultery is not founded where the cohabitation of the married couples is irreparably dissolved, the citizens who are not experts in law could not predict the level of irreparable dissolution of marriage.

On the other hand, the Supreme Court, expressing that exterior express of forgiveness or mere promise for forgiveness would not be admitted to the term of 'pardon' of adultery, explains the reasons as below: The term of 'pardon' of adultery means a unilateral expression to indicate that a spouse would not call his/her spouse who committed adultery responsible for adultery, presuming the maintenance of marriage, while he/she knows that his/her spouse committed adultery, as the post-forgiveness stated in Article 841 of the Civil Act. The term of 'pardon' can be expressed implicitly, without any restriction in expressing, while it should be expressed to show the true mind to maintain the marital relationship while certainly knowing that adultery is committed, in a clear and reliable way (Supreme Court 91Do2049, November 26, 1991; Supreme Court 2007Do4977, November 27, 2008).

Nonetheless, it is not possible to understand the degree of assurance that adultery was committed by a partner spouse. It is also difficult to

figure out how the will to maintain the marital relationship can be expressed in a clear and reliable way. Accordingly, the citizens would not be able to predict whether the adultery is pardoned or not, before the court decides each case.

Whereas the elements of adultery are clearly stated, the term of 'condone' or 'pardon', which can nullify prosecution, is vague, suggesting that the people subject to the law cannot predict the scope and limits of governmental power. Therefore, the Provision at Issue infringes on the principle of clarity.

(3) Principle of Proportionality between Responsibility and Criminal Punishment

The types and scope of statutory punishment should be decided by the Legislature within the legislative discretion, with the comprehensive considerations of the nature and public interest of crime, history and culture of our society, circumstances at the time of enactment, general value or legal sense of the people, and criminal policy for crime prevention (90Hun-Ba24, April 28, 1992). The concept of a constitutional State involves the idea of a substantially constitutional State that requires an appropriate relationship of proportionality between gravity of the crime and responsibility of the offender. Therefore, the right to legislation of legislators cannot be unlimited. Human dignity and value must be respected and protected; a scope of statutory sentence should be designed, in which customized punishments can be applied in accordance with the rule against excessive restriction under Article 37 Section 2 of the Constitution; and the principle of proportionality must be observed so that the punishment corresponds to responsibility and gravity of the crime (2002Hun-Ba24, November 27, 2003).

The Provision at Issue exclusively imposes imprisonment as statutory sentence. In order to justify the imprisonment as a sole statutory punishment, the gravity and illegality should be substantial so that pecuniary punishment, lighter than imprisonment, is not appropriate and

it has to be rationally predictable that the offender, in practice, will not be sentenced to criminal punishment beyond his responsibility in individual cases. Among the offenses regarding sexual culture and practice, only the adultery provision states imprisonment as statutory punishment exclusively. It suggests that the Legislature presumed that illegality of adultery is substantial and the types of adultery are not various, thereby adultery should be punished by imprisonment exclusively.

However, a vast majority of adultery and fornication cases exist, where the gravity of crime varies significantly according to the mode of act. It could be an intentional offense breaking the marital fidelity, or it could be the result of building a new family while the marital relationship was *de facto* dissolved. It could be either an intentional and continuous offense, or an incidental one time affair. Also, the legal accountability differs between the person who committed adultery while maintaining *de jure* or *de facto* marital relationship and the unmarried offender who committed fornication under the belief that his/her partner's marriage was in fact facing a breakdown. As such, it is fully predictable in general that the accountability widely varies from case to case.

The Provision at Issue nevertheless imposes imprisonment as an exclusive punishment of adultery and fornication acts, which excessively exaggerates the punitive aspect granted to criminal punishment, losing the balance between punishments. The statutory sentence confined to imprisonment as prescribed by the Provision at Issue makes it difficult to apply the law appropriately according to specific cases in the process of investigation and trials. This also restricts judges' sentencing discretion in announcing the ruling. It also appears that it is the imprisonment - the only sentence that greatly encourages abuse outside the original purpose of the system - the means to blackmailing or demanding excessive payment of compensation for grief by taking advantage of fear for detainment. The statutory imprisonment prescribed as the sole punishment causes the above mentioned abuse cases, which are against the nature of the system.

1. Adultery Case

Indeed, it is possible to have the necessity for heavy punishment of some types of crimes irrespective of the mode of act. Nonetheless, it would lose the balance between the crime and punishment to impose imprisonment exclusively for the various types of adultery. Adultery is a ground for claim of judicial divorce as well as a ground for claim of liability as it constitutes torts. It does not correspond to the modern legal sense to punish adultery by imprisonment, in addition to civil restrictions. Given the reality where the debate over the adultery ban from the criminal policy and legislative perspectives continues and many countries have abolished adultery crime, it was proven that the legal awareness of adultery has substantially changed, compared to the time of the enactment of the Provision at Issue.

In addition, the Provision at Issue states the maximum term of imprisonment as 2 years. Accordingly, a person who was convicted for adultery would serve a short-term imprisonment in most cases, if he/she is not sentenced with probation or suspended sentence. However, a short-term imprisonment has been criticized for abolishment or revision in that it presents several problems including labeling effects and infection during enforcement, while the deterrence effects are not expected. Accordingly, Australia provides a choice for daily fine instead of short-term imprisonment and the U.K. introduced community service or probation as an alternative to short-term imprisonment. Our court practice, also, would announce probation, instead of actual imprisonment, in order to prevent the side effects of short-term imprisonment in most cases, weakening the effects of punishment.

As a result, the Provision at Issue providing a short-term imprisonment exclusively for various types of adultery, whose gravity of illegality is different, is against the principle of rule of law by losing the balance between crime and punishment. Also, it does not correspond to the legal sense of the people as well as the global trend of legislation. Therefore, the Provision at Issue violates the principle of proportionality between responsibility and punishment in that it excludes or restricts the possibility to consider the individuality and distinctiveness of individual

cases by providing all adultery and fornication shall be punished by imprisonment less than 2 years.

VI. Conclusion

Despite the differences in reasoning, seven Justices agreed that the provision at issue is unconstitutional as set forth in the holding. The decision was also made with the dissenting opinion of Justice Lee Jung-Mi and Justice Ahn Chang-Ho as set forth in VII. and the concurring opinion to the majority opinion of Justice Lee Jin-Sung as set forth in VIII.

VII. Dissenting Opinion of Justice Lee Jung-Mi and Justice Ahn Chang-Ho

We are of the opinion that the Provision at Issue does not violate the Constitution, contrary to the majority opinion, as follows:

A. The Right of Sexual Self-Determination Protected by the Constitution

(1) 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”, thereby guaranteeing people’s personal rights and the right to pursue happiness. The right to self-determination is presupposed by personal rights and the right to pursue happiness and also includes the right to sexual self-determination for whether or not and with whom to engage in sexual intercourse. It is undoubted that regulation of adultery restricts the right to sexual self-determination.

The right to self-determination protected under our Constitution means the personal autonomy to decide one’s matter by his/her own will in

order to develop his/her personality, presuming a person is reasonable and reliable. A married couple should bear duties and responsibilities in making a family life of marriage that is developed and co-developed by the free will of two persons. A family relationship based on marriage composes cohabitation for preserving and protection of basic life of the family's members including the spouse, and delivering and raising of new family members, all under the presumption of marital fidelity and faith. A family community is also a fundamental ground to realize the right to personality and the right to pursue happiness of his/her own as well as a spouse and as a family member.

Nonetheless, the act of adultery committed by a married person is not included in the realm of the protected individual right to sexual self-determination, because such an act would violate the marital fidelity despite he/she chose marriage as a social system and thereby damages the social and legal system, which is marriage based on monogamy, having a destructive impact on the family community. It would be hardly agreeable to protect such an act under the right to sexual self-determination, as the majority opinion does. The right to sexual self-determination would protect love and sexual activities with the opposite sex. Nevertheless, an act of adultery or fornication that infringes on the legal interests of others or community, beyond his/her own boundary, would depart from the inherent limitation of the right to sexual self-determination.

(2) Family is the most fundamental community of human beings. It implies that family, which is the basis of the nation and society should be established and maintained. Considering that the marital relationship through marriage is the basic essence of family community, the marital relationship through marriage should be legally protected and respected for the sound existence of the nation and society.

Article 36 Section 1 of the Constitution, which provides that "Marriage and family life shall be established and sustained on the basis of individual dignity and equality of the sexes, and the State shall do

everything in its power to achieve that goal", stipulates that human dignity and gender equality shall be guaranteed even in family life and that institutions for marriage and family life shall be protected (*See* 2000Hun-Ba53, March 28, 2002). It suggests that the dignity of individuals and gender equality are the constitutional value in enacting law regarding marriage and family life. The marriage system based on dignity of individuals prohibits bigamy, while asking for monogamy. Adultery or fornication would be a major threat to monogamy as a fundamental of the marriage system as well as cause social problems including abandoning a spouse or family member.

The Provision at Issue intends to promote the marriage system and family life based on monogamy and marital fidelity between spouses, performing the duty to promote and protect marriage and family life based on individual dignity and gender equality under Article 36 Section 1 of the Constitution. From this perspective, a strong doubt would arise whether it is appropriate to admit an act infringing the social system of marriage based on monogamy and giving destructive effects on the promotion of family community, which is a fundamental ground for 'the right of personality and right to pursue happiness of his/her own, his/her spouse and family' under the scope of the right to sexual self-determination of individuals.

B. Criminal Punishment of Adultery and Legislative Discretion

A question may arise whether it is excessive to provide criminal punishment, instead of civil regulations or family regulations, against adultery or fornication. The issue of exercising criminal punishment or regulating by moral rules should be decided according to the correlation between people and society, time and space by circumstances at time or legal perception of the general public. Therefore, the issue whether adultery should be punished by criminal punishment in addition to civil regulations should be, in principle, decided according to the legislative policy within the legislative discretion (*see* 2000Hun-Ba60, October 25,

2001).

The Provision at Issue has been criticized in that it intervenes and enforces the issue of ethics or morality of individuals. Nonetheless, it is beyond the mere issue of ethics and morality in that adultery or fornication committed by a married person and his/her participant is a major threat to the dissolution of marriage and family life, deviating from the reasonable social ethics.

It is well known that the global trend is to repeal adultery crimes; the general perception of the citizens regarding sex has substantially changed according to the rapid acceptance of individualism and sexual liberty; and the normative power of the Provision at Issue has been relieved. Nonetheless, despite of the significant changes in the structure and general perception of the society, the ideal of chastity inherent in the Korean society, in particular that between husband and wife, is inherited from traditional ethics that is still rooted in the society. Because sustaining monogamy and the obligation to remain sexually faithful is established as a part of our moral standards, it is still our legal awareness that adultery undermines social order and infringes on others' rights (*see* 2007Hun-Ka17, October 30, 2008, etc.). The Constitutional Court had decided that adultery crimes were not unconstitutional, confirming the above ideas for several times, in a series of precedents from its foundation to 2008. We should be prudent in deciding whether there is a change of circumstances to alter established precedents.

The majority opinion suggests that the legal perception of the general public has changed. Nonetheless, there is no empirical evidence to prove the change of the legal perception of the general public. A survey conducted by the Korea Legal Aid Center for Family Relations with regard to the abolition of adultery in 2005 presented that 7,721 people (about 60% of the poll) agreed the retention of adultery crimes among 12,516 people. A survey conducted by a public opinion survey institution in 2009 showed that 64.1% of the poll agreed the retention of adultery crimes among 1,000 people aged 19 and above with regard to the abolition of adultery crimes. A survey conducted by the Korean

Women's Development Institute in 2014 also indicated that 60.4% of the poll agreed the retention of adultery crimes among 2,000 people aged 19 and above. It clearly suggests that the general public, including women who are economically and socially underprivileged, still supports the idea that the nation should protect family by criminally punishing adulterous acts. In these terms, our criminal law has aggravated punishment provision for injury or murder of ascendants in that it serves the protection of the least ethical morality of our society, instead of the enforcement of the filial duty or morality by law.

We cannot deny the role of criminal punishment in maintaining the good sexual morality of the society. Korea has prohibited adultery and punished a person who committed adultery or fornication since the law prohibiting 8 conducts in the era of *Kojoson*. Thenceforth, a perception that adultery is prohibited by law and adulterous acts are punished by criminal punishment is deeply rooted in our society. A provision to punish adulterous acts has had a general deterrence effect to prevent the general public from committing adultery. It also has served the protective function for the sound sexual morality of the society as well as the marital relationship and precious family. The abolition of adultery might lower the sexual morality of our society by demolishing a threshold of 'the least sexual morality'; cause disorder of sexual morality of our society by repealing the criminal awareness against adultery; and stimulate, accordingly, dissolution of marriage and family community. It implies that the fundamental system of community of human beings, which is 'family-society-nation' stated by the German philosopher George Wilhelm Friedrich Hegel, could be infringed. It suggests that the legislature's judgment to criminally punish adultery, in addition to the autonomous reflection of ethical principles of individuals and the society, would not be arbitrary.

It would be certainly debatable whether the criminal punishment on adultery, where marriage is irreparably broken, including a case of long-term separation, and the spousal obligation of faithfulness no longer exists, is beyond the reasonable scope to achieve the legislative purpose.

Nevertheless, it might be possible to consider that an adulterous act which lacks condemnation of the society does not violate the social rule and to deny the valid establishment of adultery by supplementing the concept of the term of 'condone' and 'pardon'. In this regard, the Supreme Court has held that if a marriage is irreparably dissolved despite the couple is not divorced yet, a sexual activity between a spouse and his/her fornication partner would not infringe on the marital cohabitation and cause any damage regarding rights to the marital cohabitation, implying that it does not compose any illegal acts (Supreme Court 2011Meu2997, November 20, 2014, en banc decision). Despite this Supreme Court decision concerning the civil liability, it implies that, where the marital cohabitation is *de fact* dissolved, an adulterous act would not be regarded as an act which violates social rules under the social ethics or social perception, for the lack of illegality.

The issue of how to punish a crime, which relates a choice of a type and scope of statutory punishment, should be decided by the legislature within the legislative discretion under the comprehensive considerations of our history, culture, circumstances at the time of enactment, values or legal perception of the general public, and criminal policy for crime prevention.

The Provision at Issue stipulates only imprisonment as punishment, but the maximum sentence of two years would not be heavy and the sentence shall be mitigated to suspension of sentence for adultery crime whose gravity of crime is not substantial. Therefore, it should not be regarded that the Provision at Issue imposes overly excessive criminal punishment that is not allowed for proportional punishment. Further, adultery and fornication, once prosecuted, result in different invasion of interests than other crimes concerning sexual culture and practice in that they cause social problems inevitably stemming from family breakdown regardless of modes of acts. Also, light fines would not be likely to have deterrence effects on adulterers who desire to avoid the responsibility of support or tort liability coming from the existing marriage. In that sense, the legislator's non-enactment of fines in the

Provision at Issue, unlike other sexual custom-related crimes under the Criminal Act, would not violate the balance of criminal punishment (*see* 2007Hun-Ka17, etc., October 30, 2008).

C. Implication of Retention of Adultery

The divorce rate of Korea has dramatically increased since the 1980s, reaching at around 40% after 2000s. Currently, Korea is the country where shows the highest divorce rate among Asian countries. From 2000 through 2006, a misconduct of a spouse is the biggest reason of a claim for judicial divorce, forming 47.1% among the reasons of claim. The majority opinion suggests that the protection of a spouse, whose spouse committed adultery, can be achieved by a claim for damage of property and mental harm. Nonetheless, division of property is rarely effective and the amount of alimony is nominal for a housewife, who does not experience social activities and is economically and socially underprivileged in family. The current civil system and judicial practice do not suffice in protecting the economically and socially underprivileged in that various systems to protect the underprivileged, including a claim for division of property during marriage, restriction on the arbitrary disposition of a spouse with regard to a residential building, the right to cancel a fraudulent transaction to reserve the right of division or property or protection of shares of inheritance according to divorce, are not arranged.

The juvenile delinquency which arises as a serious social problem, recently, also presents a point. Family takes charge of a significant role to educate children to be a sound member of society by providing stable resources and opportunities in life as well as internalizing social rules approved by society and preventing delinquency, as a social institute to be in charge of birth and nurture, socialization, social-regulation of children. Therefore, the dissolution of family community due to adultery may exercise a harmful influence on children. Several researches with regard to the causation of juvenile delinquency indicate that the rate of

delinquency of children coming from broken families, including a case of divorce or separation, is higher than ones coming from parents families.

The current systems and practices of the Civil Act do not offer sufficient protection for the socially and economically underprivileged in case of divorce. If adultery crime is abolished without providing the social safety-net for custodial responsibility and broken family upon divorce, it is concerned that several family communities would be dissolved and human rights and welfares of the underprivileged and young children would be infringed, for placing one's right to sexual self-determination and privacy before the responsibility of marriage and preciousness of family.

As seen above, punishment of adultery is still meaningful in our society. Whereas the Provision at Issue protects the sound sexual morality and marriage and family life, the regulation of acts by the Provision at Issue is a restriction on sexual behavior in specific relations that adulterous acts are forbidden during the *de jure* marriage and fornication is prohibited, if one of partners is legally married. The duty and responsibility naturally concurs with the marital relationship which is formed based on free will, in case of a person who committed adultery. It would be also reasonable for an unmarried person, who is a partner of fornication, to be responsible for not participating in fornication, knowing the violation of legal and moral duties. Therefore, the public interests achieved by the Provision at Issue and the side effects arising out of the Provision at Issue would not infringe on the reasonable proportionality.

D. Sub-Conclusion

The Provision at Issue would not violate the Constitution in that it does not restrict the right to sexual self-determination as it does not infringe on the principle against excessive restriction.

VIII. Concurring Opinion to Majority Opinion of Justice Lee Jin-Sung

I write additionally to the majority opinion to point out why stipulating the punishment by imprisonment as the only statutory punishment for an offense of adultery is against the principle of proportionality between responsibility and punishment and whether expanding classes of the statutory punishment for the offense can avoid declaration of unconstitutionality.

Determining how to punish a criminal offense, in other words, deciding the classes and sentence of statutory punishment, involves consideration of the nature of crime, interests protected by law, and punishment. The determination should be made by comprehensively considering historical, cultural and current circumstances, people's values or legal sentiments, and a criminal policy on prevention of crimes.

As was pointed out earlier in this decision, acts of adultery may be carried out in various forms. Thus, it is highly probable that stipulating imprisonment as the only statutory punishment for acts of adultery may offend the balance between responsibility and punishment. However, a fine which is a lesser degree of punishment than imprisonment, has been recognized as compensation or wergild that has the nature of personal compensation, and historically it functioned as an adequate punishment for an offense of taking the profit of others and has had strong significance as a means of redeeming profits acquired by a criminal out of a crime in reality. As adultery is an immoral crime committed by violating the duty of marital fidelity, bringing disorder in the marriage system, and not a crime taking the profit of others, a fine is not an appropriate means to punish adultery in the light of the nature of the crime.

The reason why imposing criminal punishment on adultery is expected to have no actual and fundamental preventive effect is that marital fidelity is not what can be regulated through coercion by law; failure to specify a fine as statutory punishment for adultery is not the reason. Imposing a minor fine against acts of adultery will hardly have a

deterrent effect on a person committed adultery, who desires to avoid responsibility to support the family and pay monetary compensation incurred by dissolution of a marital relationship (*see* 2007Hun-Ka17, October 30, 2008). Also, it may result in offering a way out of what he or she had done, if the person is financially well-off. On the other hand, while one of the consequences of imposing a heavy fine is to diminish one's property, under the current system in which property owned by husband and wife is assumed to be common property unless it is the separate property owned by one spouse, a heavy fine imposed on a single spouse may result in disturbing the property of both spouses.

The qualification punishment, a form of honor punishment adopted by the Criminal Act, that deprives or restricts diverse qualifications in the public law relations, and other qualifications including a government official's right to vote, run for an election, or become a director of a company, is an adequate form of punishment for a government official's crimes related to official duties or the Public Official Election Act. The qualification punishment has recently become a subject to controversy over whether the punishment should be maintained as one of major criminal punishments. Therefore, given the nature of the qualification punishment, the punishment is not different from a fine that it is also not an appropriate means of punishment for adultery involving a violation of the marital fidelity.

As examined above, a fine or qualification punishment cannot serve as an appropriate means of punishment for adultery. Given this, maintaining the offense of adultery and including a fine or qualification punishment as statutory punishment for adultery in order to pursue the principle of proportionality between responsibility and punishment are not in the best interest of protecting a good-faith spouse and children.

The crime of adultery, once prosecution begins and unless a charge is dropped, inevitably causes social problems generated by a breakup of family regardless of the type of acts of adultery. The dissenting opinion asserts retention of the crime of adultery for the reason that no proper protection measures for women and children who are economically

disadvantaged in the process of dissolution of family are yet in place. However, I do not believe that resolution of civil and family lawsuits generated by misconduct of a single spouse should resort to criminal proceedings by maintaining the crime of adultery.

In the end, abolishing the crime of adultery which has shown no actual deterrent effect, and reforming trial practice relating to a damage claim for tortious act, a claim for division of property, and custody and visitation of a child as well as coming up with systems to protect welfare of a deserted spouse and children will be the right path to pursue.

Justices Park Han-Chul (Presiding Justice), Lee Jung-Mi, Kim Yi-Su, Lee Jin-Sung, Kim Chang-Jong, Ahn Chang-Ho, Kang Il-Won, Seo Ki-Seog and Cho Yong-Ho

[Appendix]

(*intentionally omitted*)

2. *Case on the 'Act on Special Measures for National Integrity' authorizing the infringement of the right to collective bargaining and right to collective action based on the Presidential State Emergency Rights above the Constitution*

[27-1(A) KCCR 226, 2014Hun-Ka5, March 26, 2015]

Requesting Court: Seoul High Court

Requesting Petitioner: Bae O-Byeong
Represented by Jihyang Law Firm
(Attorney in Charge: Lee Sang-Hee, Kim Jin, Lee Eun-Woo, Nam Sang-Chul)

Underlying Case: Seoul High Court 2012Jaeno60 Violation of National Security Act

Decided: March 26, 2015

Holding

The part of Article 9 Section 1 of Article 11 Section 2 of the former 'Act on Special Measures for National Integrity' (enacted by Act No. 2312 on December 27, 1971 and before repealed by Act No. 3470 on December 17, 1981) violates the Constitution.

Reasoning

I. Introduction of the Case

The requesting petitioner, who was a branch manager of a labor union, had worked for a OO corporation located in OO-Dong OO, Guro-gu, Seoul from May 17, 1980 to the end of September, 1980.

The requesting petitioner exercised his right to collective bargaining and collective action without prior conciliation with the competent authorities around May 1980 through May 1981, despite the exercise of the right to collective bargaining and collective action was subject to the result of the prior consultation with competent authorities under the state of national emergency, declared on December 6, 1971. The petitioner was charged with the violation of the former 'Act on Special Measures for National Integrity' and sentenced to one year and six months in prison at Seoul High Court on April 14, 1982 (82No84, hereinafter referred to as 'the decision subject to retrial'). The decision subject to retrial was confirmed by the Supreme Court on July 27, 1982 (82Do1397).

The petitioner applied for the retrial of the aforementioned decision at Seoul High Court on October 26, 2012 (2012Jaeno60), and also filed the motion to request for the constitutional review on Article 9 and Article 11 Section 2 of the former 'Act on Special Measures for National Integrity (hereinafter, 'Act on Special Measures')' (2013Chogi290). The requesting court granted the motion and requested the constitutional review on the aforementioned provision on March 13, 2014.

II. Subject Matter of Review

The subject matter of this case is whether the part of Article 9 Section 1 of Article 11 Section 2 of the former 'Act on Special Measures for National Integrity' (enacted by Act No. 2312 on December 27, 1971 and before repealed by Act No. 3470 on December 17, 1981) (hereinafter, 'the Provision at Issue') violates the Constitution. The Provision at Issue in this case is as follows:

Provision at Issue

The former Act on Special Measures for National Integrity (enacted by

Act No. 2312 on December 27, 1971 and before repealed by Act No. 3470 on December 17, 1981)

Article 11 (Punishment)

(2) Any person who violates the Order and Measure for National Mobilization stipulated in Article 5 of this Act, or who violates the Measure or Regulation stipulated by Article 6 Section 1 or 2, or Article 7 through 9 of this Act shall be imprisoned for more than one year but less than 7 years.

Related Provision

Article 9 (Restriction on the Right to Collective Bargaining and Others)

(1) In case of state of national emergency, workers' rights to collective bargaining or collective action shall accord to the result of conciliation that should be asked for the competent authorities to conciliate in prior.

III. Reasoning of Request of Constitutional Review of the Requesting Court

The Constitutional Court has decided that the former Act on Special Measures for National Integrity (enacted by Act No. 2312 on December 27, 1971 and before repealed by Act No. 3470 on December 17, 1981, hereinafter 'Act on Special Measures') is unconstitutional for violating the constitutionalism and rule of law in that it authorized the President to exercise the national emergency right which is above the Constitution (92Hun-Ka18, June 30, 1994). According to the purpose of the aforementioned decision, the Provision at Issue should be declared to be unconstitutional.

IV. Judgment

A. Unconstitutionality of the Act on Special Measures

(1) Nature and Limitation of the National Emergency Rights

The national emergency right is a tool to promote the Constitution for preserving the Nation and maintaining the constitutional order in case of emergency where the Nation or constitutional order is threatened. The national emergency right should comply with the substantial requirements, post-controlling procedure and temporal limits that are prescribed by the Constitution in that its nature is an emergency alternative for the substantial crisis which cannot be managed with ordinary governmental powers (92Hun-Ka18, June 30, 1994; 93Hun-Ma186, February 29, 1996).

(2) Substances and Unconstitutionality of the Act on Special Measures

(A) Article 2 of the Act on Special Measures stated that "the President may declare the state of national emergency, after the consultation of the national security council and deliberation of the cabinet council, if an urgent measure is required for preserving the nation in order to manage the substantial threats to the national security in an effective way and to maintain the law and order." Nonetheless, the right to declare the state of national emergency did not conform to any substantial requirement of national emergency rights (the financial and economic emergency action and order, emergency order, and promulgation of martial law) that are listed in Article 76 and 77 of the Constitution, implying that it created the 'supra-constitutional' national emergency right. The declaration of the state of national emergency of the President according to the Act on Special Measures did not satisfy the substantial requirements for the national emergency rights under the Constitution since the 'extreme crisis' of domestic and foreign situations, which might justify the creation of supra-constitutional national emergency right, did not exist at

the time of the enactment.

(B) The Constitution states that the President shall promptly notify the financial and economic emergency action and order, emergency order, or promulgation of martial law to the National Assembly and obtain its approval in case such actions are taken or orders are issued. In case no approval is obtained, the actions or orders shall lose their effects forthwith (Article 76 Section 3 and 4). When the President has proclaimed martial law, the President shall notify it to the National Assembly without delay; and the President shall comply when the National Assembly requests the lifting of martial law with the concurrent vote of a majority of the total members of the National Assembly (Article 77 Section 4 and 5). These provisions suggest that our Constitution requires the democratic post-controlling procedure in a strict way.

The national emergency rights should be exercised to overcome the substantial crisis of the constitutional order. Because of its nature and purpose, it should be exercised within the limited scope to remove the direct cause of the substantial crisis. In addition, the national emergency right should be exercised tentatively and temporarily from the perspective of term in that it is the exception of the constitutional order to promote the constitutional order and to overcome the extreme crisis.

The Act on Special Measures stated that "the declaration of the state of national emergency shall be lifted only when the President determined that the state of national emergency was disappeared." (Article 3 Section 1) The declaration of the state of national emergency would be lifted only when the President admitted that emergent circumstances were resolved, according to his/her own decision. It implies that any democratic post-controlling procedure was not provided. The Act on Special Measures did not impose the duty to notify to the National Assembly or receive the consent of the National Assembly: Instead, it provided that the National Assembly might propose to lift the state of national emergency and the President might refuse such proposal for

special circumstances (Article 3 Section 2). Considering the temporary and provisional nature of the national emergency power, the general procedure designed by the Constitution should be promptly complied after lifting the state of national emergency. Nonetheless, the declaration of the state of national emergency according to the Act on Special Measures lasted for about 10 years. It reflected the temporal limits implied by the nature of the national emergency right was not observed in that the Act on Special Measures did not provide the effective post-controlling system for the declaration of the state of national emergency of the President. Therefore, Article 3 of the Act on Special Measures, stating the lifting of the state of national emergency, violates the Constitution for not providing the post-controlling procedure by the National Assembly and for infringing the temporal limits which is inherent in the national emergency right.

(3) Sub-Conclusion

The Act on Special Measures authorized the President to exercise the national emergency right which was not allowed under our Constitution. Article 2 and 3 of the Act on Special Measures, providing the declaration and lifting of the state of national emergency, would be unconstitutional for violating the constitutional requirements including the substantial requirements, post-controlling procedure and temporal limits. The other provisions of the Act on Special Measures, presuming the aforementioned provisions, are also unconstitutional (92Hun-Ka18, June 30, 1994). Therefore, the Provision at Issue violates the Constitution.

B. Unconstitutionality of the Provision at Issue

(1) The Constitution protects the right to organize, collective bargaining, and collective action of all workers, in principle (Article 33 Section 1 of the Constitution). The exception of these basic labor rights with regard to ‘public officers’ and ‘workers of a major defense

contractor stipulated by a statute' is also provided by the Constitution (Article 33 Section 2 of the Constitution). Accordingly, three basic labor rights for workers, who are neither public officers nor workers of a major defense contractor, stipulated by a statute should be thoroughly protected under the Constitution. Despite three basic labor rights of workers may be partially restricted for the need of national security, maintenance of order, or public interests (the former part of Article 37 Section 2 of the Constitution), the Constitution does not allow the infringement of the essence of basic rights, as the complete denial of three basic labor rights (the latter part of Article 37 Section 2 of the Constitution).

(2) Article 9 Section 1 of the Act on Special Measures stated that "in case of state of national emergency, workers' rights to collective bargaining or collective action shall accord to the result of conciliation that should be asked for the competent authorities to conciliate in prior." The Provision at Issue prescribed that "Any person who violates the provision of Article 9 shall be imprisoned for more than one year but less than 7 years." The Provision at Issue did not stipulate the scope of workers whose rights to collective bargaining and collective action would be restricted. Instead, it inclusively delegated the authorization of the exercise of the aforementioned rights to competent authorities, who would decide the result of conciliation; and it criminalized its violation, without prescribing substantial requirements, including conditions and limitations of the exercise of the rights to collective bargaining and collective action, in statutes. It would correspond to the unreasonable and complete prohibition of the right to collective bargaining and collective action of every worker, thereby infringing on the essential substance of three basic labor rights of our Constitution. Therefore, the Provision at Issue violates the Article 33 Section 1 and the latter part of Article 37 Section 2 of the Constitution.

V. Conclusion

Therefore, the Provision at Issue is unconstitutional as set forth in the holding. The decision was made with a unanimous opinion of participating justices.

Justices Park Han-Chul (Presiding Justice), Lee Jung-Mi, Kim Yi-Su, Lee Jin-Sung, Kim Chang-Jong, Ahn Chang-Ho, Kang Il-Won, Seo Ki-Seog and Cho Yong-Ho

II. Summaries of Opinions

1. Adultery Case

[27-1(A) KCCR 20, 2009Hun-Ba17 · 205, 2010Hun-Ba194, 2011Hun-Ba4, 2012Hun-Ba57 · 255 · 411, 2013Hun-Ba139 · 161 · 267 · 276 · 342 · 365, 2014Hun-Ba53 · 464, 2011Hun-Ka31, 2014Hun-Ka4(consolidated), February 26, 2015]

In this case, the Constitutional Court decided that Article 241 of the Criminal Act that imposes imprisonment as the criminal punishment of adultery or fornication violates the Constitution.

Background of the Case

The petitioners, who were prosecuted on a charge of adultery or fornication, filed the motion to request for the constitutional review on Article 241 of the Criminal Act, alleging the unconstitutionality of the aforementioned provision. After the motion was denied, the petitioners filed the constitutional complaint. Uijeongbu District Court and Suwon District Court, while hearing a trial on prosecution of adultery or fornication, requested for the constitutional review of the aforementioned provision, according to the motion of defendants or sua sponte.

Subject Matter of Review

The subject matter of review is the constitutionality of Article 241 of the Criminal Act (enacted as Act No. 293 on September 18, 1953) and its contents are listed below:

Provision at Issue

Criminal Act (enacted as Act No. 293 on September 18, 1953)

Article 241 (Adultery) (1) A married person who commits adultery shall be punished by imprisonment for not more than two years. The same shall apply to the other participant.

(2) The crime in the preceding section shall be prosecuted only upon the accusation of the victimized spouse. If the victimized spouse condones or pardons the adultery, accusation can no longer be made.

Summary of Decision

Opinion of Five Justices (Unconstitutional)

The provision at issue, which intends to promote the marriage system based on the good sexual culture and practice and monogamy and to preserve marital fidelity between spouses, restricts the right to sexual self-determination and to privacy that are protected under the Constitution.

There is no longer any public consensus regarding the criminalization of adultery, along with the change of public perception on social structure, marriage, and sex and the spread of an idea to value sexual self-determination. In addition, the tendency of modern criminal law directs that the State should not exercise its authority in case an act, in essence, belongs to personal privacy and is not socially harmful or in evident violation of legal interests, despite the act is in contradiction to morality. According to this tendency, it is a global trend to abolish adultery crimes. It should be left to the free will and love of people to decide whether to maintain marriage, and the matter should not be externally forced through a criminal punishment.

Considering the current rate of punishing adultery and the degree of social condemnation against adultery, it is hard to anticipate a general and special deterrence effect for adultery from the perspective of criminal policy. The protection of obligation to remain faithful between spouses and the protection of female spouses would be effectively achieved by a claim for judicial divorce against a spouse who committed

adultery (Article 840 Item 1 of the Civil Act), a claim for damages (Article 843 and 806 of the Civil Act), disadvantages in deciding custody and the restriction or exclusion of visitation rights (Article 837 and 837-2 of the Civil Act) or a claim for division of property (Article 839-2 of the Civil Act). Adultery law has often been misused in divorce suits by spouses whose liability is much bigger or by those outside the marriage to blackmail married women who have temporarily cheated on their husbands.

With the comprehensive considerations, the provision at issue fails to achieve the appropriateness of means and least restrictiveness.

Whereas it is difficult to suppose that the provision at issue can any longer serve the public policy objectives of protecting marriages and the spousal obligation of faithfulness, the aforementioned provision excessively restricts the basic rights of the people, including the right to sexual self-determination, thereby losing the balance of interests.

Therefore, the provision at issue violates the Constitution for infringing on the right to sexual self-determination and secrecy and freedom of privacy.

Opinion of One Justice (Unconstitutional)

The essence of adultery is the intentional breach of sexual faith between spouses by a person who chose marriage based on his/her free will.

The criminal punishment against a person who committed adultery and the other participant has a legitimate legislative purpose to protect the least social ethics order that connotes a marital system based on the spousal obligation of faithfulness, implying that it is not an excessive restriction on the right to sexual self-determination. Besides, there is a public consensus for the necessity of criminalization of adultery.

Nonetheless, certain types of adultery, which are committed in a situation where marriage is de facto dissolved and the spousal obligation

of faithfulness no longer exists, are neither morally reprehensible nor anti-social.

In addition, an unmarried person who fornicated with a married person should not be punished by criminal punishment in that it is impossible to presume his/her spousal obligation of faithfulness and the breach of faith: Rather, it would be desirable to assume his/her responsibility through ethical or moral criticism or civil tort liability. Provided, an unmarried person who fornicated with a married person lead to fornication by active provocation or temptation, it would be justifiable to exercise the State's authority for criminal punishment for its significant reprehensibility and anti-sociality.

The provision at issue provides that all modes of adultery and fornication shall be uniformly punished without any consideration of singularities and specificities, according to the type of a person who committed adultery or fornication and specific style of action. It would violate the Constitution for excessive exercise of State's criminal punishment authority in that it excessively restricts the right to sexual self-determination, overstepping its limited role in achieving the purpose and function of criminal punishment.

Opinion of One Justice (Unconstitutional)

Adultery of a married person becomes a major threat to monogamy and causes social problems including an abandonment of his/her spouse and family members. It justifies legal regulation despite adultery or fornication falls into the domain of intimate privacy. Nevertheless, accusation cannot be filed if the victimized spouse condones or pardons the adultery. The meaning of condone or pardon, which constitutes the prosecution requirement, is not clearly defined, suggesting that the people subject to the law cannot predict the scope and limits of governmental power. Therefore the provision at issue infringes on the principle of clarity.

In addition, the provision at issue states that all modes of adultery and fornication shall be uniformly punished by imprisonment without any option, despite the gravity of crime varies depending on the mode of act. It excludes or restricts the possibility to consider singularities and specificities of individual cases, violating the principle of proportionality between responsibility and punishment.

Dissenting Opinion of Two Justices

The act of adultery is not included in the realm of the protected individual right to sexual self-determination, because such an act would damage the social system, which is marriage based on monogamy, and have a destructive impact on protecting and maintaining families.

Our legal awareness still tells us that adulterous acts of a married person and the other participant not only regard ethical or moral issues but also threat social order and infringe on the others' rights. The abolition of adultery might lower the sexual morality of our society by demolishing a standard of 'minimum sexual morality'; cause disorder of sexual morality of our society by repealing the criminal awareness against adultery; and stimulate, accordingly, dissolution of marriage and family community. Therefore it is difficult to assume that legislature's judgment to criminally punish adultery is arbitrary. It would be debatable whether, where marriage is irreparably broken and the spousal obligation of faithfulness no longer exists, the criminal punishment on adultery is beyond the reasonable scope to achieve the legislative purpose. Nonetheless, the aforementioned mode of adultery would not be punished for the lack of illegality in that it would not contradict the social rules under the social ethics and social norms.

The provision at issue stipulates only imprisonment as punishment, but the maximum sentence of two years would not be heavy and the sentence shall be mitigated to suspension of sentence for adultery crime whose gravity of crime is not substantial. Because light fines are not

likely to have deterrence effect on adulterers, the balance of the criminal punishment system is not violated.

The current systems and practices of the Civil Act do not offer sufficient protection for the socially and economically underprivileged in case of divorce. If adultery crime is abolished without providing the social safety-net for custodial responsibility and broken family upon divorce, it is concerned that several family communities would be dissolved and human rights and welfares of the underprivileged and young children would be infringed, for placing one's right to sexual self-determination and privacy before the responsibility of marriage and preciousness of family.

As seen above, punishment of adultery is still meaningful in our society. Whereas the provision at issue protects the sound sexual morality and marriage and family life, the regulation of acts by the provision at issue is a restriction on sexual behavior in specific relations, thereby not infringing on the reasonable proportionality. The provision at issue would not violate the Constitution in that it does not restrict the right to sexual self-determination as it does not infringe on the principle against excessive restriction.

Concurring Opinion to Majority Opinion of One Justice

Since the modes of adultery and fornication vary, it would be possible to assume that provision at issue lost the proportionality between responsibility and punishment, by providing imprisonment as the only punishment measure. Nonetheless, it would be difficult to presume that a fine, which belongs to pecuniary punishment, or punishment concerning qualifications, which belongs to Ehrenstrafe, is appropriate and effective for adultery which abandons the spousal obligation of faithfulness and brings disorder of the marriage system. The resolution for the misbehavior of a spouse during his/her marriage under the civil law and family law should not be found in criminal punishment. While abolishing adultery

crime that does not have efficacious deterrent effects, practices regarding compensation, division of property, custody, visitation rights, and others, arising out of dissolution of family due to adultery, should be improved and a new system should be considered for spouses and children.

2. Case on Sexual intercourse by force with a female child or juvenile

[27-1(A) KCCR 112, 2013Hun-Ba107, February 26, 2015]

In this case, the Constitutional Court held that the part of Article 7 Section 5 of the former Act on the Protection of Children and Juveniles against Sexual Abuse which punished anyone who had sex with a female child or juvenile by force in the same manner as applied to anyone who raped a female child or juvenile did not violate rule of clarity, principle against excessive restriction and principle of equality.

Background of the Case

(1) The petitioner was indicted on charges of having sex or attempt to have sex with a 14-year-old girl. He was sentenced to imprisonment for a maximum of two years and a minimum of one and half year and 80 hours in a treatment program for sex offenders.

(2) While the case was pending at the Supreme Court, the petitioner filed a motion to request for a constitutional review of Article 7 Section 5 of 'Act on the Protection of Children and Juveniles against Sexual Abuse', but the motion was denied. Subsequently, the petitioner filed this constitutional complaint.

Provision at Issue

The subject matter of this case is whether the part of 'any person who had sex with a female child or juvenile by force shall be punished in the same manner as prescribed in Section 1' (hereinafter the 'Instant Provision') in Article 7 Section 5 of the former Act on the Protection of Children and Juveniles against Sexual Abuse (revised by Act No. 9765 on June 9, 2009 and before being revised by Act No. 11047 on

September 15, 2011) violates the Constitution. The provision at issue in this case is as follows:

Provision at Issue

(5) Any person who has sex with or commits an indecent act against a female child or juvenile by a deceptive scheme or by force shall be punished in the same manner as prescribed in Section 1 through Section (3).

Summary of the Decision

1. Whether the Instant Provision violates the rule of clarity

In general, 'force' is construed to mean 'any kind of power or influence that can be used to subdue and/or confuse the free will of other person.' The Supreme Court has also construed the meaning of force in the Instant Provision as 'any kind of physical or intangible influence that can be used to suppress and/or confuse the free will of a person' and 'force' includes not only physical violence or intimidation but also any kind of pressure exerted from one's social, economic or political authority and status. The precedents of the Supreme Court has consistently held that circumstantial factors such as the degree of influence, the status or authority of the person who exerts such force, victim's age, prior relationship between victim and perpetrator, reasons for having sexual intercourse, substantive types of action, situation at the time of crime, etc., should be considered to determine whether a person has a sex by force. As a reasonable person with general legal awareness and proper common sense would easily infer the meaning of 'force' from the above mentioned explanation, the definition is not unclear. Therefore, we find that the Instant Provision is not against the rule of clarity

2. Whether the Instant Provision violates the Principle against excessive restriction

Female children or juveniles are considered immature in terms of personality, emotional, intellectual and physical development and social adjustment and it is possible for them to engage in sexual activity by force even without physical violence or intimidation due to lack of ability to physically and socially defense themselves. In reality, there have been many cases of sex crimes against female children or juveniles by force without physical violence or intimidation. The Instant Provision, which was legislated to protect female children and juveniles from being victims of sex offense and help them become good and mature members of society as adults, has legitimate legislative purposes and the means to achieve the legislative purposes are proper.

Also, having sex with a female child or juvenile by force is a serious crime that can cause profound psychological trauma and emotional damage to the victimized child or juvenile and their family members and even become a threat to society, and the nature of the crime is very demoralizing. Further, considering the criminological need to provide special measures to deal with sex crimes against female children and juveniles and the difficulty to have a clear-cut age demarcation as an objective indication to be considered as children or juveniles, it is hard to conclude that the Instant Provision imposes excessive punishment on the crime compared to its culpability.

3. Whether the Instant Provision violates the principle of equality

The Instant Provision is different from the crime of ‘sexual intercourse with minors’ punished by Article 302 of the Criminal Code in terms of the object (target) of the criminal act as it is not applied to ‘anyone for whom the first day of January of the year in which he/she reaches 19 years of age has arrived.’ Moreover, the possible unconstitutionality of the statutory punishment, if any, can be resolved through sentencing

judge's discretion to mitigate punishment such as a suspended sentence if there are extenuating circumstances in relation to the commission of the crime. As such, the Instant Provision, in comparison to the crime of sexual intercourse with minors under Article 302 of the Criminal Code, does not impose excessive punishment that is clearly out of proportion to the crime being punished and therefore, does not violate the principle of equality.

Given the tremendous traumatizing effects of the crime on victims and their families, the illegality of having sex with a child or juvenile by force is serious and the nature of the crime is so demoralizing that it can be considered as blamable as the crime of rape. Also, as the scope of the act of having sex with a child or juvenile by force is very wide, depending on specific cases, punishment for the crime can be severer than or at least same as for that of rape. The possible unreasonableness in the imposition of sentence that the Instant Provision imposes the same punishment as rape can be cured by judge's case-specific decision with reference to surrounding circumstances. Therefore, the fact that the punishment for the crime imposed by Instant Provision is the same as that for rape does not necessarily mean that the Instant Provision violates the principle of equality, running afoul of systemic legitimacy and balance in criminal punishment.

The Instant Provision was legislated in consideration of the fact that rape is generally committed by men due to the physical and physiological difference between men and women; social and ethical perception of having sexual relations; and the recognized difference of the nature or severity of damage between men and women. Therefore, the legislature's decision to impose grave punishment on having sex with a female child or juvenile cannot be considered arbitrary beyond the scope of legislative discretion.

Summary of the Dissenting Opinion by Three Justices

1. Violation of the rule of clarity

There are various types of activities classified as the crime of having sex with a child or juvenile by force and all the children and juveniles do not share the same level of intellectual, physical, emotional and moral maturity, thereby showing great difference based on their personal traits or ages. Therefore, the crime of having sex with a child or juvenile by force includes not only activities involving tremendously severe culpability or illegality but also activities entailing relatively less harm or lower level of illegality. The Instant Provision, however, uniformly provides for punishment by imprisonment for more than 5 years simply because victims are female children and juveniles under 19 years old, without consideration of the aforementioned differences. The Instant Provision, which indiscriminately imposes severe punishment even on less culpable acts by ignoring the diverse types of activities included in the crime, violates the principle of proportionality between responsibility and criminal punishment.

2. Violation of the principle of equality

In relation to the crime of sexual intercourse with minors under Article 302 of the Criminal Code, the Instant Provision does not provide any other additional factors for aggregating punishment than the exclusion of ‘anyone for whom the first day of January of the year in which he/she reaches 19 years of age has arrived’ from its application even though he/she is considered as a minor. Even the objects of crimes under the Instant Provision and the provision of the Criminal Code are mostly overlapped because there is no such a big difference in the age element between the two provisions. Moreover, as the legal age of majority has been lowered to 19 years since July 1, 2013, it became harder to find any difference between the two crimes.

This shows that we have two different statutory provisions for the same type of criminal activity, one in the Criminal Code and another in the special act. Under our current situation where application of law is only in the hands of prosecutors who have discretion to indict, prosecutor's choice of any one of the provisions for indictment could finally result in disadvantage to the related parties. Therefore, the Instant Provision violates the principle of equality, running afoul of systemic legitimacy and balance in criminal punishment.

Meanwhile, although there are various types of activities classified as the crime of having sex with a child or juvenile by force and the gap between the nature and degree of illegality in them is clearly recognized, the Instant Provision stipulates a uniform punishment even on the less intrusive crime of sexual intercourse in terms of violating the right to sexual autonomy compared to rape only because victims are female children and juveniles under 19 years, failing to take into consideration of the nature and degree of illegality and the difference in the ability of victims to exercise sexual autonomy. As such, the Instant Provision treats different things same and therefore, violates the principle of equality, running afoul of systemic legitimacy and balance in criminal punishment.

Supplementary Opinion to the Dissenting Opinion by One Justice

All the people who have sex with children or juveniles by force should be equally punished regardless of whether the victim is female or male. Nevertheless, the Instant Provision stipulates that only 'female' children and juveniles are the objects of crimes, and due to this limitation, while a case of having sex with female children and juveniles by force is punished in the same manner as punished against the crime of rape, a case of having sex with male children or juveniles by force is punished in the same manner as done against the crime of forced indecent assault, not against the crime of rape. This is a clear violation of the principle of equality as it provides different punishment simply on

the basis of victims' sex.

The majority opinion argues that the heavier punishment imposed by the Instant Provision on the crime of sexual intercourse with female children and juveniles is resulted from the consideration that rape is generally committed by men due to the physical and physiological difference between men and women and the nature or severity of damage between men and women are different. But this opinion, which considers the act of having sexual intercourse with children or juveniles as a violation of chastity or as a cause of unwanted pregnancy, overlooks the fact that the essence of sex crime is not about loss of one's chastity but about infringement of one's freedom to sexual autonomy. Considering the fact that both men and women can engage in sexual intercourse and the degree of harm caused by having sexual intercourse by force is not related to the victims' sex, I believe that such argument is improper.

3. Case on the 'Act on Special Measures for National Integrity' authorizing the infringement of the right to collective bargaining and right to collective action based on the Presidential State Emergency Rights above the Constitution

[27-1(A) KCCR 226, 2014Hun-Ka5, March 26, 2015]

In this case, the Constitutional Court held that the part of Article 9 Section 1 of Article 11 Section 2 of the former 'Act on Special Measures for National Integrity' that authorized the President to restrict and criminalize the exercise of the right to collective bargaining and the right to collective action in case of national emergency violates the Constitution in that it did not observe the substantial requirements, post-controlling procedure, and temporal limits of national emergency rights, further infringing on the essential part of three basic labor rights under the Constitution.

Background of the Case

(1) The petitioner, who was a branch manager of a labor union, worked for a corporation located in Seoul around 1980.

(2) The petitioner exercised his right to collective bargaining and collective action without prior conciliation with the competent authorities around May 1980 through May 1981, despite the exercise of the right to collective bargaining and collective action was subject to the result of the prior consultation with competent authorities under the state of national emergency, declared on December 6, 1971. The petitioner was charged with the violation of Article 11 Section 2 of the former 'Act on Special Measures for National Integrity' and finally sentenced to one year and six months of imprisonment.

(3) The petitioner applied for the retrial on October 26, 2012, and also

filed the motion to request for the constitutional review on Article 11 Section 2 of the former 'Act on Special Measures for National Integrity (hereinafter, 'Act on Special Measures')'. The court granted the motion and requested the constitutional review on the aforementioned provision on March 13, 2014.

Subject Matter of Review

The subject matter of this case is whether the part of Article 9 Section 1 of Article 11 Section 2 of the former 'Act on Special Measures for National Integrity' (enacted by Act No. 2312 on December 27, 1971 and before repealed by Act No. 3470 on December 17, 1981) violates the Constitution. The provision at issue in this case is as follows:

Provision at Issue

The former Act on Special Measures for National Integrity (enacted by Act No. 2312 on December 27, 1971 and before repealed by Act No. 3470 on December 17, 1981)

Article 11 (Punishment)

(2) Any person who violates the Order and Measure for National Mobilization stipulated in Article 5 of this Act, or who violates the Measure or Regulation stipulated by Article 6 Section 1 or 2, or Article 7 through 9 of this Act shall be imprisoned for more than one year but less than 7 years.

Related Provision

The former Act on Special Measures for National Integrity (enacted by Act No. 2312 on December 27, 1971 and before repealed by Act No. 3470 on December 17, 1981)

Article 9 (Restriction on the Right to Collective Bargaining and

Others)

(1) In case of state of national emergency, workers' rights to collective bargaining or collective action shall accord to the result of conciliation that should be asked for the competent authorities to conciliate in prior.

Summary of Decision

1. Constitutionality of the Provision at Issue that Authorized the National Emergency Rights above the Constitution, Regardless of the Substantive Requirements, Post-Controlling Procedure and Temporal Limits

The national emergency right should observe the substantial requirements, post-controlling procedure and temporal limits that are prescribed by the Constitution in that its nature is an emergency alternative for the substantial crisis which cannot be managed with ordinary governmental powers.

Nonetheless, Article 2 of the Act on Special Measures, providing the declaration of the state of national emergency, did not conform to any substantial requirement that is listed at Article 76 and 77 of the Constitution, implying that it created the 'supra-constitutional' national emergency right. The 'extreme crisis' of domestic and foreign situations, which might justify such right, did not exist at the time of the enactment. In addition, Article 3 of the Act on Special Measures, providing the release of the state of national emergency, stated that the declaration of the state of national emergency should be lifted only when the President determined that the state of national emergency has disappeared. It did not provide the democratic post-controlling procedure of the National Assembly, thereby leading the prolonged state of national emergency which should be temporary and provisional by nature.

Accordingly, Article 2 and 3 of the Act on Special Measures, providing the declaration and release of the state of national emergency,

would be unconstitutional for violating the constitutional requirements including the substantial requirements, post-controlling procedure and temporal limits, as the 'supra-constitutional' national emergency power that was not authorized by the Constitution. The other provisions of the Act on Special Measures, presuming the aforementioned provisions, are also unconstitutional. Therefore, the provision at issue violates the Constitution.

2. Violation of the Three Basic Labor Rights

Article 33 Section 1 of the Constitution promotes three basic labor rights. The exception of the three basic labor rights with regard to 'public officers' and 'workers of a major defense contractor stipulated by a statute' is stipulated by Article 33 Section 2 and 3 of the Constitution. Despite the three basic labor rights of workers may be partially restricted under the former part of Article 37 Section 2 of the Constitution, it would violate the principle of the prohibition on the infringement of essential parts of basic rights, provided by the latter part of Article 37 Section 2 of the Constitution, to completely deny the three basic labor rights of workers who are not 'public officers or workers of a major defense contractor stipulated by a statute'.

The provision at issue did not stipulate the scope of workers whose rights to collective bargaining and collective action would be restricted. Instead, it inclusively delegated the authorization of the exercise of the aforementioned rights to competent authorities, who would decide the result of conciliation; and it criminalized its violation, without prescribing substantial requirements, including conditions and limitations of the exercise of the rights to collective bargaining and collective action, in statutes. It would correspond to the complete prohibition of the right to collective bargaining and collective action of every worker, thereby infringing on the essential substance of the three basic labor rights of our Constitution.

3. Case on the 'Act on Special Measures for National Integrity' authorizing the infringement of the right to collective bargaining and right to collective action based on the Presidential State Emergency Rights above the Constitution

Therefore, the provision at issue would be unconstitutional, violating the Article 33 Section 1 and the latter part of Article 37 Section 2 of the Constitution.

4. Identity Verification of a Person Intending to Use Materials Harmful to Juveniles on the Internet Case

[27-1(A) KCCR 312, 2013Hun-Ma354, March 26, 2015]

In this case, the Court held that Article 16 Section 1 of the Juvenile Protection Act which requires a person intending to provide materials harmful to juveniles through an information and communications network to verify the age and identity of a prospective recipient of the materials and Article 17 of the Enforcement Decree of the Juvenile Protection Act which specifies methods of verification such as an authenticated certificate, I-PIN (Internet Personal Identification Number), and cell phones do not infringe on the complainants' right to know and right to self-determination on personal information.

Background of the Case

While the complainants tried to listen to music files and view music video files from the Internet sites, access to those music and video files was not allowed, even for adults, without going through identity verification process, as those files were designated as materials harmful to juveniles. Thereupon, the complainants filed a constitutional complaint in this case, claiming that Article 16 Section 1 of the Juvenile Protection Act and Article 17 of the Enforcement Decree of the Juvenile Protection Act which require a person intending to provide materials harmful to juveniles to verify the age and identity of a prospective recipient through means such as an authenticated certificate infringe on rights such as the right to know and the right to self-determination on personal information.

Subject Matter of Review

The subject matter of review in this case is whether the part in the

front part of Article 16 Section 1 of the Juvenile Protection Act (wholly amended by Act No. 11048 on September 15, 2011) related to a person providing materials harmful to juveniles through an information and communications network specified in subparagraph 1 of Article 2 Section 1 of the Act on Promotion of Information and Communications Network Utilization and Information Protection, etc. (hereinafter referred to as the "Information and Communications Network Act") and Article 17 of the Enforcement Decree of the Juvenile Protection Act (the aforementioned provisions are hereinafter collectively referred to as the "Identity Verification Provisions at Issue") infringe on fundamental rights of the complainants. The provisions at issue read as follows:

Provisions at Issue

Juvenile Protection Act (wholly amended by Act No. 11048, September 15, 2011)

Article 16 (Prohibition of Sale, etc.)

(1) A person who intends to sell, lend, or distribute a media product specified by Presidential Decree as harmful to juveniles to a person or provide such product to a person for viewing, watching, or using shall verify the age and identity of the person and shall not sell, lend, or distribute such product to a juvenile or provide such product to a juvenile for viewing, watching, or use.

Enforcement Decree of the Juvenile Protection Act (wholly amended by Enforcement Decree No. 24102, September 14, 2012)

Article 17 (Methods of the Age and Identity Verification)

In the event a media product harmful to juveniles is being provided by a means such as sales in accordance with Article 16 Section 1 of the Juvenile Protection Act, the age and identity of a prospective recipient must be verified by any of the following means or methods:

1. Face to face verification of an identity card, or verification of a copy of an identity card received by fax or mail

2. An authorized certificate specified in subparagraph 8 of Article 2 of the Digital Signature Act
3. A method of identity verification not using resident registration numbers as specified in Article 23-2 Section 2 of the Act on Promotion of Information and Communications Network Utilization and Information Protection, etc.
4. A method of joining as a member without using resident registration numbers pursuant to Article 24 Section 2 of the Personal Information Protection Act
5. Certification by a credit card
6. Certification by a cell phone. In this case, the age and identity must be verified by adding means such as the sending of text messages or voice automated response via cell phones.

Summary of the Decision

As the Identity Verification Provisions at Issue aim to block and protect juveniles from harmful materials containing obscenity and violence by accurately confirming the age of a person using materials harmful to juveniles, legitimacy of the legislative purpose of the Provisions is recognized, and because verification of an identity card through face to face contact is virtually impossible on the Internet, requiring identity verification through a licensed certification authority or a third party carrying information for identify verification is an appropriate means to achieve the legislative purpose.

The means of identity verification such as an authorized certificate, I-PIN, and cell phones prescribed by the Identity Verification Provisions at Issue was developed from reflective consideration of reckless collection of resident registration numbers in the past. Such means is a measure devised to achieve accurate identity verification and at the same time to minimize the giving and maintenance of private information by having the identity verification conducted through a reliable institution. Furthermore, unless a user voluntarily consents to the giving of personal

information, the Identity Verification Provisions at Issue, in and of themselves, do not provide grounds based on which an information provider may collect and maintain personal information of a user, and even in the event a user consented to the giving or collection of the information, the personal information collected shall be protected pursuant to the Act on the Promotion of Information and Communications Network Utilization and Information Protection, etc. Based on these grounds, the Identity Verification Provisions at Issue do not violate the principle of the least restrictive means.

Considering the nature of the Internet media that has likelihood of indiscriminate dissemination with the strong distributive powers, the public interest which such restrictions aim to serve, namely, the protection of juveniles, is very significant. On the other hand, the detriment to be suffered by the complainants as a result of the Identity Verification Provisions at Issue is having to go through the identity verification process when they wish to use the materials harmful to juveniles on the Internet. Therefore, a balance of interests is also met.

Accordingly, the Identity Verification Provisions at Issue are not against the rule against excessive restriction and do not infringe on fundamental rights of the complainants.

Summary of Dissenting Opinion by One Justice

While there is a need to block and protect the juveniles from harmful environments, the Identity Verification Provisions at Issue, despite availability of less restrictive alternative means such as installment of filtering software, in certain aspects excessively restrict an adult's right to freely access the materials harmful to juveniles by requiring every user to undergo the identity verification procedure, which is complicated and bears significant risk of personal information leakage. Moreover, in case of a person providing the materials for non-commercial purposes or others providing the materials via websites on foreign-based servers, the verification requirements tend to be less effective as regulating those

providers is practically difficult. Therefore, the Identity Verification Provisions at Issue are against the rule against excessive restriction which is the threshold requirement that must be met when limiting fundamental rights and thereby infringe on fundamental rights of the complainants.

5. Case on Internet Game Authentication

[27-1(A) KCCR 342, 2013Hun-Ma517, March 26, 2015]

In this case, the Constitutional Court held that Article 12-3 Section 1 Item 1 and 2 of the Game Industry Promotion Act and Article 8-3 Section 3 and 4 of the Enforcement Decree of the same Act, which mandate game product-related business operators to take measures for authentication when game users sign up as members as well as to obtain the consent of legal representatives when juvenile users sign up, are not in violation of the complainants' general freedom of action and their right to informational self-determination.

Background of the Case

A. One of the complainants named ○○○, who was 17 years old when he brought this case to the Court, is a "juvenile" under Article 2 Item 10 of the Game Industry Promotion Act (hereinafter the "Game Industry Act"), and the other complainant ××× is an adult. Complainants ○○○ and ××× attempted to sign up for a website to play an internet game provided via an information and communications network but, pursuant to Article 12-3 Section 1 Item 1 and 2, were not able to sign up as members and use the game products. Complainant ○○○ failed to follow the procedure for authentication and secure the consent of a legal representative, while complainant ××× did not take the steps for authentication.

B. Accordingly, on July 24, 2013, the complainants filed a constitutional complaint with this Court challenging the constitutionality of Article 12-3 Section 1 Item 1 and 2, which require game product-related business operators that supply public access to game products via information and communications networks to provide game users with a means for authentication when they sign up and to obtain the consent of

legal representatives when juveniles sign up, and Article 8-3, Section 3 and 4 of the Enforcement Decree of the same Act, which elaborate on the methods of authentication and the consent of legal representatives, alleging that these provisions violated their general freedom of action and right to informational self-determination.

Subject Matter of Review

The subject matter of review in this case is whether Article 12-3 Section 1 Item 1 and 2 of the Game Industry Act (amended by Act No. 10879, Jul. 21, 2011), Article 8-3 Section 3 and 4 of the Enforcement Decree of the same Act (amended by Presidential Decree No. 23523, Jan. 20, 2012) (Article 12-3 Section 1 Item 1 of the Game Industry Act and Article 8-3 Section 3 of the Enforcement Decree of the same Act that stipulate on authentication are hereinafter referred to as the "Authentication Clause", and Article 12-3 Section 1 Item 2 of the Game Industry Act and Article 8-3 Section 4 of the Enforcement Decree of the same Act that provide for the requirement of prior consent by legal representatives are hereinafter referred to as the "Prior Consent Clause"), as provided below, infringe on the fundamental rights of the complainants.

Game Industry Promotion Act (amended by Act No. 10879, Jul. 21, 2011)

Article 12-3 (Preventative Measures on Excessive Immersion in and Addiction to Games, etc.)

(1) For the prevention of excessive immersion in or addiction to games by users of game products, game products-related business operators [limited to those who provide service so that the public may use game products through the information and communications network (hereinafter referred to as "information and communications network") as defined in Article 2 (1) 1 of the Act on Promotion of Information and Communications Network Utilization and Information Protection, etc.:

hereinafter the same shall apply in this Article] shall take measures to prevent an excessive use of game products including the following (hereinafter referred to as "preventative measures"):

1. Confirmation of real name and age of users of game products when they join as members and authentication of themselves;
2. Securing the consent of legal representatives, such as persons with parental right when juveniles join as members;

Enforcement Decree of the Game Industry Promotion Act (amended by Presidential Decree No. 23523, Jan. 20, 2012)

Article 8-3 (Preventive Measures on Excessive Immersion in and Addiction to Games, etc.)

(3) Each game product-related business operator (limited to game products related business operators under Article 12-3 (1) of the Act; hereafter the same shall apply in this Article) shall devise means to confirm the identification of the user of a game product by requesting that an accredited certification authority referred to in subparagraph 10 of Article 2 of the Digital Signature Act or other third party or administrative agency providing services for confirmation of identification confirm his/her identification, or by face-to-face identification, when the user of the game product becomes a member as prescribed in Article 12-3 (1) 1 of the Act.

(4) Each game products related business operator shall obtain the consent of legal representatives by any of the following methods pursuant to Article 12-3 (1) 2 of the Act:

1. That the game products related business operator posts the details of the consent in the information and communications network defined in Article 12-3 (1) of the Act and requests the legal representatives to mark whether they consent to such details;
2. That the game products related business operator directly issues a document stating the details of the consent or delivers such document to the legal representatives by mail or fax, and requests

them to submit the document after affixing their seal or signature to the details of the consent;

3. That the game products related business operator sends an electronic mail message stating the details of the consent to the legal representatives and receives electronic mail messages stating the expression of consent from them;
4. That the game products related business operator informs the legal representatives of the details of the consent and obtains their consent over the phone, or informs the legal representatives of the method by which he/she may check the details of the consent, such as the Internet address, and obtains their consent over the phone again.

Summary of Decision

A. Review of Authentication Clause

The Authentication Clause aims to prevent excessive immersion in or addiction to internet games by effectively ensuring age-based regulatory measures and inducing internet game users to voluntarily restrict their game hours, which is considered a legitimate legislative purpose, and requiring the authentication of users is an appropriate means to serve such purpose.

Information and communications network service providers, such as game product-related business operators, are not authorized to collect and utilize the resident registration number of their service users and are thus practically unable to confirm just their real name or age accurately online without authentication procedures, and the method specified in Article 8-3 Section 3 of the Enforcement Decree of the Game Industry Act requires a credible third party to carry out authentication measures and minimize the scope of information collection, which appears to be the least restrictive means in gaining precise confirmation of the real

name and age of game users. Furthermore, additional consent of internet game users is required for game product-related business operators to collect information other than the results of authentication; there are sufficient ways available to minimize the restriction of fundamental rights resulting from information disclosure by strictly regulating the entire process throughout the collection, use, and storage of information collected with consent; and the requirement for one-time authentication at the time of sign-up does not necessarily present a major barrier or restriction so as to make users rethink their game use itself or intimidate the game market. For this reason, the Authentication Clause also meets the least restrictive means test.

In addition, no significant private interest is limited by the requirement for one-time authentication when signing up, while major public interest lies with the purpose of the Authentication Clause to prevent excessive immersion in and addiction to games, which means the Clause is not inconsistent with the doctrine of balance of interests.

Therefore, the Authentication Clause does not infringe on the complainants' general freedom of action and their right to informational self-determination.

B. Review of Prior Consent Clause

The Prior Consent Clause aims to prevent juveniles from being excessively immersed in or addicted to internet games by allowing their legal representatives to intervene their decision on whether or not to use internet games. This legislative purpose is considered legitimate, and obligating juveniles to obtain the consent of their legal representatives when signing up is deemed an appropriate means to achieve that purpose.

The Prior Consent Clause offers the opportunity to determine the game use and game hours of juveniles at their homes through dialogue and thereby prioritizes the autonomous efforts of each household in resolving

the issues of overindulgence or addiction of juveniles. This measure does not amount to excessive restriction of the juveniles' right to self-determination, and other legal, coercive means concerning the game use of juveniles cannot fully replace the autonomous efforts either. Additionally, a vast majority of juveniles under the age of 18 lack independent financial capabilities, which implies a high risk of them being involved in crimes related to purchasable game items, etc., so the age criterion of 18 years should by no means be considered excessive. And the measures to minimize the restriction of fundamental rights are well established, such as keeping to the minimum the scope of information collected in obtaining the consent of a legal representative and diversifying the methods for such consent, which means the Clause complies with the least restrictive means requirement.

At the same time, the private interest involved in the juveniles' obligation to discuss and obtain the consent from legal representatives is relatively small compared to the great significance of public interests, such as the reduction in social costs by preventing juveniles from being excessively immersed in or addicted to internet games and the social benefits gained from the juveniles' growth into sound beings. This considered, the Prior Consent Clause is not contrary to the doctrine of balance of interests.

For the reasons stated above, the Prior Consent Clause is not in violation of complainant ○○○'s general freedom of action and his right to informational self-determination.

Dissenting Opinion by Two Justices

A. Dissenting Opinion on Authentication Clause

Internet game use is a recreational activity whose essential element is freedom, so the intervention in or regulation of game use by the state should be done in a very discreet manner. Therefore, insofar as it is

uncertain as to what is the direct cause of the harm allegedly inflicted by overindulgence and addiction to internet games, the legislative purpose of preventing such excessive use through effective guarantee of age-based regulatory measures and precise notification of game hours, regardless of who is subject to this regulation, should not be perceived as a legitimate public interest that can be pursued by the state.

Even if the legislative purpose of the Authentication Clause is considered legitimate to an extent, such legislation is rarely found in other countries. It is hardly an effective means to accomplish the legislative purpose given the risk of children stealing their parents' identities; the requirement for authentication in anonymity-based internet games enables monitoring and control and thus threatens the freedom of game users; the authentication method provided for in the Clause is not universally accessible to all, which may result in marginalizing some people due to economic, social reasons; there is likelihood that personal information collected by certification authorities or authentication agencies can be leaked; and the Clause may undermine the growth of the game industry contrary to the legislative purpose of the Game Industry Act. As such, the Authentication Clause is not an appropriate means and fails to meet the least restrictive means requirement.

In addition, the complainants' freedom and right of access to internet games is significantly violated by the Authentication Clause, while it is not even clear whether it is legitimate for the state to intervene in order to pursue the public interest underlying the prevention of overindulgence and addiction to games. Thus, the Clause is also in violation of the doctrine of balance of interests.

Therefore, the Clause violates the rule against excessive restriction, infringing on the general freedom of action and the right to informational self-determination of the complainants.

B. Dissenting Opinion on Prior Consent Clause

In terms of the juveniles' overindulgence and addiction to internet games, autonomous regulation and self-purification of each household should come before the state's intervention. Therefore, to legally force juveniles to obtain the consent of their legal representatives when signing up for game websites has the risk of violating the parents' right to educate their children and, insofar as no procedure is secured to verify the identification of the legal representative who expresses consent, cannot function as an effective means to enforce the guidance of legal representatives. Consequently, the Prior Consent Clause has no legitimate legislative purpose and does not provide an appropriate means to achieve that purpose.

Even if it is considered necessary to mandate the intervention of a legal representative in connection with the content and duration of internet game use, a number of systems are already in place under the Game Industry Act and the Juvenile Protection Act, such as the shutdown system and the time restriction on the entrance to internet game facilities aimed at preventing juveniles' overindulgence and addiction to internet games. This considered, requiring all juveniles to obtain the consent of legal representatives in signing up is arguably a duplicate and excessive measure; legal representatives, even if they agree to the use of internet games itself, may hesitate consenting because of their concern over the collection of personal information; and even requiring all those aged between 16 and 18, who are fully capable of autonomously controlling game hours according to their will, to gain the consent of their legal representatives constitutes an excessive limitation on the juveniles' right to informational self-determination, which fails the least restrictive means test. Furthermore, it is considered illegitimate to force legal representatives to intervene in preventing the juveniles' overindulgence and addiction to games, while the juveniles' right to general freedom of action including their right to self-determination may

be overly limited and the right to informational self-determination of legal representatives who intend to consent to the juveniles' use of internet games may be infringed upon by the Prior Consent Clause. Given this, the Prior Consent Clause also fails to comply with the doctrine of balance of interests.

Accordingly, the Prior Consent Clause violates the rule against excessive restriction and infringes on the general freedom of action and the right to informational self-determination of complainant ○○○.

6. Limits on the Period and Method of Election Campaign Case

[27-1(A) KCCR 407, 2011Hun-Ba163, April 30, 2015]

In this case, the Constitutional Court struck down the following provisions as unconstitutional: the main text of Article 59 of the former Public Official Election Act and Article 254 Section 2 of the current Public Official Election Act that prohibit election campaigns prior to the election campaign period; Article 255 Section 1 Item 18 of the current Act banning acts of obtaining any signature or seal impression as part of the election campaigns; Article 255 Section 2 Item 5 of the current Act restricting the distribution of printed materials, etc.; and Article 256 Section 2 Item 1 (h) of the former Act banning the installing, etc. of facilities.

Background of the Case

The complainant in this case was indicted on charges that "he, as the Head of Operations Steering Committee of the Environment-Friendly ○○○○○ Free Meal Service Group, resolved to engage in the campaigning for the candidates in favor of introducing free school meals and against those opposing it in the 5th nationwide local elections on June 2 and, in an effort to influence the election from 180 days prior to the election day to the election day, among others, installed, displayed, posted the banners, placards, signboards, and signs calling for the full introduction of eco-friendly free meals on 14 occasions from April 5 to May 16, 2010; distributed the printed materials along the similar lines as well as some badges representing eco-friendly free meals; collected signatures from voters to garner support for eco-friendly free meals; and engaged in election campaigns as such before the election campaign period and thereby violated the Public Official Election Act." Consequently, the complainant was sentenced to two million Korean won in fines on February 18, 2011 and appealed to the appellate court. With the appeal pending, the complainant filed a motion requesting the

judicial review of Article 59, Article 90 Section 1, Article 93 Section 1, Article 107, and Article 254 Section 2 of the Public Official Election Act, but when it was denied on June 30, 2011, filed a constitutional complaint with this Court on July 28, 2011.

Subject Matter of Review

The subject matter to be reviewed in this case is the constitutionality of the following: ① the main text of Article 59 of the former Public Official Election Act (amended by Act No. 7681, Aug. 4, 2005 and later amended by Act No. 10981, Jul. 28, 2011) and a part of Article 254 Section 2 of the Act (amended by Act No. 9974, Jan. 25, 2010) concerning "any person who conducts an election campaign by using propaganda facilities or tools, various printed materials, etc." (the stated provisions are hereinafter jointly referred to as the "No Pre-Election Campaign Clause"), ② Article 255 Section 1 Item 18 of the Act (amended by Act No. 7681, Aug. 4, 2005) (hereinafter "No Signature Campaign Clause"), ③ a portion of Article 255 Section 2 Item 5 of the Act (amended by Act No. 9974, Jan. 25, 2010) concerning "a person who distributes any writing, book, picture in contravention of Article 93 (1)" (hereinafter "Non-Distribution of Printed Materials Clause"), ④ a portion of Article 256 Section 2 Item 1(h) of the former Act (amended by Act No. 9974, Jan. 25, 2010 and later amended by Act No. 12393, Feb. 13, 2014) concerning "a person who installs, displays, posts any banners, other advertising material or facilities in contravention of Article 90 Section 1 Item 1 or distributes a label or other indicating materials in contravention of Item 2 of the same Section" (hereinafter "Non-Installment of Facility Clause").

Former Public Official Election Act (amended by Act No. 7681, Aug. 4, 2005, later amended by Act No. 10981, Jul. 28, 2011)

Article 59 (Period for Election Campaign)

An election campaign may be allowed during the period from the day

next to the closing date of candidate registration, to the day before the election day: Provided, That the same shall not apply to cases falling under any one of the following subparagraphs:

1. Where any preliminary candidate, etc. wages the election campaign pursuant to the provisions of Article 60-3 (1) and (2);
2. Deleted; and
3. Where a candidate or a person intending to become a candidate conducts election campaigns by utilizing the Internet homepages opened by himself

Public Official Election Act (amended by Act No. 9974, Jan. 25, 2010)
Article 254 (Violation of Election Campaign Period)

(2) Except as prescribed otherwise by this Act, any person who conducts an election campaign by using propaganda facilities or tools, various printed materials, broadcasting, newspapers, news communications, magazines, other publications, campaign meetings, symposiums, debates, native folks meetings, alumni meetings, neighbors meetings, other meetings, information and communications, the establishment of an organization for the election campaign or private organization, door-to-door visit and other methods prior to an election campaign period shall be punished by imprisonment for not more than two years or by a fine not exceeding four million won.

Public Official Election Act (amended by Act No. 7681, Aug. 4, 2005)
Article 255 (Unlawful Election Campaign)

(1) Any person who falls under any one of the following subparagraphs shall be punished by imprisonment for not more than three years or by a fine not exceeding six million won:

18. A person who obtains or causes another person obtain any signature or seal impression, in contravention of Article 107

Public Official Election Act (amended by Act No. 9974, Jan. 25, 2010)
Article 255 (Unlawful Election Campaign)

(2) Any person who falls under any of the following subparagraphs shall be punished by imprisonment for not more than two years or by a fine not exceeding four million won:

5. A person who distributes, pastes, scatters, posts, plays, any writing, book, picture or causes another person to do so, in contravention of Article 93 (1), who makes or has another person make an advertisement or appearance, in contravention of paragraph (2) of the same Article, or who issues, distributes or demands any identification card, document or other printed materials, or makes another person do so, in contravention of paragraph (3)

Former Public Official Election Act (amended by Act No. 9974, Jan. 25, 2010, later amended by Act No. 12393, Feb. 13, 2014)

Article 256 (Violation of Various Restrictive Provisions)

(2) Any person who falls under any of the following subparagraphs shall be punished by imprisonment for not more than two years or by a fine not exceeding four million won:

1. A person who falls under any of the following items in connection with an election campaign:

(h) A person who installs, displays, posts, or distributes any propaganda materials, or makes another person do so, or makes and sells any symbol, or makes another person do so, in contravention of Article 90

Summary of Decision

1. Review of No Pre-Election Campaign Clause

As the “election campaign” in the No Pre-Election Campaign Clause can be interpreted as a proactive, premeditated action with an objective purpose and intention to make a candidate win or lose, among all actions required to support a certain candidate and garner votes to that end or to defeat a candidate, the Clause is not void for vagueness under

the principle of *nulla poena sine lege,* or the principle of legality. The limit on the period of election campaigns is considered necessary and reasonable in light of its legislative purpose and content, the general form and practice of elections in Korea, the practical necessity of the restriction, etc. This form of regulation is not considered so overly restrictive as to make the freedom of election campaign irrelevant, and therefore the No Pre-Election Campaign Clause is not in violation of the freedom of political expression, etc. Since the Clause bans anyone from engaging in election campaigns before the election campaign period, it is considered not discriminatory and not in violation of the equality principle.

2. Review of No Signature Campaign Clause

In the same vein, the concept of "election campaign" in the No Signature Campaign Clause is not in violation of the void for vagueness doctrine under the principle of legality. The Clause has been legislated for the purpose of achieving fair elections, with due consideration given to the particularity of election campaigns through collection of signatures and seal impressions, the implication of such campaigns on the electoral reality, etc. Given that the Clause does not ban the acts of collecting signatures and seal impressions related to entire political issues but only regulates those aimed at election campaigning, and that only the constituents are prohibited from collecting signatures and seal impressions for election campaigns and non-constituents are not subject to this regulation, it is not considered to infringe on the freedom of political expression.

3. Review of Non-Distribution of Printed Materials Clause

The phrase "in an effort to influence the election" in the Non-Distribution of Printed Materials Clause refers to the intention to take action related to the preparatory process of elections, election

campaigns, election results, etc. that in effect amounts to election campaigning from “180 days before the election day”, during which candidates or political parties are expected to develop plans and begin preparation to win elections, to the “election day”, so the Clause is not void for vagueness. The current Public Official Election Act allows for the registration of preliminary candidates and permits just them to engage in election campaigns prior to the election campaign period, but in a limited manner through certain designated methods such as handing out name cards. If the distribution and posting of documents and printed materials is allowed altogether, the regulations under the Public Official Election Act may be rendered virtually irrelevant and damage the fairness of elections. Taking into account the fact that, among others, only the “expressive acts that amount to election campaigns” aimed at influencing elections from 180 days before the election day to the election day are regulated in consideration of the nature of Korea’s election culture, it is not considered that the Clause infringes on the freedom of political expression, including the freedom of election campaigning.

4. Review of Non-Installment of Facility Clause

The same phrase “in an effort to influence the election” in the Non-Installment of Facility Clause is not void for vagueness for the same reason above. Pursuant to the current Public Official Election Act, only the preliminary candidates are allowed to engage in election campaigns before the election campaign period and only certain methods are permitted, such as wearing shoulder belts or labels. If installing signboards, tablets, or hanging boards were fully allowed, the regulations under the Public Official Election Act would be rendered insignificant in practice and may harm the fairness of elections. The scope of limited freedom is only confined to, among a variety of conceivable election campaigns, certain methods and contents of election campaigns that particularly contain a high risk of causing substantial damage, and as the

election campaign practically begins 180 days before the election day, this kind of regulation does not exceed the minimum extent required to prevent any damages and therefore does not violate the freedom of political expression.

Opinion by Three Justices Dissenting from No Signature Campaign Clause

Since voters can cast a ballot free from any papers they may have signed or sealed prior to voting, signatures and seal impressions are hardly considered a disruption to fair voting based on the free will of voters. Even if a ban on signatures and seal impressions in elections is needed for fair voting, this purpose can be served fully by limiting the duration of the ban on signature campaigns to a reasonable timeframe that can affect elections. Nevertheless, the No Signature Campaign Clause does not specify the period of banning campaigns to collect signatures or seal impressions, and so the general public is exposed to a constant risk of having one's rights limited in terms of political expression. The issue of importance in the elections is to reflect the public will more accurately to the election results, but the Clause constitutes an excessive limitation on the freedom of expression as it regulates even those signature campaigns that were originally permitted previously. Eventually, the Clause banning and punishing political expressions continuously and completely fails to satisfy the least restrictive means requirement and therefore infringes on the complainant's freedom of political expression by violating the rule against excessive restriction.

Opinion by Three Justices Dissenting from Non-Distribution of Printed Materials Clause and Non-Installment of Facility Clause

The Non-Distribution of Printed Materials Clause limits written political

expressions by general voters from “180 days before the election day”, and the period of ban is excessively lengthy. The fairness of elections undermined by financial disparity and black propaganda can be fully protected by regulating the management bodies and expenses of election campaigns or punishing the spread of false information and slander. A document as a medium through which information is delivered becomes effective only when the intended receiver reads it proactively, so it is possible that rebuttal, debate, and correction can take place by way of documents. The general voters’ right to political expression should be encouraged in order to realize real democracy, but the Clause imposes a general, total ban on it and thus infringes on the complainant’s freedom of political expression.

Although printed materials are mediums that are more common and accessible than facilities, the same assessment of the Non-Distribution of Printed Materials Clause mentioned above applies to the Non-Installment of Facility Clause. The Non-Installment of Facility Clause limits political expression using facilities from “180 days before the election day”, which is too lengthy. The possible damage to the fairness of elections caused by imbalance stemming from financial gap between candidates and black propaganda can also be fully prevented through regulations of management bodies and expenses of election campaigns or punishment of spreading false information and slander. Therefore, the Non-Installment of Facility Clause, for the reasons stated above, violates the rule against excessive restriction and thus infringes on the complainant’s freedom of political expression.

7. Case on "Pro-Enemy" Clauses of the National Security Act

[27-1(A) KCCR 453, 2012Hun-Ba95 · 261, 2013Hun-Ba77 · 78 · 192 · 264 · 344, 2014Hun-Ba241, 2013Hun-Ka26, 2015Hun-Ka7, 2014Hun-Ba100 (consolidated), April 30, 2015]

In this case, the Constitutional Court upheld the provisions of the National Security Act prohibiting "pro-enemy" actions, accession to "pro-enemy" organizations, as well as manufacture, possession, distribution, or acquisition of any expression materials with the intention to commit "pro-enemy" actions. The portions of the provisions at issue are, respectively, "any person who praises, incites or propagates the activities of an anti-government organization or who acts in concert with it with the knowledge of the fact that it may endanger the existence and security of the State or democratic fundamental order" in Article 7 Section 1; "any person who joins an organization aiming at the act as referred to in paragraph (1)" in Article 7 Section 3; and "any person who manufactures, holds, distributes, or acquires any documents, drawings or other expression materials with the intention of committing the act as referred to in paragraph (1)" in Article 7 Section 5.

Background of the Case

A. The movants of 2013Hun-Ka26, 2015Hun-Ka7 and complainants of 2012Hun-Ba95, 261, 2013Hun-Ba77, 78, 192, 264, 344, and 2014Hun-Ba100, 241 had been indicted on charges of violating Article 7 Section 1, 3 and 5 of the National Security Act that criminalize pro-enemy actions, accession to pro-enemy organizations, and manufacture, possession, distribution, or acquisition of expression materials with the intention of committing pro-enemy acts.

B. With the above cases pending, the defendants, or the abovementioned movants and complainants, filed motions requesting constitutional review of the aforementioned provisions and Article 2 Section 1 of the National

Security Act which provide for anti-state organizations. The Suwon District Court and the Seoul Northern District Court granted the motions and filed for constitutional review of the laws in question (2013Hun-Ka26, 2015Hun-Ka7), while the other courts dismissed the motions. Therefore, the complainants, pursuant to Article 68 Section 2 of the Constitutional Court Act, filed a constitutional complaint challenging the constitutionality of the said provisions (2012Hun-Ba95, 261, 2013Hun-Ba77, 78, 192, 264, 344, 2014Hun-Ba100, 241).

Subject Matter of Review

The subject matter of review in this case is as follows: (a) Article 2 Section 1 of the National Security Act (amended by Act No. 4373, May 31, 1991; the same applies hereinafter) (the provision, specifically, is hereinafter referred to as the “Anti-State Organization Clause”), (b) a portion of Article 7 Section 1 of the Act regarding “any person who praises, incites or propagates the activities of an anti-government organization or who acts in concert with it with the knowledge of the fact that it may endanger the existence and security of the State or democratic fundamental order” (hereinafter the “Pro-Enemy Actions Clause”), (c) a portion of Article 7 Section 3 of the Act regarding “any person who joins an organization aiming at the act as referred to in paragraph (1)” (hereinafter the “Joining Pro-Enemy Organizations Clause”), and (d) the portion of Article 7 Section 5 concerning “any person who manufactures, holds, distributes, or acquires any documents, drawings or other expression materials, with the intention of committing the act as referred to in paragraph (1)” (hereinafter the “Pro-Enemy Expression Materials Clause”).

National Security Act (Amended by Act No. 4373, May 31, 1991)
Article 2 (Definition)
(1) For the purpose of this Act, the term “anti-government organization” means a domestic or foreign organization or group which uses

fraudulently the title of the government or aims at a rebellion against the State, and which is provided with a command and leadership system.

Article 7 (Praise, Incitement, etc.)

(1) Any person who praises, incites or propagates the activities of an anti-government organization, a member thereof or of the person who has received an order from it, or who acts in concert with it, or propagates or instigates a rebellion against the State, with the knowledge of the fact that it may endanger the existence and security of the State or democratic fundamental order, shall be punished by imprisonment for not more than seven years.

(3) Any person who constitutes or joins an organization aiming at the act as referred to in paragraph (1) shall be punished by imprisonment for a definite term of one or more years.

(5) Any person who manufactures, imports, reproduces, holds, carries, distributes, sells or acquires any documents, drawings or other expression materials, with the intention of committing the act as referred to in paragraph (1), (3) or (4), shall be punished by the penalty as referred to in the respective paragraph.

Summary of Decision

A. Review of Anti-State Organization Clause

The claim that classifying North Korea as an anti-state organization specified in the Anti-State Organization Clause is an unconstitutional interpretation is nothing more than contesting the admission of facts, subsumptive application of legal norms, or legal interpretation or judgments of courts, which in effect constitutes a violation of the current system designed for control of norms. Therefore, the complaint challenging the Anti-State Organization Clause is nonjusticiable.

B. Review of Pro-Enemy Actions Clause

1. Conformity with void-for-vagueness doctrine required under *nulla poena sine lege* principle

It is fully predictable for addressees of the law that, given the circumstances such as the standoff between the two Koreas and the legislative purpose of the National Security Act, the pro-enemy actions refer to those that cause division of the public opinion and subversion of the regime or that destabilize the principles of popular sovereignty and the rule of law as the foundation of democracy. Also, it cannot be considered that the meaning of individual elements constituting the pro-enemy actions, namely "praise", "incitation", "propagation", and "sympathy", are unclear, either. Therefore, the Pro-Enemy Actions Clause is not void for vagueness as required by the *nulla poena sine lege* principle, or principle of legality.

2. Protection of freedom of expression

The Pro-Enemy Actions Clause serves a legitimate purpose, as it aims to ensure national safety as well as the survival and freedom of the people by staving off social unrest possibly caused by anti-state organizations or their followers and preemptively blocking the attempts for subversion of the state, etc. Additionally, criminal penalties for those praising, inciting, propagating, or working in concert with the activities of anti-state organizations, etc. provide an appropriate means to achieve such a purpose.

Meanwhile, the 1991 amendment to the Pro-Enemy Actions Clause inserted a subjective element of action that states "with the knowledge of the fact that it may endanger the existence and security of the State or democratic fundamental order", limiting the applicable scope of the Clause to actions that have a clear and real danger of posing substantial harm to the existence and security of the state or fundamental order. In

light of the unique security environment facing Korea, regulating pro-enemy actions that contain a clear and present danger, if not a concrete danger, does not constitute an excessive breach of the freedom of expression. Therefore, the Clause does not violate the freedom of expression.

C. Review of Joining Pro-Enemy Organizations Clause

The Joining Pro-Enemy Organizations Clause aims to prevent the risks such as subversion of the state through group activities and thereby ensure the safety of the state as well as the survival and freedom of individuals, which is a legislative purpose that is considered legitimate, and heavier penalties for the acts of joining pro-enemy organizations compared to simple pro-enemy actions constitute an appropriate means to achieve the stated purpose.

The activities of a group with organizational power are systematic and have a great impact or influence, serving as a potential trigger for social confusion at any time. Therefore, punishing the act of joining certain groups itself is by no means an excessive restriction on the freedom of expression and association. Thereupon, the Joining Pro-Enemy Organizations Clause does not violate the freedom of expression and association.

D. Pro-Enemy Expression Materials Clause

1. Conformity with void-for-vagueness doctrine required under *nulla poena sine lege* principle

The "documents, drawings or other expression materials" in the Pro-Enemy Expression Materials Clause" refers to every material that depicts one's personal ideas, opinions, faith, or ideologies in articles, drawings, languages, etc., and holding pro-enemy expression materials practically means having them under one's control, which is hardly open

for unclear or ambiguous interpretation. Therefore, the Clause is not in violation of the void-for-vagueness doctrine required under the *nulla poena sine lege* principle.

2. Protection of freedoms of expression and conscience

The legislative purpose of the Pro-Enemy Expression Materials Clause lies in preventing social unrest possibly caused by manufacturing, distribution, dissemination, etc. of expression materials and ensuring the safety and existence of the state as well as the survival and freedom of the people, which is considered legitimate. And imposing criminal penalties on manufacturing, holding, distributing or acquiring any expression materials offers an appropriate means.

The Clause is applied only to cases where the actions of manufacturing, holding, distributing or acquiring expression materials have an evident risk of causing substantial harm to the state's existence and safety and the democratic fundamental order, and the restriction thereof is considered definitely not excessive. It is difficult to exclude the possibility that the pro-enemy contents of such expression materials can be disseminated solely by holding or acquiring such materials. In particular, the materials in electronic format whose use is ever increasing can be distributed in real-time to many, and it is not totally unlikely that they can be communicated or distributed regardless of the will of the person who holds or has acquired them, so it is hardly considered that holding or acquiring pro-enemy expression materials contains a lower risk than manufacturing or distributing thereof. Thus, the Clause is not in violation of the freedoms of expression and conscience.

3. Conformity with principle of proportionality between crime and punishment

It cannot necessarily be concluded that the actions of holding or acquiring pro-enemy expression materials is less legal than other actions

of different types, and that the decision of legislators to have imprisonment as the only statutory punishment is unreasonable. Therefore, applying the same statutory punishment to the actions of holding and acquisition and to those of manufacturing and distribution under the Pro-Enemy Expression Materials Clause is not against the principle of proportionality between crime and punishment.

Summary of Dissenting Opinion by One Justice regarding "Act in Concert with" of Pro-Enemy Actions Clause

A. Conformity with void-for-vagueness doctrine required under *nulla poena sine lege* principle

"Act in concert with" in the Pro-Enemy Actions Clause refers to working in cooperation with or joining the activities of anti-state organizations, etc. by echoing or acting along the same lines of those activities such as propagation and instigation. However, some of the arguments set forth by North Korea in its propagation and instigation activities are not in themselves deemed to threaten the existence, safety, and democratic fundamental order of the Republic of Korea, and it is difficult to define the line that sets the scope for penalties in the case of "echoing along the same lines of anti-state organization activities such as propagation and instigation." It is also very hard to predict precisely which actions are subject to penalties by viewing the phrases "acting along the same lines of North Korea's activities such as propagation and instigation" or "working in cooperation with or joining the activities of anti-state organizations, etc." Hence, "act in concert with" in the Pro-Enemy Actions Clause violates the void-for-vagueness doctrine as a requirement for the *nulla poena sine lege* principle.

B. Protection of freedom of expression

The action of working in concert is a peaceful act of expression that

does not resort to physical violence and which that is far more passive and receptive compared to praising, inciting, and propagating activities, and it has little external impact as it requires no other parties as direct objects. For this reason, punishing the actions of working in concert with anti-state organizations, etc. is, in effect, punishing them for the content or nature of the their position and actions instead of the external risks arising from such position and actions. This amounts to preventing and suppressing the expression of certain ideas or views for reasons that they are subversive and dangerous and are outside the mainstream, which presents an outright challenge to the political ideals of democracy founded upon pluralistic perspectives.

The part "work in concert with" in the Pro-Enemy Actions Clause has forgone the strict interpretation of criminal elements and left open the possibility of autonomy for investigation authorities and courts in deciding whom to punish. This allows for arbitrary discrimination based on ideologies or ideas, as even those who make the same statements can be subject to varying punishments depending on their track records, history, and so forth, and it is not unlikely that the said Clause can be abused or misused as a means of suppressing dissidents or minorities.

Thus, the part "work in concert with" fails to meet the least restrictive means requirement, thereby infringing on the freedoms of expression and conscience, and contravenes the Constitution.

Dissenting Opinions by Three Justices on "Who Holds or Acquires" of Pro-Enemy Expression Materials Clause

The action of holding or acquiring pro-enemy expression materials does not, in itself, contain the possibility of distribution, and it is hardly perceived as a risk to the existence and security of the state. There is only vague and latent possibility for the person holding or acquiring expression materials to disseminate or spread them, and the circulation and dissemination of pro-enemy expression materials can be fully prevented by directly punishing those actions. Imposing punishment at an

earlier stage, namely the actions of holding or acquiring pro-enemy expression materials, constitutes an excessive regulation. This conclusion should apply the same even to pro-enemy expression materials in electronic formats.

As the criteria for determining whether the person who holds or has acquired pro-enemy expression materials had the intention of engaging in pro-enemy actions is too abstract, subjective, and inconclusive, it becomes possible for investigation authorities or courts to impose arbitrary punishment based on sole consideration of one's ideological preferences inferred from his or her track records or past history just because he or she held or had acquired pro-enemy expression materials, and it is not completely impossible that the part of Pro-Enemy Expression Materials Clause which provides for the holding or acquiring of materials can be misused or abused as a way of suppressing dissidents or minorities.

Hence, the part "who holds or acquires" in the Pro-Enemy Expression Materials Clause fails to fulfill the least restrictive means requirement, thereby breaching the freedoms of expression and conscience, and violates the Constitution.

8. Constitutionality of Article 844 Section 2 of the Civil Act

[27-1(B) KCCR 107, 2013Hun-Ma623, April 30, 2015]

In this case, the Constitutional Court held that the part of "the one who was born within 300 days of the termination of marriage" in Article 844 Section 2 of the Civil Act, which presumes a child who was born within 300 days of the termination of the marriage to be a child of the mother's ex-husband, violates the mother's right to personality in family and social life and the fundamental right related to marriage and family life, as deviating the limit of legislator's formative power.

Background of the Case

(1) Complainant married Yoo, ○-Sul on April 25, 2005 and reached a mutual agreement to divorce on December 19, 2011. After obtaining confirmation of their divorce from the family court, they filed an attested copy of the confirmation with their local Gu-office. Later, the complainant lived with Song, ○-Min and gave birth to a daughter on October 22, 2012.

(2) The complainant visited the local Gu- Office and tried to register the birth of her daughter with the name of Song, ○-Yoon. But she was told that pursuant to Article 844 of the Civil Act which presumed a child who was born within 300 days of the termination of the marriage to be a child of the mother's ex-husband, her daughter would be registered as Yoo, ○-Yoon instead of Song, ○-Yoon, as she would be registered as the legitimate child of her ex-husband in the Family Register. In order to correct this, she needed to initiate a paternity suit to deny the relationship. Upon this, the complainant decided to put off the birth registration.

(3) The DNA test performed by the Department of Forensic Medicine, Seoul National University confirmed that Song, ○-Yoon was the

biological child of Song, ○-Min, and Song, ○-Min wanted to be legally acknowledged as her father.

(4) The complainant filed this constitutional complaint on September 5, 2013, arguing that Article 844 of the Civil Act violated her fundamental rights.

Provision at Issue

The subject matter of this case is whether the part "the one who was born within 300 days of the termination of marriage" in Article 844 Section 2 of the Civil Act (enacted by Act No. 471 on February 22, 1958; hereinafter, the Instant Provision) violates the Constitution, infringing upon the complainant's fundamental rights. The provision at issue in this case is as follows:

Provision at Issue

Civil Act (enacted by Act No. 471 on February 22, 1958)

Article 844 (Presumption as Husband's Child) (2) A child born after two hundred days from the day when the marriage was formed or born within three hundred days from the day when the matrimonial relation was terminated, shall be presumed to have been conceived during the marriage.

Summary of the Decision

1. Whether the Instant Provision infringes on the mother's right to personality in family and social life and the fundamental right related to marriage and family life, deviating the limit of legislator's formative power

8. Constitutionality of Article 844 Section 2 of the Civil Act

The presumption of paternity under the Instant Provision has a stronger effect compared to ordinary presumption, thereby exerting greater influence on the legal status of the interested parties. Therefore, despite the fact that enacting a law related to the presumption of paternity issue is basically within the realm of legislative discretion, if such a law prescribes an excessively unreasonable standard for statutory presumption of paternity or excessively limited ways to escape the clutches of the paternity presumption, thereby establishing filiation not corresponding to actual blood ties, the law is in violation of the Constitution, exceeding the limit of legislative discretion.

The criterion of 'within 300 days of the termination of marriage' itself as the standard of presumption of paternity under the Instant Provision does not seem cross the line of legislative discretion. Despite the reasonableness of the standard itself, however, failure to provide legal exceptions for the '300 days' standard without reflecting social changes since the enactment of the Instant Provision should be considered as exceeding the limit of legislative discretion, as it places excessive emphasis only on legal stability to be achieved by the rapid conclusion of parent-child relationship, while turning a blind eye to the reality of true blood relationship.

The Instant Provision has been effective without undergoing a single revision since the enactment of the Civil Act in 1958. When the Instant Provision was enacted, divorce and remarriage were not common in our society and woman's remarriage was statutorily prohibited for 6 months after her divorce. Given the circumstances, it was reasonable at that time to presume the one who was born within 300 days of termination of marriage to be a child of the mother's ex-husband without exception and to allow exceptional cases to be solved only through filing a suit to deny paternity.

Nowadays, however, divorce and remarriage are not rare anymore and the six month ban on women's remarriage after divorce was discarded by the revision of the Civil Act in 2005. Also, the introduction of a cooling off period before divorce and mandatory arbitration prolonged

the whole process from the breakdown of marriage to final divorce. As a result, the possibility for a woman to give birth to a child of its biological father, not her ex-husband, within 300 days from the termination of marriage has increased, and the development in DNA paternity testing techniques makes it possible to medically clarify whether two individuals are biologically parent and child.

Nevertheless, due to the Instant Provision, even when it is clear that a child born within 300 days after the termination of marriage is not a biological child of the ex-husband or even when the ex-husband does not want to establish paternity and the child's biological father wants to be legally acknowledged as father, the child is forced to be registered as the legitimate child of the ex-husband in the Family Register, which can be changed only through a strict paternity suit to deny the relationship. As a result, the Instant Provision unduly places burden on the divorced mother and her ex-husband to respectively make their own new families and becomes a stumbling block to recover the real blood relationship between a biological father and his child.

As such, failing to reflect the social, legal and technical changes since the enactment of the Civil Act, the Instant Provision, which forces a paternity suit by presuming the child as a biological child of the ex-husband without exception even when a child was born after the termination of marriage and the biological father wants to be legally acknowledged as father, imposes unreasonably excessive restriction. Therefore, the Instant Provision infringes on the mother's right to personality in family and social life and the fundamental right related to marriage and family life, deviating the limit of legislator's formative power.

2. Decision of non-compatibility with the Constitution

Declaring the Instant Provision unconstitutional would cause a vacuum in the legal status of a child who was born within 300 days after the termination of marriage as the presumption of paternity ceases to be

effective right after the decision. And it is basically within the realm of the legislative discretion to make decisions on the standard and elements to improve the unconstitutionality of the Instant Provision. Therefore, we declare the decision of non-compatibility with the Constitution and order the Instant Provision to be effective until the legislature amends it.

Summary of Dissenting Opinion by Three Justices

The Instant Provision presumes paternity of a child who was born after the termination of marriage. But any presumption naturally entails some possibility of being different from real fact, and therefore, if an exception is provided to reverse such presumption, the law should be regarded as being properly enacted, not going beyond the limit of legislative discretion.

The scope of application of the Instant Provision includes: first, when no one disputes the presumption of paternity; second, when it is strongly expected that a third party, not the ex-husband, would be the child's biological father; and third, when it is unclear who would be the biological father. The reasoning of the majority opinion, however, is limitedly applicable to the second case, but for other cases, it will result in neglecting legal vacuum.

As the presumption of paternity is closely and systemically related to the paternity suit, in order to solve the problems presented by the majority opinion, the subject matter of review in this case should have been extended to include Article 846 and Article 847 of the Civil Act that stipulate the paternity suit to deny father-child relationship, thereby the Court could have reviewed whether the pseudo legislative omission to provide for any better solution to turn over the presumption was constitutional or not. The Instant Provision itself is legitimate in terms of the fact that it fills up the vacuum of legal protection as it provides a child with a stable legal status and therefore, it does not violate the mother's fundamental rights.

Considering the prevalent practice of the law makers, we would like to

point out that the majority's decision not to specify the exact time limit of legislative revision, although understanding the majority's agonizing contemplation on the legal vacuum, is not a proper way to announce a decision of non-conformity with the Constitution.

9. Korean Teachers and Education Workers' Union Case

[27-1(B) KCCR 336, 2013Hun-Ma671, 2014Hun-Ka21, May 28, 2015]

In this case, the Constitutional Court held that Article 2 of the Act on the Establishment, Operation, etc. of Trade Unions for Teachers, which provides that only those who are defined by Article 19 Section 1 of the Elementary and Secondary Education Act as well as current teachers are entitled to form and join trade unions for teachers, does not infringe on the rights of teachers' trade unions and dismissed teachers to organize and is thus not in violation of the Constitution.

Background of the Case

1. The complainant of this case, the Korean Teachers and Education Workers' Union (hereinafter the "Korean Teachers' Union" or the "KTU"), is one of the nationwide trade unions for teachers (hereinafter "teachers unions") established by the Act on the Establishment, Operation, etc. of Trade Unions for Teachers (hereinafter the "Teachers Union Act") on July 1, 1999, and the remainder of the complainants are members of the KTU who have *ipso facto* retired.

2. On September 23, 2013, the Minister of Employment and Labor ordered the KTU to revise the provision of its statute which allowed dismissed teachers to maintain their status as members of the union so that it can conform to Article 2 of the Teachers Union Act, and to prohibit the nine dismissed teachers from joining and engaging in the activities of the KTU, stating that the Ministry would outlaw the union in the event of its non-compliance thereof. In response, the complainants filed a constitutional complaint in this case with the Constitutional Court, claiming that Article 2 of the Teachers Union Act, Article 9 Section 2 of the Enforcement Decree of the Trade Union and Labor Relations Adjustment Act (hereinafter "Labor Union Act"), and the corrective order issued by the Employment and Labor Ministry mentioned above

infringe on their fundamental rights, such as their right to organize (2013Hun-Ma671).

3. The Minister of Employment and Labor notified the KTU that it would no longer be recognized as a trade union on October 24, 2013, citing the union's failure to comply with the corrective order (hereinafter the "Outlaw Notification"). With an appellate case in which the KTU sought revocation of the Outlaw Notification pending, the union filed a motion requesting a constitutional review of Article 2 of the Teachers Union Act, and the Seoul High Court granted the motion to file for constitutional review with the Constitutional Court (2014Hun-Ka21).

Subject Matter of Review

The subject matter of review in case 2013Hun-Ma671 is whether (1) Article 2 of the Teachers Union Act (amended by Act No. 10132, Mar. 17, 2010) (hereinafter the "Provision at Issue"), (2) the portion of Article 9 Section 1 of the Enforcement Decree of the Teachers Union Act (amended by Presidential Decree No. 24447, Mar. 23, 2013) concerning Article 9 Section 2 of the same Enforcement Decree (hereinafter the "Outlaw Notification Clause"), and (3) the corrective order issued by the respondent on September 23, 2013 against the complainant KTU (hereinafter the "instant corrective order") infringe on the fundamental rights of the complainants. Meanwhile, at issue in case 2014Hun-Ka21 is whether the Provision at Issue is in violation of the Constitution.

Act on the Establishment, Operation, etc. of Trade Unions for Teachers (Amended by Act No. 10132, March 17, 2010)

Article 2 (Definition) The term "teacher" in this Act refers to a person prescribed in Article 19(1) of the Elementary and Secondary Education Act. Provided that any dismissed persons who have made an application to remedy unfair labor practices to the Labor Relations Commission under the provision of Article 82(1) of the Trade Union and Labor

Relations Adjustment Act shall be regarded as teachers until a review decision is made by the National Labor Relations Commission pursuant to Article 2 of the Labor Relations Commission Act.

Enforcement Decree of the Act on the Establishment, Operation, etc. of Trade Unions for Teachers (Amended by Presidential Decree No. 23337, March 23)

Article 9 (Relations with Other Enforcement Decrees) (1) Except as prescribed in paragraph (2), matters not provided for in this Decree with regard to trade unions and labor relations adjustments applicable to trade unions for teachers shall be governed by the Enforcement Decree of the Trade Union and Labor Relations Adjustment Act.

The Respondent's Corrective Order against Complainants (Issued Sept. 23, 2013)

■ Deadline for Corrective Actions: October 10, 2013

■ Corrective Actions Required:

- Article 5 of the Addenda of the KTU Statute grants member status to dismissed teachers without confirming facts such as whether they have applied for remedies against unfair labor practices with the Labor Relations Commission. The provision is in violation of Article 2 of the Teachers Union Act, which is considered a peremptory norm, and thus requires correction to be consistent with the Act.
- The dismissed teachers in the list attached do not qualify as members of the trade union defined by Article 2 of the Teachers Union Act, and, therefore, measures should be taken to prevent them from joining and participating in the activities of the KTU.

*Attachment: List of dismissed members of the KTU

We thereby require that corrective measures be taken in accordance with Article 14 of the Teachers Union Act, Article 9 of the Enforcement Decree of the Teachers Union Act, Article 12 Section 3 of the Labor Union Act, and Article 9 Section 2 of the Enforcement Decree of the Labor Union Act.

NOTE: Please be informed that a trade union which fails to report the result of corrective actions taken within the deadline shall no longer be recognized as a trade union defined in the Teachers Union Act.

Summary of Decision

1. Claim Regarding the Outlaw Notification Clause

Since the Outlaw Notification Clause envisages additional executive actions such as corrective orders and notifications outlawing trade unions, the constitutional complaint against the Outlaw Notification Clause is injusticiable because it fails to meet the directness requirement for a violation of fundamental rights.

2. Claim Regarding the Instant Corrective Order

The instant corrective order constitutes an administrative action that may change the rights and obligations of the complainant KTU, but the KTU filed a constitutional complaint directly with the Constitutional Court before exhausting other means of appeal or remedies. Therefore, the claim regarding the instant corrective order in this complaint fails to meet the subsidiarity requirement and is thus injusticiable.

3. Claim Regarding the Provision at Issue

The Provision at Issue limits the right of organization of teachers and teachers unions and therefore should comply with the rule against excessive restriction as prescribed by Article 37 Section 2 of the Constitution.

The entitlements to forming teachers unions or engaging in their activities are, in principle, confined to teachers of elementary or middle schools under the Provision at Issue, which thereby aims to contribute to the substantial enhancement of teachers' working conditions by securing the independence and self-reliance of teachers unions. And limiting the eligibility of teachers union members to currently employed teachers is considered an appropriate means to serve the stated legislative purpose.

Trade union activities have, in principle, been guaranteed since the enactment of the Teachers Union Act on January 29, 1999, and teachers unions exercise a direct and significant influence on teachers' working conditions, such as exercising the right to collective bargaining and the right to sign collective agreements on behalf of teachers with the purpose of enhancing their working conditions. In light of this role or function of teachers unions, granting the teacher status only to those who are currently employed is inevitable to an extent.

In addition, teachers unions, given their nature, can only be formed by industries or regions, but most of the teachers' working conditions are established by statutes or ordinances. In this context, denying the teacher status of those who are no longer teachers and are irrelevant to the said working conditions is not considered an excessive restriction on their right of organization, and little benefit is likely to be gained from allowing non-teachers to engage in the collective bargaining of teachers unions over the appointment, status, etc. of teachers against the government and authorities.

Meanwhile, the term "worker" defined by Article 2 Item 1 and Item 4(d) of the Labor Union Act also includes the temporarily unemployed or jobs-seekers insofar as they require the protection of three basic labor

rights (refer to Supreme Court ruling of 2001Du8568, decided Feb. 27, 2004), and those who seek the position of teachers face no restriction in forming or joining any labor unions pursuant to the Labor Union Act.

The proviso of the Provision at Issue is originally aimed at guaranteeing the trade union activities of teachers by protecting them from any unjust restrictions by the appointing authorities, but allowing dismissed teachers to preserve their status as members of teachers unions in general may cause concerns about possible abuse of lawsuits under the current legal system that imposes no deadline on disputing the effect of dismissal or about the possibility of taking advantage of teachers union activities in claiming the unfairness of one's personal dismissal. Thereupon, there is good reason to deny dismissed teachers the status of teachers union members as prescribed by the Provision at Issue.

Nevertheless, it is not always legitimate to deny the legal status of teachers unions that have completed their registration and are lawfully active just because it is reasonable that the Provision at Issue should confine the eligibility to form teachers unions or join their activities to teachers who are currently employed in elementary or middle schools. There is a constant possibility that unqualified members will temporarily exist in teachers unions due to incidents such as dismissal or resignation of teachers who rightfully joined teachers unions in the first place when the unions were established, and this matter is directly regulated by the Outlaw Notification Clause. However, the KTU has been acting as a lawful teachers union for more than 10 years since the introduction of the Teachers Union Act, and the Outlaw Notification to the KTU was issued only on October 24, 2013 although the dismissed teachers had been serving as its members all along. These considered, it is affirmed that it is the discretion of administrative authorities to decide whether or not to outlaw an active trade union on grounds that it has some members who are currently not teachers, and courts are fully capable of making judgments on whether such decisions fall within the legitimate discretion of administrative authorities.

All circumstances considered, the Provision at Issue is not deemed to

overly limit the rights of organization of prospective teachers with teaching certificates or dismissed teachers as well as the same rights of teachers unions which encourage the prospective or dismissed teachers to join or retain their union membership, and the matter concerning whether to deprive the legal status of teachers unions that have already notified of their establishment will depend on the interpretation of the Outlaw Notification Clause or operation of the law enforcement. For this reason, the Provision at Issue meets the least restrictive means requirement in restricting the right of organization of teachers unions and teachers seeking employment.

According to the Provision at Issue, teachers unions as well as job-seekers with teaching certificates or dismissed teachers are prevented from being members of teachers unions and thus are not authorized to form or join teachers unions defined by the Teachers Union Act, but this disadvantage does not necessarily represent a deprivation of the right of organization itself and the restriction imposed is not so significant. On the contrary, the damage done to self-reliance can be severe if teachers who are not currently employed in elementary or middle schools form or join teachers unions and exercise all sorts of powers such as the right to collective bargaining specified in the Teachers Union Act. Therefore, the Provision at Issue also complies with the balance of interests doctrine.

Thereupon, the Provision at Issue is not in violation of the rule against excessive restriction.

Summary of Dissenting Opinion by Justice Kim Yi-su

The Provision at Issue, regardless of the legitimacy of its legislative purpose, is excessively restrictive of the organization right of teachers unions, dismissed teachers, or job-seekers with teaching certificates.

There is no need to strictly prohibit the temporarily unemployed such as dismissed teachers or job-seekers with teaching certificates, let alone the currently employed teachers, from joining teachers unions that actually constitute industrial, regional labor unions, and such a stringent

restriction despite the particular occupational nature of teachers who can hardly change their line of work may result in an excessive restriction on the organization right of those who are in the same line of profession as teachers.

Since the Teachers Union Act has provisions prohibiting the industrial actions of teachers unions and their members (Article 8) as well as banning the political activities of teachers unions (Article 3), the existence of dismissed teachers within the teachers unions is not likely to result in either the groups' politicization or the undermining of the public nature of education and the people's right to education.

Furthermore, it is common practice for dismissed teachers to take their appeal to the Appeal Commission for Educators, so the infringement on their right of organization can be minimized by keeping their member status until the Commission reaches a decision on their applications for appeal.

Above all, as seen from the procedure taken to outlaw the KTU, the Provision at Issue rather undermines its legislative purpose, contrary to its original aim to protect the self-reliance of trade unions by way of taking the administrative means.

The three basic labor rights of teachers were not guaranteed in the past, but since 1995 the government began discussing the protection of those rights in consideration of the recommendations issued by international bodies such as the International Labor Organization and the Organization for Economic Cooperation. Pursuant to the agreement of the Tripartite Commission of Labor, Management and Government in 1998, the Teachers Union Act was enacted and promulgated on January 29, 1999 (Act No. 5727). On the first day of the Act's enforcement on July 1, 1999, the KTU submitted an application for its registration and has operated as a lawful trade union for approximately 15 years, but the competent administrative authority interpreted and applied the Provision at Issue with excessive formality and took the most radical administrative measure solely on grounds that the organization had a few dismissed teachers. Therefore, the Provision at Issue may serve as a

fundamental violation of the self-reliance and the right to organize of teacher unions.

Additionally, the working relations of teachers who work for state or public schools and are thus public servants and those of teachers of private schools differ from one another, so Article 31 Section 6 of the Teachers Union Act that prescribes the principle of legality concerning the status of teachers cannot serve as the basis for limiting the three basic labor rights of private school teachers, and such restriction is rarely found even from the perspective of comparative law. Besides, this kind of restriction also contradicts the Freedom of Association and Protection of the Right to Organize Convention (No. 87) and Convention No. 98 of the ILO, which the Korean government has yet to ratify.

Thereupon, the Provision at Issue fails to comply with the rule against excessive restriction and the right to organize of teachers unions, dismissed teachers, or job-seekers with teaching certificates and thus violates the Constitution.

10. Restriction on the scope of practice performed by dentists who advertise their dental specialties

[27-1(B) KCCR 361, 2013Hun-Ma799, May 28, 2015]

In this case, the Constitutional Court held unconstitutional Article 77 Section 3 of the Medical Practice Act which prevents dentists at dental clinics who indicate and advertise their specialty areas from treating patients not related to their specialties as it violates the complainants' freedom of occupation as dentists and equality right.

Background of the case

(1) On July 16, 1998, the Constitutional Court ruled that the omission to provide for procedure to institute dental specialist examination by the Minister of Health and Welfare, pursuant to the delegation from the Medical Service Act and the 'Regulation for Training of Board Certified Specialists and Recognition of qualification', was unconstitutional (96Hun-Ma246).

(2) After the decision, the 'Regulation for Training Dental Specialists and Recognition of Qualification' was enacted by Presidential Decree No. 18040 on June 30, 2003 and the 'Enforcement Regulation for Training of Board Certified Specialists and Recognition of qualification' was enacted by Ministry of Health and Welfare Decree No. 258. Pursuant to the Enforcement Regulation, the first dental specialist examination was held in 2008.

(3) Meanwhile, the proviso of Article 55 Section 2 (currently the proviso of Article 77 Section 2) was newly inserted in the Medical Service Act revised by Act No. 6686 on March 30, 2002 and banned dental specialists to indicate their specialties. But the provision was expired on December 31, 2013 and therefore, dental specialists are

allowed to indicate their specialties since January 1, 2014.

(4) But Article 77 Section 3 was newly inserted in the Medical Service Act revised by Act No. 10609, and stipulates that a dental clinic indicating its specialized department should treat patients only concerned with the specialized department indicated, and Article 1 of the addenda of the same Act provided that the Act should enter into force on January 1, 2014. As a result, although dental clinics are allowed to indicate their specialties, such dentists who indicate their specialized areas should treat patients only concerned with their specialties.

(5) Complainants are dental specialists who run their own clinics, are hired by dental hospitals or are public health dentists and also dental residents who prepare for the 7th dental specialist examination conducted in January 2014.

(6) The complainants filed this constitutional complaint on November 26, 2013, arguing that Article 77 Section 3 of the Medical Service Act infringes on their freedom of occupation and equality right as it prevents dentists who indicate their specialties from treating patients other than those related to their specialties.

Provision at Issue

The subject matter of this case is whether Article 77 Section 3 of the Medical Service Act (revised by Act No. 10609, April 28, 2011, hereinafter, the "Instant Provision") violates the Constitution, infringing on the complainants' fundamental rights.

Medical Service Act (revised by Act No. 10609, April 28, 2011)

Article 77 (Medical Specialists) (3) Notwithstanding the provisions of Article 15 Section 1, a dental clinic indicating its specialized medical department under Section 2 shall treat patients only concerned with the

specialized medical department indicated: Provided, that the same shall not apply to emergency patients.

Summary of Decision

1. Whether the Instant Provision infringes on the freedom of occupation

(1) Whether the Principle of protection of confidence is violated

The complainants argued that they were confident in that they could treat all types of patients when it became possible for them to indicate their specialties in dentistry from January 1, 2014, but the Instant Provision betrayed their confidence, thereby violating the principle of protection of confidence. Given the fact that the indication of dental specialist itself had never been allowed before, however, the aforementioned confidence should be considered as a mere expectation or prediction toward the possible future of their legal situation. The two and half year grace period provided by the Instant Provision also proves that the level of infringement on their confidence is not so severe. Therefore, the Instant Provision does not infringe on the freedom of occupation, in violation of the principle of protection of confidence.

(2) Whether the rule of clarity is violated

The Medical Service Act or other related laws and regulations do not specify the contents and scope of practice the dental specialists can do. But in order to be a dental specialist, a board certified general dentist should pass the dental specialist examination after completing a residency program, and the complainants who are obliged to abide by the Instant Provision must know their practice areas and the differences among each of dental specialties. Therefore, the Instant Provision does not violate the rule of clarity.

(3) Whether the rule against excessive restriction is violated

The legislative purposes of the Instant Provision are to place maximum restriction on the dental specialists from treating patients at dental clinics, which are the primary health care providers, as general dentists, while leading them to provide medical service at secondary health care institutions, thereby consolidating a proper dental health care delivery system and to promote well-balanced development among specialized areas by preventing excessive imbalance in the dentists' preference of particular specialties and such purposes are legitimate.

The Instant Provision, by placing restrictions on the scope of dental specialists' practice, makes it practically impossible for the dental specialists at dental clinics to indicate their specialties, resulting in drastic deterioration of the value of dental specialists: this makes dental specialists working at dental clinics decline to specify their specialized areas, and therefore, patients have difficulties in choosing proper professional treatment as they cannot find which dental clinics have dental specialists whom they look for. As a result, it is worried that the dental specialist system itself would be incapacitated by the Instant Provision.

Although there is no doubt that dental specialists can also provide all kinds of medical treatments provided by general dentists, the Instant Provision prevents dental specialists working at dental clinics from treating patients not concerned with their specialties. This prevention is a very grave infringement on the fundamental right, as it imposes extensive ban on the medical practice that can be provided by the dental specialists.

Inducing the dental specialists to practice at the secondary health care institutions by giving them disadvantage for indicating their specialized areas at primary care dental clinics is not a desirable solution. Rather, it is more appropriate to provide a fundamental and systemic solution for the proper division of role between general dentists and dental specialists and for the enhancement of mutual cooperation. Also the Instant

Provision can worsen the undesirable imbalance in the popularity of specific dental specialties such as orthodontics because only those who specialize in the popular dental specialties, which can ensure sufficient profits even by treating patients only concerned with their specialized areas, would indicate their specialties. Therefore, the Instant Provision is not a proper means to achieve the legislative purposes.

When dental specialists working at dental clinics are restricted to treat patients only concerned with their specialized areas, medical expenses can also be increased because it is hard for patients to find out dental clinics where their diseases can be properly treated and they would waste time and money to look for the right dental clinic. Moreover, if a patient has complicated diseases that require multiple treatments by collaboration of various specialized areas, the patient cannot but going to several different clinics, resulting in an increase in medical expenses. This causes great inconvenience to medical customers who want to get proper treatment by dental specialists. Therefore, the Instant Provision failed to fulfill the requirements of both appropriateness of means and least restriction of means.

The public interests intended to be achieved by the Instant Provision are admittedly important. But while it is still unclear whether placing imposition on the scope of practice of dental clinics which indicate their specialized areas can effectively achieve the legislative purposes, the private disadvantage caused by the prohibition against the dental specialists working at dental clinics from providing their medical service as general dentists are extremely severe. Therefore the Instant Provision fails to strike the balance between legal interests.

Considering the aforementioned reasons, the Instant Provision infringes on the complainants' freedom of occupation.

2. Whether the equality right is violated

Regarding the indication of specialized areas in primary health care provider, there is no fundamental difference among medical specialists,

oriental medical specialists and dental specialists. Therefore, it is hard to find a reasonable ground for the restriction imposed only on dental specialists regarding the scope of practice when the specialized areas are indicated.

The Instant Provision, while allowing dental hospitals where specialized treatments should be provided to treat patients concerned with all kinds of specialized areas, forces dental clinics where generalized treatments should be provided to treat patients only concerned with the indicated specialties, and such discrimination is considered unreasonable.

Due to the Instant Provision, while general dentists can treat all kinds of patients regardless of specialties, dental specialists cannot treat patients not related to their specialized areas. It is hard to find any reasonable ground to rationalize this difference, as the Instant Provision allows dental specialists who have higher level of qualification to provide far narrower scope of treatment.

Therefore, the Instant Provision discriminates dental specialists against medical specialists and oriental medical specialists without any reasonable grounds and also discriminates dental specialist working at dental clinics against dental specialists at dental hospitals and general dentists, thereby violating the equality right.

11. Case on Production, Distribution, etc. of Virtual Child or Juvenile Pornography

[27-1(B) KCCR 402, 2013Hun-Ka17 · 24, 2013Hun-Ba85 (Consolidated), June 25, 2015]

In this case, the Constitutional Court held that the portion of the former Act on the Protection of Children and Juveniles against Sexual Abuse which provides for criminal punishment of actions that produce, distribute, etc. child and juvenile pornography and involves the "depiction of persons or representations that can be obviously perceived as children or juveniles, engaging in any other sexual act" is not contrary to the void-for- vagueness doctrine under the *nulla poena sine lege* principle and the rule against excessive restriction, and is therefore not in violation of the Constitution.

Background of the Case

(1) The petitioner of 2013Hun-Ka17, who had been indicted on charges of exhibiting or displaying pornography containing sexual acts by women dressed up in school uniforms, filed a motion for constitutional review of Article 2 Section 5 and Article 8 Section 2 of the former Act on the Protection of Children and Juveniles against Sexual Abuse, which prescribe punishment for acts such as distribution of videos or films which depict persons or representations that can be perceived as children or juveniles, or virtual images of children or juveniles (amended by Act No. 11047, September 15, 2011, later amended by Act No. 11572, December 18, 2012). Then, the competent court granted the motion and filed for constitutional review with the Constitutional Court.

(2) The petitioner of 2013Hun-Ka24 had been accused of distributing a pornographic animated film displaying sexual intercourses between

female and male students in school uniforms by uploading it on online file-sharing websites and thereafter filed a motion requesting constitutional review of Article 2 Section 5 and Article 8 Section 4 of the aforementioned Act. The court in question granted this motion and filed a request for constitutional review with the Constitutional Court.

(3) The petitioner of 2013Hun-Ba85, having been indicted on charges of uploading and publicly exhibiting a pornographic video titled "A uniform beautiful Girl Club", which depicts persons or representations that may be perceived as children or juveniles, on an online file storage service for users to view or download it, petitioned for constitutional review of Article 2 Section 5 and Article 8 Section 4 of the aforementioned Act. As this motion was denied by the competent court, the petitioner filed a constitutional complaint challenging the constitutionality of the said provisions with the Constitutional Court pursuant to Article 68 Section 2 of the Constitutional Court Act.

Subject Matter of Review

The subject matter of review in this case is the constitutionality of the portion of Article 8 Section 2 and 4 of the former Act on the Protection of Children and Juveniles against Sexual Abuse (amended by Act No. 11047, Sept. 15, 2011 and later wholly amended by Act No. 11572, Dec. 18, 2012, hereinafter the "former Children and Juveniles Protection Act") concerning the "depiction of persons or representations that can be obviously perceived as children or juveniles, engaging in any other sexual act (hereinafter the "Provision at Issue")", which is laid out below:

Former Act on the Protection of Children and Juveniles against Sexual Abuse

Article 8 (Production, Distribution, etc. of Child or Juvenile Pornography)

(2) Any person who sells, lends, distributes, or provides child or

juvenile pornography for commercial purposes, or possesses or transports them for any of such purposes, or publicly exhibits or displays them, shall be punished by imprisonment with labor for not more than seven years.

(4) Any person who distributes, publicly exhibits or displays child or juvenile pornography shall be punished by imprisonment with labor for not more than three years or by a fine not exceeding 20 million won.

Relevant Provisions

Former Act on the Protection of Children and Juveniles against Sexual Abuse (amended by Act No. 11047, Sep. 15, 2011, later wholly amended by Act No. 11572, Dec. 18. 2012)

Article 2 (Definitions)

The terms used in this Act shall be defined as follows: <Amended by Act No. 11574, Dec. 18. 2012; Act No. 12361, Jan. 28. 2014>

(Section 1-3 omitted)

4. The term "purchasing sex from a child or juvenile" means doing any of the following acts to a child or juvenile or compelling a child or juvenile to do such act, in return for offering or promising to offer money, valuables or other property gains, services or favors to those who arrange the purchase sex from a child or juvenile, or those who actually protect and supervise the child or juvenile, or any third person:

(a) Sexual intercourse;

(b) Pseudo-sexual intercourse using part of the body, such as the mouth and anus, or implements;

(c) Contacting or exposing all or part of the body, which causes sexual humiliation or repugnance of ordinary people;

(d) Masturbation;

5. The term "child or juvenile pornography" means depiction of children or juveniles, or persons or representations that can be obviously perceived as children or juveniles, doing any act defined in any of subparagraph 4 or engaging in any other sexual act, in the form of a film,

video, game software, or picture, image, etc. displayed on computers or other communications media;

(Section 6-9 omitted)

Summary of Decision

A. Conformity with the void-for-vagueness doctrine required under the *nulla poena sine lege* principle

Considering factors such as the legislative purpose, the regulatory background of virtual child or juvenile pornography, and the level of relevant statutory punishment associated with the Children and Juveniles Protection Act, it can be acknowledged that the phrase "persons that can be obviously perceived as children or juveniles" implies a depiction of those who are highly likely to be misperceived as children or juveniles by any ordinary person given their looks, identity, as well as motivation and background of pornography production. In addition, the portion of the Act concerning "representations that can be obviously perceived as children or juveniles" is, when taking into account the circumstances such as motivation and background of production, level of sexual acts depicted, overall background or storyline, and obscenity of the media contents that display a variety of sexual acts in different forms of representations, confined to acts that are fully capable of arousing abnormal sexual desire toward children or juveniles and thus likely to cause sex crimes targeting them. The portion can also be clarified by a more detailed judgment criteria determined by the supplementary interpretation of judges based on their style or reasons. This, in fact, hardly indicates any lack of clarity.

In consideration of its legislative purpose, level of relevant statutory punishment, etc., the portion concerning "any other sexual act" of the Provision at Issue can be perceived as obscenity that is highly likely to be sexually humiliating and repulsive to an ordinary person and that corresponds to the level of "sexual intercourse, pseudo-sexual intercourse

using part of the body, contacting or exposing all or part of the body which causes sexual humiliation or repugnance of ordinary people, and masturbation" as enumerated in Article 2 Section 4 of the Children and Juveniles Protection Act, and it is difficult to categorically define in law what constitutes an obscene action involving children or juveniles. It is therefore, to an extent, inevitable that a comprehensive form of regulation stating "any other sexual act" has been adopted.

Thus, the Provision at Issue is not in violation of the void-for-vagueness doctrine required under the *nulla poena sine lege* principle.

B. Conformity with the rule against excessive restriction

At issue is whether the Provision at Issue violates the rule against excessive restriction by overly limiting the freedom of expression and failing to comply with the principle of proportionality between crime and punishment. Even for virtual or pseudo child and juvenile pornography, continuous distribution and exposure to expression materials using the image of children and juveniles as sexual objects may develop distorted perception and abnormal attitude toward the sex of children and juveniles. Moreover, comprehensive review of research and study results involving sexual criminals targeting children and juveniles suggests that it is necessary to impose heavy penalties on distribution and dissemination of virtual child and juvenile pornography in order to protect children and juveniles from potential sex crimes and send out a warning signal to society.

In addition, virtual child or juvenile pornography is fully capable of developing abnormal sexual desires toward children or juveniles as much as real child or juvenile pornography, and the punishment for such pseudo pornography is limited to the minimum necessary, to unavoidable circumstances where such restriction is essential for protecting children or juveniles from sex crimes. Because the gravity of crime and reprehensibility of such virtual pornography differs from that of regular pornography, the Provision at Issue, which imposes heavier statutory

punishment than the Criminal Act that prohibits the distribution of obscene pictures or the Act on Promotion of Information and Communication Network Utilization and Information Protection that bans circulation of obscene information, does not violate the principle of proportionality of criminal punishment. It also achieves the balance of interests when taking into account the significance of public interest involved in the protection of children and juveniles.

Thereupon, the Provision at Issue does not breach the rule against excessive restriction.

C. Conformity with principle of equality

The Provision at Issue prescribes the same statutory punishment for the distribution of both virtual and real child pornography and, furthermore, applies the same penalties for virtual child pornography irrespective of the different levels of sexual acts depicted. However, the two types of pornography are barely different in terms of their gravity of crime and reprehensibility in that they both can cause abnormal sexual desire toward children or juveniles and give rise to sex crimes that involve children or juveniles, and, since only the maximum sentence is laid out in the provision, judges have the discretion to determine the sentence within the scope of statutory punishment based on their consideration specific to cases. Therefore, the Provision at Issue is not considered to breach the principle of equality by failing to maintain the proportionality between crime and punishment.

Summary of Dissenting Opinion by Four Justices

A. Conformity with void-for-vagueness doctrine required under the *nulla poena sine lege* principle

We agree with the majority opinion regarding the view that the portion stating “persons that can be obviously perceived as children or juveniles”

in the Provision at Issue is clearly defined. However, as to the portion "expression materials that can be perceived as children or juveniles", it is hard to judge whether it refers only to the expression materials that are highly likely to be misperceived as real children or juveniles or whether it also includes pictures or cartoons insofar as they depict the images of children or juveniles as sexual objects, and, consequently, it is hardly predictable what types of acts are punishable. Additionally, because this discerning judgment is entirely entrusted to the complementary interpretation of law enforcement agencies or judges, there is also the concern that laws may be interpreted or executed in an arbitrary manner.

Also, considering the purpose of the Act's amendment on December 29, 2005 (Act No. 7801) to establish a comprehensive scope of sexual acts and thereby not confine it to depictions of obscene contents, the portion stating "any other sexual act" cannot be readily determined as obscenity as the majority opinion does. Furthermore, Article 2 Section 4 of the Children and Juveniles Protection Act serves as an open and comprehensive provision as it states "contacting or exposing all or part of the body, which causes sexual humiliation or repugnance of ordinary people", which makes it difficult for persons with decent judgment to predict what "any other sexual act" subject to punishment refers to. Therefore, this portion is also unclear.

Even if "any other sexual act" is not considered unclear, the ambiguity of "expression materials that can be obviously perceived as children or juveniles" renders it difficult even for law enforcement entities as well as ordinary citizens as norm addressees to clearly distinguish what is applicable under the Provision at Issue, specifically the scope and limitations of virtual child or juvenile pornography. Consequently, the Provision at Issue is void for vagueness.

B. Conformity with rule against excessive restriction

Criminal punishment prescribed by an ambiguous legislation may result in unnecessary punishment of even the acts that should originally

be protected under the Constitution, which is inconsistent with the rule against excessive restriction.

Applying the same serious statutory punishment to virtual pornography as the one imposed for real pornography, which victimizes real children or juveniles as objects of sexual exploitation and puts their interests at stake, despite the lack of substantiated causal relationship between the exposure to pseudo pornography and the occurrence of sex crimes involving children or juveniles constitutes an extensive regulation of expression materials solely based on vague assumption or possibility of their harmfulness, and this is unacceptable.

Even if there is a need for regulation, prescribing the same heavy penalties for virtual pornography although children or juveniles are in effect not used as sexual objects in the process of its production solely on grounds that it can potentially encourage sex crimes is also not appropriate in terms of the proportionality of crime and punishment.

Yet, the portions of the Provision at Issue stating “expression materials that can be perceived as children or juveniles” and “any other sexual act” are, as reviewed above, ambiguously defined and thus may result in an overly extensive scope of punishment. This extensiveness, in turn, may even lead to punish or discourage the expressions that require protection. Thus, the Provision at Issue is likely to result in an excessive restriction on the freedom of expression and excessive criminal punishment.

Furthermore, the Provision at Issue also fails to balance the competing interests in that the level of statutory punishment or the extensive scope of punishable acts laid out in the provision have resulted in a serious level of restriction on freedom of expression and disproportionality of criminal punishment. The Provision at Issue, for this reason, also fails to meet the balance of interests requirement and thereby violates the rule against excessive restriction.

12. Case on Non-Disclosure of Bar Examination Scores

[27-1(B) KCCR 513, 2011Hun-Ma769, 2012Hun-Ma209・536(consolidated), June 25, 2015]

In this case, the Constitutional Court held that Article 18 Section 1 of the National Bar Examination Act which prohibited disclosure of bar examination scores violated the Constitution, infringing complainants' right to know (right to demand disclosure of information).

Background of the Case

Complainants have passed national bar examination or were attending law schools at the time of filing this constitutional complaint. They filed this constitutional complaint arguing that Article 18 Section 1 of the National Bar Examination Act which prohibited disclosure of bar examination scores infringed on their fundamental rights including the right to know.

Provision at Issue

The subject matter of this case is whether the main text of Article 18 Section 1(underlined part) of the National Bar Examination Act (revised by Act No. 10923 on July 25, 2011; hereinafter, the Instant Provision) violates the Constitution as infringing upon the complainants' fundamental rights. The provision at issue in this case is as follows:

Provision at Issue

National Bar Examination Act (revised by Act No. 10923 on July 25, 2011)

Article 18 (Non-Disclosure of Examination Information) (1) The scores of the Examination shall not be disclosed to anyone including the

applicants: Provided, That a person who failed the Examination may request the Minister of Justice to disclose his/her Examination score within six months after the date of the announcement of successful candidates.

Summary of the Decision

1. Fundamental rights to be limited

The Instant Provision limits complainants' right to know who passed the bar examination as it stipulates non- disclosure of bar exam scores of people who passed the exam.

2. Whether the Instant Provision violates the rule against excessive restriction

The Instant Provision was legislated to prevent excessive competition over the rankings among law schools through prohibiting the disclosure of bar examination scores and to train competent and professional attorneys with expertise in various fields through ensuring proper management of legal education. Such legislative purposes of the Instant Provision are considered legitimate.

However, the rankings of law schools can be more deeply set in by the non-disclosure policy of bar exam scores under the Instant Provision as there is no other objective alternatives to evaluate bar exam passers' ability, which may result in evaluating newly admitted lawyers' ability simply based on their law schools' rankings. Also, as law school grades become the most important factor in legal employment, it is expected that most students may choose courses from which they can easily get good grades and as a result, specialized education programs prepared by each law school cannot be properly maintained. Students' priority in choosing their law schools will go to the existing university or law school rankings regardless of whether a specific law school provides

specialized programs that accommodate their academic or practical interests. From the perspectives of law schools, it becomes difficult to know their students' relative weakness in specific subjects and gets harder to achieve their purpose of training competent and professional attorneys with expertise in various fields. Meanwhile, it is also argued that the disclosure of examination scores may lead students to focus only on bar exam preparation but we think it is natural for law students to do their best to achieve decent scores in examination and the non-disclosure of bar examination score does not necessarily make law students pay less attention to their bar exam preparation. Rather, such disclosure of exam score will be helpful in training competent legal experts and in providing an objective standard for hiring them. Therefore, the Instant Provision cannot be considered as appropriate means to achieve the legislative purposes as it causes side effects such as entrenching the existing hierarchies in school rankings while failing to fulfill the legislative purposes.

The legislative purposes of normalization of legal education, education of competent legal experts or prevention of excessive competition among law schools can be achieved by other means without restricting the right to know, such as providing wide range of specialized programs and strict management of academic affairs. In this regard, the non-disclosure of examination scores stipulated in the Instant Provision fails to fulfill the element of least restrictive means.

While the public interests to be pursued by the Instant Provision are not achieved by the non-disclosure of examination scores, and the disclosure of such scores does not prohibit the achievement of the public interests, the right to know of bar exam applicants is restricted by the non disclosure of examination scores. Therefore, the Instant Provision also fails to strike balance between legal interests.

Summary of Dissenting Opinion by Two Justices

1. Whether the Instant Provision violates the principle against excessive restriction

The legislative purposes of the Instant Provision to train competent and professional attorneys with expertise in various fields through ensuring proper management of legal education and to prevent excessive competition over rankings among law schools through prohibiting disclosure of bar examination scores are legitimate.

If the bar examination scores are not disclosed, evaluation of applicants can be conducted based on various standards such as law school curriculum taken by the applicants, school activities or academic achievements, which would lead law students to focus more on the development of personality, rather than on simply getting higher marks in exams. Therefore, the non-disclosure policy of the Instant Prevision is a proper means of achieving the legislative purposes.

If bar examination scores are disclosed, applicants cannot help concentrating more on preparing for the bar examination to get decent scores. Given the purpose of introducing law school system in Korea, the legislative decision not to disclose bar exam scores for the soft-landing of the new system seems to be reasonable. Also, it is hard to conclude that the disclosure of bar examination scores itself based on limited information, such as applicants' alma mater, accumulated for a short period of time is the very cause of solidifying hierarchies in law school rankings. And applicants' bar exam scores cannot be considered as an objective standard for hiring lawyers, reflecting their academic performance at their law schools.

Given the facts that the decision as to whether the examination scores of bar exam passers are disclosed or not should be made depending on the specific situation of the society such as history, purposes and realities of lawyer selection system; the current law school system was introduced to eradicate the hierarchical ranking structure and excessive competition

found among universities and colleges; and the bar exam scores are not the conclusive and ultimate standard for evaluating lawyers' abilities, the disclosure of bar examination scores, which will make applicants focus only on preparing for bar examination, can be considered as a reversion to the former judicial examination system. By non-disclosing bar exam scores, however, law students can enjoy more diversified education rather than concentrating on bar examination only and multi-dimensional evaluation system can be introduced for hiring lawyers. Other alternatives, such as non-disclosure of applicants' rankings or non-disclosure of applicants scores based on their alma mater, cannot be proper solutions to prevent law school education from focusing only on bar exam preparation or to eradicate the hierarchical ranking structure and excessive competition found among law schools. Therefore, the Instant Provision does not fail to meet the requirement of least restrictive means.

The complainants' private interests to be infringed on by the Instant Provision is that they are unable to know their own scores in bar examination and such interests can be dwarfed by the public interests to be protected by the Instant Provision. Therefore, the Instant Provision strikes the balance between legal interests.

2. Whether the Instant Provision violates the principle of confidence in law

The Instant Provision had been enacted before the first National Bar Examination was taken and as a result, bar exam scores have never been disclosed. Therefore, even though the complainants believed that their bar exam scores would be disclosed, their confidence or expectation in the matter seems not worthy of great protection. Also, compared to the public interests to be achieved by the Instant Provision to prevent law school education from focusing only on bar exam preparation and to eradicate the hierarchical ranking structure and excessive competition found among law schools, the complainants' expectation cannot be considered greater than the public interests.

Supplement Opinion to the Court Opinion by One Justice

Within the Judicial Examination-Judicial Research and Training Institute system, all applicants' judicial examination scores and rankings were disclosed. So, applicants could be hired based on the examination scores they had gotten, regardless of the rankings of their alma mater. Judges and prosecutors were also appointed on the basis of the exam scores, thereby guaranteeing fairness and justice in test, evaluation and recruitment process. But within the current Law School-Bar Examination system, as the name value of law school itself becomes the foremost important standard of evaluation, the objectiveness of evaluation and the fairness of recruitment process have been questioned.

In spite of the importance of the bar examination as one of the most important and effective means to evaluate applicants' ability and capacity as lawyers, the absence of objective and fair standard to appraise their competence as lawyers becomes the cause of criticism and suspicion that applicants' school rankings or background are considered more importantly than their actual abilities. Also, it has been criticized that relatively high bar exam passage rate and the non disclosure policy make the law school system as an effective way to pass on one's power and vested interests to their descendants. The difference between the Judicial Examination-Judicial Research and Training Institute system and the Law School-Bar Examination system basically rests on the differences in procedural and consequential fairness between the disclosure and non-disclosure of exam scores and the objectiveness of evaluation.

Also, compared to other qualification examinations conducted in our country and foreign practice and related law, the non-disclosure policy does not seem to be a proper measure.

The purpose to disclose bar exam scores is to provide a chance to consider the bar exam scores, which is an objective standard for evaluating applicants' ability, as one of the factors to evaluate applicants, not to make the scores become the only standard for hiring lawyers.

Considering the facts that many of the bar exam passers want to

overcome their disadvantage in school rankings and to be objectively evaluated through their bar exam scores and the Law School-Bar Examination system contains problems as mentioned before, the Instant Provision which prevents the bar passers' scores from being disclosed is in violation of the Constitution.

13. Case on the order to publish a written apology against unfair election report

[27-2(A) KCCR 1, 2013Hun-Ka8, July 30, 2015]

In this case, the Constitutional Court held that the part of "publishing a written apology" in Article 8-3 Section 3 of the Public Official Election Act and the part of 'publishing a written apology pursuant to Article 8-3 Section 3' in Article 256 Section 2 Item 3(b) of the Former Public Official Election Act and Article 256 Section 2 Item 2 of the current Public Official Election Act violate the Constitution.

Background of the Case

(1) ○○ Inc. is a corporation that publishes a weekly magazine dealing with current affairs in Chongju City. The Election News Deliberative Committee under the Press Arbitration Commission decided to order ○○ Inc. to publish a written apology pursuant to its decision that the corporation carried unfair election news while reporting the suspicion of bribery of Chung ○○ who ran for the 19th National Assembly Election, and consequently on April 6, 2012, the Press Arbitration Commission ordered the corporation to publish a written apology. At the same day, the corporation filed a motion to review the order but the Press Arbitration Commission denied the request on April 12, 2012.

(2) The defendant of the underlying case, the CEO and publisher of the corporation, due to the failure to execute the order, was prosecuted for violating the Public Official Election Act on October 10, 2012.

(3) The requesting court, while reviewing the underlying case, moved *sua sponte* to request the Constitutional Court a constitutional review of the part of 'publishing a written apology' in Article 8-3 and in Article

256 Section 2 Item 3(b) of the Public Official Election Act on February 6, 2013.

Provision at Issue

The subject matters of this case are whether the part of "publishing a written apology" in Article 8-3 of the Public Official Election Act (Revised by Act No. 9785, July 31, 2009, hereinafter, the "Apology Provision") and the part of 'publishing a written apology pursuant to Article 8-3 Section 3' in Article 256 Section 2 Item 3(b) of the Former Public Official Election Act (after revised by Act No. 7681, August 4, 2005 but before revised by Act No. 12393, February 13, 2014, hereinafter the "Former Punishment Provision") violate the Constitution.

Meanwhile, the current Public Official Election Act revised by Act No. 12393 on February 13, 2014 moved the Former Punishment Provision in this case to Article 256 Section 2 Item 2 and raised the upper limit of fine up to 15 million won, but still provided criminal punishment against the failure to execute the order of publishing an apology. Therefore, the part of 'publishing a written apology pursuant to Article 8-3 Section 3' in Article 256 Section 2 Item 3(b) of the current Public Official Election Act (revised by Act No. 12393, February 13, 2014, hereinafter the "Current Punishment Provision"; hereinafter the "Former Punishment Provision" and the "Current Punishment Provision" altogether will be called the "Punishment Provisions" and the "Apology Provision" and the "Punishment Provisions" altogether will be called as the "Instant Provisions") should also be included in the subject matters of review (*see also* 2009Hun-Ka27, August 23, 2012).

The provisions at issue in this case are as follows:

[Provisions at Issue]

○ Public Official Election Act (Revised by Act No. 9785, July 31, 2009)

Article 8-3 (Election News Deliberative Committee) (3) The Election News Deliberative Committee shall inspect whether the election news

appearing in newspapers under subparagraph 1 of Article 2 of the Act on the Promotion of Newspapers, etc., magazines, information publications, electronic publications and other publications under subparagraph 1 of Article 2 of the Act on Promotion of Periodicals, Including Magazines, and news agencies under subparagraph 1 of Article 2 of the Act on Promotion of News Communications (hereafter in this Article and Article 8-4, "periodicals, etc.") is fair, and shall, in cases where the contents of election news are recognized as unfair upon inspection, decide on the publication of a written apology or a corrected report concerning the contents of the relevant news and shall notify the Press Arbitration Commission thereof, and the Press Arbitration Commission shall order, without delay, the publication of a written apology or a corrected report to the person (hereafter in this Article and Article 8-4, "press company") who has published the periodicals, etc. which carried unfair election news.

○ Former Public Official Election Act (after revised by Act No. 7681, August 4, 2005 but before revised by Act No. 12393, February 13, 2014)

Article 256 (Violation of Various Restrictive Provisions) (2) Any person who falls under any of the following subparagraphs shall be punished by imprisonment with prison labor for not more than two years or by a fine not exceeding four million won:

3. A person who has failed to implement it without delay upon receiving a notification falling under any of the following items:

(b) Publishing a written apology or a corrected report pursuant to Article 8-3 (3)

○ Public Official Election Act (revised by Act No. 12393, February 13, 2014)

Article 256 (Violation of Various Restrictive Provisions) (2) Any person who fails to comply with the notice given with regard to any of the following measures shall be punished by imprisonment with prison labor for not less than two years or by a fine not exceeding 15 million

won:

(b) Publishing a written apology or a corrected report under Article 8-3 (3)

Summary of the Decision

The Apology Provision in this case forces news agencies to acknowledge their faults and make an apology pursuant to the decision of the Election News Deliberation Committee when the election news made by news agencies that publish periodicals, etc. are recognized as unfair: this practice that forcibly coerces news agencies to express ethical and moral decision not readily conceded or formed by themselves severely limits the media's right to personality. Moreover, the Punishment Provisions ensure their effectiveness by providing criminal punishment. According to the Public Official Election Act, however, the Election News Deliberation Committee can order not only the publication of a written apology but also the publication of a corrected report if a news agency is considered to report unfair election news. Also, there could be alternative measures such as the publication of the fact that 'the news agency has received a decision by the Election News Deliberation Committee to violate the duty of fair report' and the recommendation of apology even when the publication of a written apology is required.

Further, although there is no doubt that the legislative purposes of the Instant Provisions to contribute to form democratic and fair public opinion by reinforcing the responsibility of news agencies that carry election news are important, the infringement on the media's right to personality caused by deteriorating media's social trust and dignity and hampering free expression of personality are not dwarfed by the public interests.

Therefore, the Instant Provisions violate the Constitution, infringing upon news agencies' right to personality.

Summary of Dissenting Opinion on the Apology Provision by One Justice and Concurring Opinion on the Punishment Provision

The meaning of the right to personality of juristic persons, or in other words, the right to freely express the personality of juristic persons, is unclear and the constitutional basis of such a right is vague. Since the Apology Provision in this case forces the juristic person or news agency to publish a written apology against its will, it simply limits media's freedom not to express or its general freedom of action. Combined with the importance of public election, given the fact that unfair election news, once published, hardly can be restored unless corrected right after the news has been released, ordering to publish a written apology itself against a news agency that published unfair election news should not be considered an excessive restriction on the media's fundament right, unless the contents of the apology excessively infringe on the media's right. As we reviewed in this case, the order to publish a written apology is not fundamentally different from the aforementioned suggestion by the majority opinion to publish a decision by the Election News Deliberation Committee. Therefore, the legislative decision to enable the Election News Deliberation Committee to order news agencies to publish a written apology does not seem to violate the Constitution.

Meanwhile, when news agencies fail to execute the order of publishing a written apology, the legislative purposes of the Apology Provision can also be achieved by imposing fines or providing administrative measure against the news agencies. But as the Punishment Provisions impose criminal punishment on representatives or publishers of news agencies, the Punishment Provisions also infringe upon the freedom of action of the representatives or publishers of news agencies, thereby violating the Constitution.

14. Determination of Maritime Boundary Case

[27-2(A) KCCR 54, 2010Hun-Ra2, July 30, 2015]

The issue in this case was how to determine boundary of public waters, and the Constitutional Court departed from conventional legal principles in determining the maritime boundary under which the boundary on the basic map of the nation was customarily recognized as basis of the boundary and held that the sea boundaries must be determined under the principles of equity by considering factors such as geographic natural conditions, status of relevant laws, history, specifics of exercise of administrative authority, facts regarding how administrative works were handled, and social and economic benefits of residents.

Background of the Case

(1) The petitioner became Hongseong-gun by administrative districts reform in 1914 by merging Hongju-gun, Gyulsung-gun and part of Boryung-gun. As part of Seosan-eup, Seosan-gun advanced as Seosan-si pursuant to Article 2 of the Act on Establishment of Twelve Cities including Osan-si and Taean-gun and Change of Names of Gun (enacted as Act No. 4050 on December 31, 1988), the respondent, while it was part of Seosan-gun, was organized as a new local government governing the remaining areas of previous Seosan-gun including Taean-eup and Anmyeon-eup.

(2) Cheonsoo Bay, located between the petitioner and the respondent, borders with Hongsung-gun and Boryung-si to the East and with Seosan-si (Seosan Seawall) to the North, and with Anmeyondo to the West. The Bay is surrounded by these districts and stretches long from North to South. Juk-do and several other neighboring islands are located inside the Bay. While these islands were initially incorporated into Jukdo-ri, Anmeyon-eup, the name of districts changed into Jukdo-ru, Seobu-myeon, Hongseong-gun on January 1, 1989 pursuant to the

Regulation Regarding Change of Administrative Districts of Cities, Guns, and Autonomous Districts.

(3) Governor of Taean-gun issued the following fisheries licenses with respect to part of public waters inside the Bay ("Public Waters"): Taean Fish Farming No. 192 and 193 (April 23, 2003), Taean Community No. 136 and 137 (January 22, 2010) (these fisheries licenses are hereinafter collectively referred to as the "Licenses"). Governor of Hongseong-gun requested the governor of Taean-gun to revoke these Licenses claiming that part of the waters subject to the Licenses is under jurisdiction of Hongseong-gun. The Governor of Taean-gun did not respond to the request.

(4) The petitioner thereafter on May 14, 2010 sought declaration against Taean-gun and its governor that the petitioner has jurisdiction over part of the Public Waters ("Disputed Waters"), and requested a review of whether part of the Licenses regarding the Disputed Waters is void.

Subject Matter of Review

The subject matter of review in this case is (1) whether the petitioner has autonomous authority over the Disputed Waters, and (2) whether the Licenses are void as the Licenses infringed upon the petitioner's autonomous authority over the Disputed Waters.

Summary of the Decision

1. A Local Government's Jurisdiction and Autonomous Authority over the Public Waters

Jurisdictional area of a local government provided in Article 4 Section 1 of the Local Autonomy Act is an element constituting a local

government along with residents and autonomous authority. The scope of jurisdiction over which a local government has autonomous authority extends over the waters as well as the land, and thus a local government has autonomous jurisdiction over the public waters.

2. Determination of Borders of Jurisdiction on the Public Waters and Criteria for Determination

Article 4 Section 1 of the Local Autonomy Act provides that a local government's jurisdiction shall be determined "as used before." In the light of the legislative history of the Act, interpretation of the term "as used before" requires going up to the provision which was very first enacted in August 15, 1948, and the borders existed as of August 15, 1948 should be the original criterion to determine the borders. However, in the history of our legal system, no express provision governing the determination of borders of administrative districts over the public waters has been enacted. Thus, if there are principles of customary law on determining borders of administrative districts over the public waters, we must follow the principles. If there are no principles of customary law on the issue, the Constitutional Court is mandated to demarcate sea boundaries under the principles of equity by considering factors such as geographic natural conditions, status of relevant laws, history, specifics of exercise of administrative authority, facts regarding how administrative works were handled, and social and economic benefits of residents in a reasonable and fair manner, if it is postulated that there are certain areas without jurisdictional boundaries despite the nature of local governments composed of three essential elements: residents, area, and autonomous authority.

3. Changing of Precedents which Recognized Maritime Boundaries on National Base Map as Customary Boundaries

Maritime boundaries indicated on the national base map are lines

marked by the National Geographic Information Institute when there is a need to specify administrative districts to which islands belonged. Those lines were marked at appropriate spots between islands on the map merely for the purpose of discerning administrative districts of the islands without conducting actual survey. Therefore, we overrule the precedents which recognized those lines as customary maritime boundaries to the extent that they are in conflict with opinions expressed in this decision.

4. Determination of Jurisdiction between Petitioner and Respondent under the Equity Principles

In this case, the maritime boundary must be determined under the equity principles by considering the following factors among others: the equidistance principle based on the normative perspective that interests of two local governments must be treated equally, presence of other islands located on the Public Waters such as Anmeyon-do, Hwang-do and Juk-do, change of relevant administrative districts (i.e., Jukdo-ri which was a part of Seosan-gun was incorporated into Hongseong-gun), history of how administrative authority has been exercised and administrative affairs have been handled, and circumstances that Juk-do and the Disputed Waters are closely connected in terms of geography and resident life. We hold that it is reasonable to demarcate maritime boundary on the Disputed Waters in the light of the equidistance principle solely based on examining land areas of the petitioner and the respondent and coastline of Juk-do, Anmeyon-do, and Hwang-do under the current law (as of the approximate highest high water level).

5. Declaring the Petitioner's Jurisdiction and Nullity of the Licenses Issued by Governor of Taean-gun that Infringed on the Petitioner's Jurisdiction

The right side (southeast side) of the boundary connecting dots marking

each coordinates between “Ga” and “Na” indicated on the Attachment falls under jurisdiction of the petitioner, and the respondent has jurisdiction over the left side (northwest side). The fisheries licenses issued by the governor of Taean-gun, Taean Community No. 136 and 137, are void to the extent associated with the area falling under jurisdiction of the petitioner as they were issued by a person without authorization by infringing on the petitioner’s right for local autonomy.

Summary of Dissenting Opinion by Two Justices

A comprehensive review of living areas of residents is required for determination of boundaries of a local government’s territory. Hence, when determining maritime boundary, it is important to study how natural conditions of the waters subject to dispute such as undersea features and sea current have affected lives of residents. However, the majority opinion has a problem of demarcating boundary of the public waters by applying uniform standard such as the equidistance principle. This is close to establishment of a new boundary rather than confirmation of it.

In this case, the petitioner had a burden to prove that the Disputed Waters was closely connected with lives of residents of the petitioner with concrete details to support its argument that the waters, which has been under management of the respondent and its residents, is under the petitioner’s jurisdiction. Nevertheless, even after reviewing the entire evidence submitted by the petitioner, we are not convinced that the Disputed Waters falls under jurisdiction of the petitioner. Therefore, the petitioner’s claim must be dismissed.

Summary of Dissenting Opinion by One Justice

In order to acknowledge a local government’s jurisdiction over the public waters, there must be a legislation that provides legal basis therefor. However, since the establishment of the government, a local

government's jurisdiction over the waters has never been regulated by legislations, and there is no administrative practice on this issue. Furthermore, the nation is not obligated to set forth general jurisdiction of local governments over the waters. The majority opinion, being dominated by the need to resolve the dispute, established general jurisdictional area of local governments by applying the equidistance middle line without any legal basis and by not verifying conventional boundaries that existed at the time of foundation of the government under the criteria set forth in the Local Autonomy Act. Yet, the Constitutional Court is without authority to exercise legislative or executive function, for example, by newly establishing the scope of autonomy authority of a local government, albeit absence of legal basis. Thus, the petitioner's claim must be dismissed.

15. Administrative Fine for Failure to Issue Cash Receipt Case

[27-2(A) KCCR 85, 2013Hun-Ba56 · 401 · 420, 2014Hun-Ga26, 2014Hun-Ba176 · 469 · 470 · 471, 2015Hun-Ga6 · 10 · 12, 2015Hun-Ba76 · 114 · 115 (consolidated), July 30, 2015]

In this case, the Constitutional Court held that the main text of Article 15 Section 1 of the Punishment of Tax Evaders Act, Article 162-3 Section 4 of the former Income Tax Act, and Article 117-2 Section 4 of the former Corporate Tax Act that place a duty on high-income professional businesses to issue receipt for cash payment (hereinafter referred to as the "Cash Receipt") for purchases exceeding three hundred thousand Won and, for breach of such duty, impose an administrative fine equivalent to fifty percent of the sales value for which the Cash Receipt has not been issued are not in violation of the Constitution.

Background of the Case

(1) While the complainants and requesting petitioners operate the types of businesses such as law practice or general medical clinics that are required to issue the Cash Receipt, they received fine equivalent to 50/100 of the sales value for which the Cash Receipt has not been issued as they failed to comply with the Cash Receipt issuance requirement.

(2) The complainants and requesting petitioners filed an objection to the disposition of fine, and the court upheld the disposition and imposed fine equivalent to 50/100 of the sales value for which the Cash Receipt has not been issued. The complainants and requesting petitioners then filed an objection to the court's decision, and during a formal trial, filed a motion with the court to request the Constitutional Court for a constitutional review of Article 15 Section 1 of the Punishment of Tax Evaders Act and other provisions. As the court dismissed the motion, the complainants filed a constitutional complaint, and the requesting courts

granted the motion and requested the constitutional review.

Subject Matter of Review

The following provisions are hereinafter collectively referred to as the "Provisions at Issue" - the main text of Article 15 Section 1 of the Punishment of Tax Evaders Act (wholly amended by Act No. 9919 on January 1, 2010, hereinafter referred to as the "Fine Provision"), Article 162-3 Section 4 of the former Income Tax Act (amended by Act No. 9897 on December 31, 2009, but prior to amendment to Act No. 11611 on January 1, 2013, hereinafter referred to as the "Income Tax Act Provision"), and Article 117-2 Section 4 of the former Corporate Tax Act (amended by Act No. 9898 on December 31, 2009, but prior to amendment to Act No. 10423 on December 30, 2010, hereinafter referred to as the "Corporate Tax Provision") (The Income Tax Provision and the Corporate Tax Provision are hereinafter referred to as the "Mandatory Cash Receipt Issuance Provisions"). The subject matter of review in this case is constitutionality of the Provisions at Issue.

Provisions at Issue

Punishment of Tax Evaders Act (wholly amended by Act No. 9919 on January 1, 2010)

Article 15 (Breach of Obligations to Issue Receipts for Cash Payments)

(1) Any person who breaches obligations pursuant to Article 162-3 (4) of the Income Tax Act and Article 117-2 (4) of the Corporate Tax Act shall be punished by an administrative fine equivalent to 50/100 of the sales value for which receipts for cash payments have not been issued.

The former Income Tax Act (amended by Act No. 9897 on December 31, 2009, but prior to amendment to Act No. 10423 on January 1, 2013)

Article 162-3 (Obligations, etc. to Register as Cash Receipt Merchant

and to Issue Cash Receipts for Cash Payment)

(4) Where any business operator who engages in the type of businesses prescribed by Presidential Decree, among those business operators registered as a cash receipt merchant, supplies goods or services, the amount of transactions (including the amount of value-added tax) for every purchase of which is not less than 300 thousand Won and receives the payment in cash, notwithstanding paragraph (3), he/she shall issue a cash receipt, as prescribed by Presidential Decree, even if the other party does not request the issuance thereof: Provided, that where he/she supplies goods or services to any person who has registered as a business operator pursuant to Article 168 of this Act, Article 111 of the Corporate Tax Act or Article 5 of the Value-Added Tax Act and issues an invoice or a tax invoice pursuant to Article 163 of this Act, Article 121 of the Corporate Tax Act or Article 16 of the Value-Added Tax Act, he/she may choose not to issue a cash receipt.

The former Corporate Tax Act (amended by Act No. 9898 on December 31, 2009, but prior to amendment to Act No. 10423 on December 30, 2010)

Article 117-2 (Obligation, etc. to Become Cash Receipt Merchants and to Issue Cash Receipts)

(4) Where a domestic corporation that engages in the type of business prescribed by Presidential Decree supplies goods or services for an amount of 300,000 Won or more for each transaction (including the valued added tax thereon) and is paid in cash, notwithstanding paragraph (3), it shall issue the Cash Receipt, as prescribed by Presidential Decree, although a consumer does not request the issuance of a Cash Receipt: Provided, that the domestic corporation may elect not to issue a Cash Receipt if it issues an invoice or tax invoice under Article 121 of this Act, Article 163 of the Income Tax Act or Article 16 of the Value-Added Tax Act after having supplied goods or services to a person who has registered his/her business under Article 111 of this Act,

Article 163 of the Income Tax Act or Article 16 of the Value-Added Tax Act.

Summary of the Decision

The Provisions at Issue aim to establish fair trade order with respect to the types of businesses that involve frequent cash transactions such as high-income professional businesses and to prevent tax evasion by bringing out into the open the tax base for those businesses. If a legislator is mandated to impose fine at his or her own discretion, determining the amount of the fine also falls under the legislative discretion. As the fine rates in this case, i.e., fifty percent of the sales value for which the Cash Receipt has not been issued, is determined flexibly in proportion to the transaction amount, and in light of factors such as composite income tax rate of the high-income professional businesses, such penalty cannot be seen as an unreasonably burdensome one. Furthermore, as to the act of failure to issue the Cash Receipt itself, it is difficult to view that factors such as motive, types, circumstances, methods, or ex-post circumstances of the act of violation render a considerable difference in the degree of illegality of such act.

As the businesses under the business categories required to issue the Cash Receipt can issue the Cash Receipt by entering a customer's cell phone number without separate charge immediately after a cash transaction in excess of certain amount took place, the procedure of issuing the Cash Receipt cannot be regarded as a complicated one. Moreover, the issuance does not require significant time and money. Also, the businesses can avoid violating the obligation to issue the Cash Receipt by issuing the Cash Receipt anonymously within five days from the date of the cash transaction or a tax invoice as to the transaction with a registered business operator. A fine can also be reduced if a fined person voluntarily pays the fine within a fixed period during which a fined person must present his or her opinion or is qualified as a recipient under the National Basic Living Security Act. For these

reasons, the Provisions at Issue do not infringe on the freedom to conduct their occupation of the complainants and requesting petitioners.

Summary of Dissenting Opinion by Three Justices

The Fine Provision imposes a fine at a flat-rate determined solely based on the amount for which the Cash Receipt has not been issued without considering specific and individual circumstances of each violation of the duty to issue the Cash Receipt. This is not only in contrary to the purpose of the Act on the Regulation of Violations of Public Order but also hardly a punishment that corresponds to the principle of responsibility.

Unlike an additional tax, the substance of which is similar to that of a fine, the Fine Provision does not have provisions at all that provide possible reduction for the circumstances in which there are justifiable grounds for delay in issuing the Cash Receipt or in case of voluntary issuance after the lapse of a prescribed period. Because the legislative purpose of the Provisions at Issue can be still met to a sufficient extent, even by adjusting the additional tax rate upward or specifying possibility of a fine reduction with maintaining the form of a fine, the Fine Provision that does not provide possibilities of reduction is an excessive means that restricts the freedom to conduct their occupation of the complainants and requesting petitioners.

16. Registration of personal information of sex offenders

[27-2(A) KCCR 370, 2014Hun-Ma340 · 672, 2015Hun-Ma99 (consolidated), July 30, 2015]

In this case, the Constitutional Court held constitutional Article 42 Section 1 of the 'Act on Special Cases Concerning the Punishment, etc. of Sexual Crimes' stipulating that any person finally declared guilty of taking photos by using cameras, etc. shall be subject to registration of personal information, not infringing on the complainant's right to informational self-determination. The Court, however, held that Article 45 Section 1 of the Act stipulating 20 years of storage and management period for criminals' personal information violates the Constitution as it infringes on the complainant's right to self-determination of personal information.

Background of Case

The complainants were convicted of crimes (taking photos by using cameras, etc. and attempted taking photos by using cameras, etc.) under the 'Act on Special Cases Concerning the Punishment, etc. of Sexual Crimes' and their personal information was registered pursuant to Article 42 Section 1 and Article 45 Section 1 of the 'Act on Special Cases Concerning the Punishment, etc. of Sexual Crimes.' The complainants filed this constitutional complaint arguing that their fundamental rights including human dignity and value were violated by the aforementioned provisions.

Provisions at issue

The provisions at issue in this case are whether ① the part of "any person finally declared guilty of a crime defined in Article 14 Section 1 and Article 15 (limited to the attempt under Article 14 Section 1 of the 'Act on Special Cases Concerning the Punishment, etc. of Sexual

Crimes') of the 'Act on Special Cases Concerning the Punishment, etc. of Sexual Crimes' (wholly revised by Act No. 11556 December 18, 2012, hereinafter the 'Act') shall be a person subject to registration of personal information" in Article 42 Section 1(hereinafter the "Registration Provision") and ② Article 45 Section 1 of the Act (hereinafter, the "Management Provision") are in violation of the Constitution, infringing upon the complainants' fundamental rights. The provisions at issue are as follows:

Provisions at Issue

Act on Special Cases Concerning the Punishment, etc. of Sexual Crimes (wholly revised by Act No. 11556 December 18, 2012)

Article 42 (Persons Subject to Registration of Personal Information) (1)Any person finally declared guilty of a crime as defined in any of Articles 2 (1) 3 and 4 and (2) (limited to paragraph (1) 3 and 4) and 3 through 15 or a crime as defined in subparagraph 2 of Article 2 of the Act on Protection of Children and Juveniles from Sexual Abuse (hereinafter referred to as "sex crime subject to registration"), or any person to whom a definitive order is issued to disclose information under Article 49 (1) 4 of the said Act, shall be a person subject to registration of personal information (hereinafter referred to as "person subject to registration"): Provided, That this shall exclude any person who is fined for committing a crime as defined in Article 11 (5) of the Act on Protection of Children and Juveniles from Sexual Abuse.

Article 45 (Management of Registered Information) (1)The Minister of Justice shall keep and manage any registered information for 20 years from the date on which it is initially registered (referring to the date of registration, the notice of which is given to the person subject to registration).

Summary of Decision

1. Whether the Registration Provision infringes on the right to informational self-determination

Maintenance of registry for certain types of sex offenders' personal information and its management in order to prevent repeated sex crimes and enhance effectiveness of criminal investigation are proper means to achieve legitimate legislative purposes. Expanding the scope of punishment or imposing heavier sentence are not enough to curve the crime of taking photos by using cameras etc. and therefore state's management of the personal information of any person who has been punished for such crimes can be an effective and pragmatic way to prevent such crimes from being repeatedly committed. There could be various types of crimes of taking photos by using cameras etc. and different levels of illegality or culpability, but the nature of the crime that violates the victims' sexual freedom and right not to be photographed is basically identical despite the possible differences. Therefore, the legislature's decision not to place different weight on the individual types or level of illegality of the crime cannot be considered as excessive restriction. Also, being the subject of registration of personal information does not necessarily mean that the person's rehabilitation becomes difficult or the person will be stigmatized as a criminal. In this regard, while the private interests are not seriously infringed by the Registration Provision, the public interests to be achieved by the Registration Provision are very important. Therefore, the Registration Provision does not infringe upon the complainants' right to informational self-determination.

2. Whether the Management Provision infringes on the complainants' right to informational self-determination

Storage and management of sex offender's personal information, in

order to inhibit repetition of sex offense and enhance the effectiveness of investigation, for 20 years during which the possibility of recurrence of crime can always be expected are effective means to achieve legitimate legislative purposes. But the levels of risk related to the recurrence of crime can be different depending on the types of sex offenses subject to registration and the characteristics of offenders, and it is reasonable for the legislators to minimize the restriction on the right to informational self-determination by differentiating the registration period. But the Management Provision in this case sets '20 years' as the uniform registration period during which the personal information would be stored and managed. Moreover, once personal information is stored pursuant to the Management Provision, there is no way to review the order for exempting the duty to register or shortening the registration period, which is extremely severe restriction. And even thought the public interests to be achieved by the Management Provision are important, setting the uniform 20 year registration period without exception and imposing various duties during the period can bring about serious imbalance between the public interests to be achieved and the private interests for the sex offenders whose culpability is relatively low and who are less likely to commit similar crimes again. Therefore, the Management Provision infringes upon the right to informational self-determination.

3. Decision of incompatibility with the Constitution regarding the Management Provision

It is the legislative discretion to provide for different levels of registration period to eradicate unconstitutionality of the Management Provision and come up with measures to exempt the duty to register personal information or shorten the registration period when there is any change in the circumstance such as disappearance of the risk of recidivism. Therefore, we declare the Management Provision is incompatible with the Constitution, making the Management Provision to

be tentatively applied until the legislature amends it by December 31, 2016.

Dissenting Opinion by Two Justices on the Registration Provision

The Registration Provision, although its main legislative purpose is to prevent recidivism of the crime of taking photos by using cameras etc., does not consider 'the risk of recidivism' as one of the requirements for selecting criminals who would be the subjects to the registration of personal information. Thereby, the Registration Provision imposes unnecessary restriction on the sex offenders subject to the provision who are not likely to bear the risk of recidivism. Also, the Registration Provision violates the requirement of least restrictive means because it fails to provide less restrictive alternatives such as narrowing the scope of application based upon the types of crimes and seriousness of culpability or providing separate appeal procedures, thereby excluding offenders who are less culpable or responsible such as those who only attempted to commit a crime or who are fined from being subject to the registration. Also, the Registration Provision fails to strike balance between the public interests to be achieved and the private interests of the sex offenders whose culpability is relatively low and who are not vulnerable to recidivism. Therefore, the Registration Provision violates the right to informational self-determination.

Dissenting Opinion by Two Justices on the Registration Provision

The elements of crime of taking photos by using cameras etc. do not include sexual intercourse by force or sexual molestation and the crime is strongly related to sexual morality or infringement on the victim's privacy. The types of actions involved in the crime are various depending on the criminal intent and motive, crime target, numbers and mode of action, differentiating the necessity for registration of personal information and the risk of recidivism. But the Registration Provision

uniformly imposes the duty to register personal information on all kinds of offenders who commit the crime of taking photos by using cameras etc. without any variation or exception.

Also, the elements of crime under Article 14 Section 1 of the Act are unclear, thereby failing to give fair notice to the people who are subject to the provision about the standard of culpability and scope of crime and the Registration Provision makes anyone who is finally convicted of the crime of taking photos by using cameras etc. to mandatorily be the subject of the registration of personal information without going through any separate procedure such as decision of a judge. Therefore, it is hard to expect what kind of action makes the offender to be subject to the registration.

Therefore, the Registration Provision violates the Constitution as it fails to provide any other alternatives such as reducing the scope of application to those who are more culpable and vulnerable to recidivism or allowing the request for a separate decision by a judge on the matter of registration apart from the conviction of crime.

Dissenting Opinion by Two Justices on the Management Provision

We agree with the conclusion and reasoning of the majority opinion that the Management Provision violates the Constitution, but we think that the Court should declare the decision of simple unconstitutionality regarding the Management Provision, so that the infringement on the fundamental rights can be immediately eliminated.

17. Case on Immediate Appeal Filing Period under the Habeas Corpus Act

[27-2(A) KCCR 461, 2013Hun-Ka21, September 24, 2015]

In this case, the Constitutional Court held that the portion of Article 15 of the Habeas Corpus Act which prescribes "three days" as the period for habeas corpus petitioners to file an immediate appeal against rulings that dismiss their habeas corpus petitions violates the complainant's right to trial.

Background of the Case

(1) Inmate Lee ○-Sik, who has been held in Maeumae Hospital located in Seobuk-gu, Cheonan-si for paranoid schizophrenia since May 8, 2009, filed a habeas corpus petition to seek relief with the Cheonan Branch of the Daejeon District Court in August 2012, claiming that his confinement by the custodian (head/administrator of the hospital) was unlawful. However, the Cheonan Branch dismissed the petition on November 1, 2012 (2012In4, Cheonan Branch).

(2) The inmate was served the document of the court's decision dismissing his habeas corpus petition on November 5, 2012 and requested an immediate appeal he drafted on the same day to be served via mail to a nurse at the Maeumae Hospital. This application for immediate appeal, thereafter, reached the Cheonan Branch on November 9, 2012.

(3) The Cheonan Branch, while reviewing the case involving the aforementioned immediate appeal (2012In-Ra1, Daejeon District Court), filed ex officio for constitutional review of Article 15 of the Habeas Corpus Act with the Constitutional Court on June 20, 2013, on grounds that the three-day period for immediate appeal violates the right to trial,

personal liberty, and equality rights.

Subject Matter of Review

The subject matter of review in this case is the constitutionality of the portion of Article 15 of the Habeas Corpus Act (enacted as Act No. 8724, Dec. 21, 2007) which provides "three days" for a habeas corpus petitioner to file an immediate appeal (hereinafter the "Provision at Issue").

Habeas Corpus Act (Amended by Act No. 8724, Dec. 21, 2007)
Article 15 (Appeal)
A habeas corpus petitioner or custodian, who is dissatisfied with a ruling under Article 13, may make an immediate appeal against such ruling within three days of the ruling.

Summary of the Decision

The habeas corpus petitioners defined by the Habeas Corpus Act are those confined in a detention facility against their will, and their personal liberties are restricted. Therefore, they cannot, by themselves, submit an immediate appeal against the ruling that rejected their petition for habeas corpus, and filing it with external assistance may not be so feasible when it is hard to expect goodwill and cooperation from the outside people. It is also difficult to consider three days to be sufficient for submitting an immediate appeal by mail, given the time required for its drafting and for the mail to be sent and delivered to the competent court.

Habeas corpus petitioners are entitled to representation by court-appointed counsels according to the Habeas Corpus Act, but it is hard to readily conclude that the right to counsel includes the right to appeal. Even if the right to appeal is considered a part of the right to counsel, the three-day period for filing an immediate appeal is still too limited in that

the extension of the statutory filing period and exceptional provisions such as Article 345 of the Criminal Procedure Act are not likely to be applied. Petition for retrial may be an alternative, but since its concept differs from that of an immediate appeal, the possibility of a retrial petition in itself cannot justify the excessive restriction on the period of immediate appeal.

Furthermore, allowing for a little longer period than the current three days for filing immediate appeal is not likely to serve as a major impediment to achieving the legislative purpose of the Provision at Issue-to promptly decide on the matter of law regarding the position of inmates. The Provision at Issue, therefore, infringes on the inmate's right to trial.

18. Travel Ban for Criminal Defendant Case

[27-2(A) KCCR 514, 2012Hun-Ba302, September 24, 2015]

In this case, the Constitutional Court held that subparagraph 1 of Article 4 Section 1 of the Immigration Control Act under which a person pending in a criminal trial may be prohibited from departing the country does not contravene the warrant requirement and the freedom to leave the country.

Background of the Case

While the complainant was undergoing investigation for alleged fraud, he left the country on June 9, 2005 and returned on November 22, 2011. He was indicted on a charge of fraud on April 30, 2012. The Minister of Justice on May 7, 2012 prohibited the complainant from leaving the country for six months (from May 7, 2012 to November 6, 2012) pursuant to subparagraph 1 of Article 4 Section 1 of the Immigration Control Act on the ground that a criminal trial was pending against the complainant.

Thereupon, the complainant on May 22, 2012 filed an action against the Minister of Justice with the Seoul Administrative Court seeking cancellation of the travel ban disposition above, and at the same time filed a motion to request the Constitutional Court to conduct a constitutional review of subparagraph 1 of Article 4 Section 1 of the Immigration Control Act. As the motion was dismissed on July 27, 2012, he filed a constitutional complaint in this case on August 21, 2012.

Subject Matter of Review

The subject matter of review in this case is constitutionality of subparagraph 1 of Article 4 Section 1 of the Immigration Control Act

(amended by Act No. 10863 on July 18, 2011, hereinafter referred to as the "Provision at Issue"). The Provision at Issue reads as follows:

Provisions at Issue

Immigration Control Act (amended by Act No. 10863 on July 18, 2011)
Article 4 (Prohibition of Departure)
(1) The Minister of Justice may prohibit any of the following nationals from departing from the Republic of Korea for a fixed period not exceeding six months:
1. A person pending in a criminal trial

Summary of the Decision

1. Warrant Requirement

The travel ban decision of the Minister of Justice pursuant to the Provision at Issue is a mere administrative disposition that limits a citizen's freedom to leave the country. The decision cannot be regarded as a compulsory disposition that carries physical legal force exerted directly upon one's body. The warrant requirement applies to such physical legal force. Therefore, the Provision at Issue cannot be viewed as a violation of the warrant requirement set forth in Article 12 Section 3 of the Constitution.

2. Due Process

As the travel ban decision based on the Provision at Issue by its nature requires speed and secrecy, providing an advance notice to a person subject to the travel ban or conducting a hearing may encumber achieving the aim of the travel ban system - securing the state's punishment power. Furthermore, as the decision of travel ban must be notified in writing immediately upon the decision, and procedural

participation is guaranteed by affording an opportunity to retroactively dispute the decision by filing an objection or an administrative lawsuit, it is hardly seen as a violation of due process.

3. Principle of Presumption of Innocence

The Provision at Issue merely mandates that the Minister of Justice may restrict a person pending in a criminal trial from leaving the country in case there is a concern that the person may flee abroad in order to avoid the state's punishment power. Thus, the Provision at Issue hardly intends to impose on a person pending in a criminal trial any disadvantages that may be resulted from a plea of guilty, i.e., social stigmatization and retributive sanctions, on the ground that the person is guilty. The imposing of such disadvantages is which the principle of presumption of innocence proscribes. Accordingly, the Court does not find that the Provision at Issue violates the principle of presumption of innocence.

4. Freedom to Leave the Country

The legislative intent of the Provision at Issue which aims to realize judicial justice and finding of substantive truth by securing the state's punishment power through prohibiting a person pending in a criminal trial from fleeing abroad is legitimate, and since prohibiting a person from leaving the country for certain period may contribute to fulfilling the legislative intent, appropriateness of the means is also recognized. The Minister of Justice, in determining the travel ban, must take account of specific circumstances related to the defendant's case such as fundamental principles of the travel ban, facts of a criminal conduct for which the defendant subject to the travel ban is charged, age and family relations, and likelihood of escape to foreign countries, and in actual practice, the travel ban pursuant the Provision at Issue is exercised very restrictively. Also, since many other means intending to minimize

restriction of fundamental rights of a person pending in a criminal trial (e.g., revocation of the travel ban, an ex post notification system, filing of an objection, an administrative lawsuit) are available, there is no violation of the principle of the least restrictive means. Whereas the disadvantage suffered by a person pending in a criminal trial due to the Provision at Issue is being prohibited from leaving the country for certain period of time, the public interest to be achieved by the Provision at Issue is finding of substantive truth and realization of judicial justice by securing the state's punishment power. As such public interest is of significant importance, the balance of interest is also met. For these reasons, the Provision at Issue is not in violation of the principle of the least restrictive means and thus does not infringe upon the freedom to leave the country.

5. Right to a Fair Trial

The Provision at Issue merely mandates the Minister of Justice to prohibit the defendant from departing the country. The Provision has no direct connection with the defendant's exercise of rights to assert and defend. Furthermore, the right to a fair trial is hardly deemed to incorporate the right to collect evidence abroad. Thus, this Court finds that the Provision at Issue does not infringe upon the right to a fair trial.

Summary of Dissenting Opinion by Two Justices

The travel ban decision by the Minister of Justice needs to be permitted for a fixed minimum period when the decision is inevitable in order to secure the state's punishment power. However, the Provision at Issue, which prescribes that the Minister may prohibit a person from leaving the country simply if the person is pending in a criminal trial, may possibly be construed as an excessive restriction of fundamental rights of a person whose need to travel abroad is strongly demanded, e.g., a defendant who is not in custody and has primary base of living

abroad or frequently travels abroad for business purposes. Moreover, while the Immigration Control Act provides that the Minister of Justice may extend the period of the travel ban (Article 4-2), the Act does not specifically specify how many times the ban may be extended. Such absence of specific prescription of the number of extensions, by authorizing repetitive extension of the ban, may lead to a grave limitation of the freedom to leave the county of a person pending in a criminal trial for several months or even years until a defendant's conviction becomes final. Therefore, the Provision at Issue which allows a person to be prohibited from leaving the country throughout the trial period is in contravention of the principle of the least restrictive means. The Provision at Issue creates a disadvantage upon a person pending in a criminal trial who needs to leave the country for business purposes. Such disadvantage is significant enough to adversely affect the livelihood of the person. Moreover, in regards of those who are pending in a criminal trial, the Provision at Issue restricts the important right enshrined in the Constitution, the freedom to leave the country. For these reasons, the Provision fails to satisfy the balance of interest test. On these grounds, the Provision at Issue is against the principle of the least restrictive means and does infringe on the freedom to leave the country.

19. Profanity Against the Nation Case

[27-2(A) KCCR 700, 2013Hun-Ka20, October 21, 2015]

In this case, the Constitutional Court held that Article 104-2 of the former Criminal Act, which prescribes criminal penalties for expressions or actions that may or actually do undermine the safety, interest or dignity of the nation through means such as insult, defamation, distortion or dissemination of false facts related to state institutions established by the Korean government or its Constitution, infringes on the freedom of expression and thereby violates the Constitution.

Background of the Case

(1) The petitioner who requested constitutional review in this case had been indicted on charges of profaning the nation and violating the Presidential Emergency Decree on the Protection of National Safety and Public Order by drafting and keeping expression materials that distorted information related to state institutions, etc. as well as circulating them to some Japanese and American people, leading to the publication of the materials' translated version in a Japanese magazine and thereby undermining the safety, interest, and dignity of the state by way of foreigners.

(2) The said petitioner was sentenced to three years of imprisonment and three years of suspension of qualifications for the above crimes at the court of first instance, and this sentence was affirmed following the dismissal of the petitioner's appeals to the High Court and the Supreme Court, respectively. The petitioner filed for retrial of the case with the court of first instance, namely the Seoul Central District Court, which decided to commence the retrial on April 19, 2013.

(3) While the abovementioned retrial was pending, the petitioner filed a motion requesting a constitutional review of Article 104-2 of the

former Criminal Act that prohibits profanity against the nation with the Seoul Central District Court, which granted the motion and filed for constitutional review with the Constitutional Court on June 13, 2013.

Subject Matter of Review

The subject matter of review in this case is the constitutionality of Article 104-2 of the former Criminal Act (amended by Act No. 2745, Mar. 25, 1975 and later amended by Act No. 4040, Dec. 31, 1988), which is laid out below:

Former Criminal Act (amended by Act No. 2745, March 25, 1975, and later amended by Act No. 4040, December 31, 1988)

Article 104-2 (Profanity against the Nation, etc.)

(1) A Korean national who may or actually does undermine the safety, interest or dignity of the nation through insult, defamation, distortion, or dissemination of false facts of state institutions established by the government of the Republic of Korea or its Constitution, or through other means in a foreign territory shall be punished by imprisonment or imprisonment without prison labor for not more than seven years.

(2) A Korean national who commits acts specified in paragraph 1 by using aliens, foreign organizations, etc. in the territory of the Republic of Korea shall be punished as prescribed in paragraph 1.

(3) The person who is guilty of acts as mentioned in paragraph 2 may also be deprived of his or her qualifications for not more than 10 years.

Summary of Decision

1. The instant provision limits certain contents of expression, and since the limitation of such rights is, in principle, allowed only under strict conditions, limited to inevitable circumstances where major public interests are at stake, it is at issue whether the provision at issue violates the rule against excessive restriction and thus infringes on the freedom

of expression.

2. In light of the circumstances at that time when the press was regulated and the aforementioned provision was removed, it is doubtful whether the true legislative purpose of the instant provision can be construed as the protection of national safety, interest, and dignity; it is also hardly conceivable that blanket limitation of acts of expression by way of criminal punishment contributes to the purpose. Therefore, the means to achieve the legislative purpose is not considered appropriate.

3. "Other means" as a form of behavior prohibited by the instant provision is not clearly defined, and the scope of its application is too far-reaching. The "interest" or "dignity" of the nation is also abstract and unclear in its meaning; imposing punishment not just for the acts that undermined national interest or dignity but also for those that can possibly do so, discourages free criticism and debate regarding the state and state agencies and extensively limits the freedom of expression.

The Criminal Act has a number of provisions to ensure the safety and independence of the nation, and the National Security Act or the Military Secret Protection Act also has detailed provisions to that end, which means there is no need to have the instant provision for the purpose of securing the "safety" of the nation. Furthermore, preserving the true "interest" of the nation is ensured through extensive discussions and forums, and enforcing this with criminal punishment is excessive. Imposing criminal penalties on the general public for their criticism or negative judgments on grounds that they undermine the "dignity" of the nation is contrary to the spirit of democracy that guarantees free criticism and participation involving the state. The state or state agencies are capable of finding facts and engaging in public relations of national administration by themselves with diverse and vast sources of information in hand, and are also well-equipped to fully achieve the legislative purpose of the instant provision by actively responding to dissemination of false facts or malicious distortion. Thus, the instant

provision fails to meet the least restrictive means requirement.

4. It is doubtful to what extent the blanket restriction of people's expressions through criminal punishment can truly contribute to protecting the safety, interest, or dignity of the state, and the level of limitation on fundamental rights is highly important in light of the value that the freedom of expression holds in a democratic society. For this reason, the instant provision also fails to strike the balance of competing interests.

Thereupon, the instant provision breaches the rule against excessive restriction and infringes on the freedom of expression, ultimately violating the Constitution.

20. Limitation of Period of Special Cases Allowing Children of a Korean Mother to Obtain Korean Nationality

[27-2(B) KCCR 206, 2014Hun-Ba211, November 26, 2015]

This is the case in which the Constitutional Court held that a clause, "by reporting to the Minister of Justice through means prescribed by the Presidential Decree by December 31, 2004", in Article 7 Section 1 (amended by Act No. 6523 on December 19, 2001) of an addendum to the Nationality Act (Act No. 5431, December 13, 1997) does not violate the principle of equality. The addendum provides provisions for special cases under which children of a Korean mother born between June 14, 1978 and June 13, 1998 may acquire Korean nationality.

Background of the Case

(1) The Nationality Act, in the process of being wholly revised by Act No. 5431 as of December 13, 1997, abandoned the paternal *ius sanguinis* principle and switched over to the unlimited *ius sanguinis* principle, and as interim measures, included the provisions for special cases under which a person whose mother is a Korean national or whose deceased mother had Korean nationality at the time of her death (hereinafter collectively referred to as the "Person with a Korean Mother") and who was born during a ten-year period immediately prior to enforcement of the revised Nationality Act could obtain Korean nationality by reporting to the Minister of Justice within three years from the date on which the revised Nationality Act came into force.

(2) The Constitutional Court, in its 97Hun-Ga12 decision rendered on August 31, 2000, held that a clause, "during a ten-year period", in Article 7 Section 1 of an addendum to the former Nationality Act (Act No. 5431, December 13, 1997) (hereinafter referred to as the "Addendum to the Former Act"), is nonconforming to the Constitution

on the ground that the clause which does not suggest a reasonable criteria in terms of the Constitution and indeed has a discriminatory impact is against the principle of equality. The National Assembly, in compliance with the Court's decision, revised the Addendum to the Former Act by broadening the scope of beneficiaries eligible for acquisition of Korean nationality under the special cases as "the Person with a Korean Mother who was born between June 14, 1978 and June 13, 1998" and extending the reporting period under the special cases until "December 31, 2004."

(3) The complainant is a male U.S. citizen who was born on April 24, 1980. At the time of his birth, his father was a U.S. citizen and mother was a Korean national. The complainant, in seeking to obtain Korean nationality, on November 6, 2013, reported pursuant to Article 7 Section 1 of an addendum (amended by Act No. 6523 on December 19, 2001) (hereinafter referred to as the "Revised Addendum Provision") to the National Act (Act No. 5431, December 13, 1997). The request was rejected on the ground that the reporting period prescribed in the Revised Addendum Provision expired.

(4) Thereupon, the complainant on February 5, 2014 filed an action seeking cancellation of the rejection disposition above, and as a motion requesting a constitutional review of the clause, "by December 31, 2004", in the Revised Addendum Provision filed during the pendency of the said action was dismissed, filed a constitutional complaint in this case on May 12, 2014.

Subject Matter of Review

The constitutional complaint filed by the complainant asked the Court to review the clause, "by December 31, 2004", in the Revised Addendum Provision that provides provisions for special cases under which the Person with a Korean Mother could obtain Korean nationality.

Nonetheless, since the clause specifying the reporting period by December 31, 2004, comprises the provisions for special cases allowing the Person with a Korean Mother to obtain Korean nationality in conjunction with the reporting requirement to the Minister of Justice, it is appropriate to include the part on the reporting requirement in the scope of the Court's review and decision as well.

Then, the question in this case is whether the clause that reads, "by reporting to the Minister of Justice through means prescribed by the Presidential Decree by December 31, 2004", in Article 7 Section 1 (amended by Act No. 6523 on December 19, 2001) of an addendum to the Nationality Act (Act No. 5431, December 13, 1997) (hereinafter referred to as the "Provision at Issue") contravenes the Constitution. The Provision at Issue reads as follows:

Provision at Issue

Article 7 Section 1 (Amended by Act No. 6523 on December 19, 2001), Addendum to the Nationality Act (Act No. 5431, December 13, 1997)

Article 7 (Special Cases Allowing Children of a Korean Mother to Obtain Korean Nationality Pursuant to Adoption of Unlimited *Ius sanguinis* Principle)

(1) A person who was born to a mother with Korean nationality between June 14, 1978 and June 13, 1998 and who falls under any of the following subparagraphs may obtain Korean nationality by reporting to the Minister of Justice through means prescribed by the Presidential Decree by December 31, 2004:

1. A person whose mother is currently a Korean national
2. A person whose deceased mother had Korean nationality at the time of her death

Summary of the Decision

The Provision at Issue treats the following two types of persons

differently in the way of obtaining Korean nationality: the Person with a Korean Mother born between June 14, 1978 and June 13, 1998 who may obtain Korean nationality pursuant to the Revised Addendum Provision (hereinafter referred to as the "Person with a Korean Mother Subject to Special Cases") and the Person with a Korean Mother born on or after June 14, 1998 who automatically obtains Korean nationality by birth to a Korean mother.

The purpose of the Revised Addendum Provision is, as the Nationality Act abandoned the paternal *ius sanguinis* principle and shifted to the unlimited *ius sanguinis* principle, to ease discrimination against the Person with a Korean Mother by granting the Person an opportunity to obtain Korean nationality, and the Provision at Issue in the Revised Addendum Provision requires the Person with a Korean Mother Subject to Special Cases to report to the Minister of Justice by December 31, 2004 in order to obtain Korean nationality. Such reporting requirement has reasonable objectives: it aims to confirm at an early stage nationality relations of the Person with a Korean Mother who had not been a Korean national, to deter the possibility of the Person with a Korean Mother abusing the right to obtain the nationality, to reduce an unnecessary waste of administrative resources, and to make sure whether the Person with a Korean Mother who is not yet a Korean national and a foreigner is willing to obtain Korean nationality. The objectives are reasonable in consideration of cases of Germany and Japan as well. These countries switched over to the unlimited *ius sanguinis* principle earlier than Korea and maintained special cases equivalent to the special cases in this case. The reporting period of the special cases in Germany and Japan was also three years from the enforcement date of the respective revised nationality legislation.

Also, the Nationality Act already provides adequate relief measures for the Person with a Korean Mother who was not able to report during the period prescribed by the provisions for special cases: if the Person with a Korean Mother was unable to report during the period due to force majeure causes, he or she could still acquire Korean nationality by

reporting within three months from the date on which the pertinent force majeure cause ceases to exist (Addendum to the Nationality Act, Act No 5431, December 13, 1997), and if the Person with a Korean Mother failed to report due to other causes, he or she could still obtain Korean nationality without troubles by applying for Simple Naturalization (Article 6 Section 1 of the Nationality Act) or Special Naturalization (Article 7 Section 1 of the Nationality Act).

Then, the Provision at Issue which mandates the Person with a Korean Mother Subject to Special Cases to report to the Minister of Justice by December 31, 2004 in order to obtain Korean nationality cannot be deemed discrimination not based on rational grounds between the Person with a Korean Mother Subject to Special Cases and the Person with a Korean Mother who was born after the revised Nationality Act came into force. Thus, the Provision at Issue does not violate the principle of equality.

Summary of Dissenting Opinion by Four Justices

The intent of enacting special cases allowing the Person with a Korean Mother to acquire Korean nationality was not to merely grant a dispensation upon the Person with a Korean Mother who was born prior to adoption of the unlimited *ius sanguinis* principle. The intent was to, along with abolishment of the paternal *ius sanguinis* principle which was held as a violation of the principle of equality, relieve those Persons who were born before the abolishment and thus were not entitled to obtain Korean nationality from disadvantages of being unconstitutionally discriminated. Then, the Revised Addendum Provision should be able to provide adequate remedy for the Person with a Korean Mother who suffered disadvantages as a result of the discrimination.

The Provision at Issue, with respect to the Person with a Korean Mother Subject to Special Cases, consistently requires reporting under the provisions for special cases to be done during a three-year period from December 19, 2001 to December 31, 2004. However, still forcing

the reporting to be done by December 31, 2004 even upon showing of exceptional circumstances due to which the Person was unable to report in due course (e.g., the Person with a Korean Mother was an infant, there was a reason that the Person was not able to acknowledge that the Person himself or herself is indeed not a Korean national, or the Person was not able to report to the Minister of Justice due to circumstances that were hardly attributable to the Person), is nothing but an idea that only serves the expediency of the administration, and cannot be deemed appropriate remedial measures for the Person with a Korean Mother under the above exceptional circumstances.

According to the statistics released by the Ministry of Justice, the number of the Person with a Korean Mother who obtained Korean nationality during the period prescribed by the provisions for special cases was merely 1,213. This number supports that it is difficult to conclude that most of the Persons with a Korean Mother eligible for the special cases received relief.

The majority opinion expressed a concern that allowing exceptions to the reporting period for the special cases will give a rise to various types of adverse ramifications. Nonetheless, such ramifications are the ones that had been prevailed since adoption of the paternal *ius sanguinis* principle, and they are hardly recognized as problems emerged as a result of having exceptions to the reporting period for the special cases.

Although Article 7 Section 3 of an addendum to the Nationality Act allows an exception for failure to report due to "natural disasters and other force majeure causes", receiving relief under this exception is almost impossible. The "natural disasters and other force majeure causes" requirement in Article 7 Section 3 is a narrower requirement than "justifiable causes" or "causes not attributable to an applicant." Moreover, certain requirements specified in the Nationality Act must be satisfied to obtain Korean nationality through Simple Naturalization and Special Naturalization under the Nationality Act, and because naturalization through Simple Naturalization and Special Naturalization ultimately requires approval of the Minister of Justice, if the Minister

rejects the request for naturalization, the Person with a Korean Mother can't obtain Korean nationality. Therefore, it is difficult to regard that the above measures are effective remedies.

The complainant in this case was listed as a son in his father's book of removed entries from the family register (under the former Family Register Act). He also finished all of his studies and military service in Korea and is now working as a resident physician in a hospital in Korea. Barring the Person with a Korean Mother like the complainant in this case, who was under circumstances sufficient to mistake that he himself was a Korean national and completed military service based on such misunderstanding, from obtaining the nationality merely by reason of expiration of the reporting period under the special cases is an unreasonable discrimination against the Person with a Korean Mother who was under circumstances in which he or she was unable to report during the period prescribed by the provisions for special cases.

Then, the Provision at Issue which limits the period for special cases by December 31, 2004 is not sufficient to be regarded as an effective remedy to the Person with a Korean Mother Subject to Special Cases and thus the Provision is against the principle of equality.

21. Case Concerning Number and Time of Prisoner Visit by Legal Counsel in Civil Case

[27-2(B) KCCR 306, 2012Hun-Ma858, November 26, 2015]

This is the case in which the Constitutional Court held that the following provisions infringe on the petitioner prisoner's right to trial and thus are unconstitutional: Article 58 Section 2 of the former Enforcement Decree of the Administration and Treatment of Correctional Institution Inmates Act which defined a meeting between a prisoner and his or her legal counsel representing the prisoner in civil lawsuit as a general meeting and therefore limited the period and number of meetings to thirty minutes and four times per month respectively; parts related to a "prisoner" in Article 58 Section 2 of the Enforcement Decree of the Administration and Treatment of Correctional Institution Inmates Act; Article 58 Section 3 of the Enforcement Decree of the Administration and Treatment of Correctional Institution Inmates Act.

Background of the Case

The petitioner was convicted of attempted fraud and sentenced to one year of imprisonment on September 27, 2012 and had been detained in Incheon Detention Center. The petitioner lost in a civil action which he filed on October 1, 2010 to seek payment of loans and filed an appeal on May 11, 2012. Thinking that a general visit is not adequate for a client meeting to prepare for an appellate trial, the petitioner's counsel in that civil action on October 16, 2012, during the pendency of the appellate trial, requested to meet his client in a room for an attorney visit in Incheon Detention Center. The counsel's request was rejected on the ground that a legal counsel in civil actions does not qualify as a defense counsel.

The petitioner then filed a constitutional complaint in this case on October 23, 2012 claiming that restricting the number and time of

meetings with the legal counsel to thirty minutes and four times per month respectively by treating the meeting as a general visit is unconstitutional.

Subject Matter of Review

The subject matter of review in this case is whether Article 58 Section 2 of the former Enforcement Decree of the Administration and Treatment of Correctional Institution Inmates Act (wholly amended by Enforcement Decree No. 21095 on October 29, 2008, but prior to amendment by Enforcement Decree No. 25397 on June 25, 2014), parts related to a "prisoner" in Article 58 Section 2 of the Enforcement Decree of the Administration and Treatment of Correctional Institution Inmates Act (amended by Enforcement Decree No. 25397 on June 25, 2014), and Article 58 Section 3 of the Enforcement Decree of the Administration and Treatment of Correctional Institution Inmates Act (wholly amended by Enforcement Decree No. 21095 on October 29, 2008) are constitutional.

Provisions at Issue

The former Enforcement Decree of the Administration and Treatment of Correctional Institution Inmates Act (wholly amended by Enforcement Decree No. 21095 on October 29, 2008, but prior to amendment by Enforcement Decree No. 25397 on June 25, 2014)

Article 58 (Meeting)

(2) The duration of a meeting of a prisoner, other than unconvicted prisoners, with his/her defense counsel shall be up to 30 minutes per meeting.

Enforcement Decree of the Administration and Treatment of Correctional Institution Inmates Act (amended by Enforcement Decree No. 25397 on June 25, 2014)

Article 58 (Meeting)

(2) The duration of a meeting of a prisoner, other than unconvicted prisoners, with his/her defense counsel (including a person who desires to become a defense counsel; hereinafter the same shall apply) shall be up to 30 minutes per meeting.

Enforcement Decree of the Administration and Treatment of Correctional Institution Inmates Act (wholly amended by Enforcement Decree No. 21095 on October 29, 2008)

Article 58 (Meeting)

(3) The frequency of meetings for convicted prisoners shall be permitted up to four times per month.

Summary of the Decision

1. Right to Trial of Convicted Prisoner

The legislative purpose of the restriction of the number and time of prisoner visits, that is to maintain order and regulations in a correctional facility and to secure a convicted prisoner's physical restraint, is recognized as a legitimate one. As treating a meeting with a legal counsel representing the prisoner in trials ("Attorney Meeting") as a general visit and therefore restricting the number and time of such meetings contribute to achieve such legislative purpose, an element of the appropriateness of means is satisfied.

Nonetheless, if a convicted prisoner and his or her legal counsel have to discuss or prepare for trials by communicating through correspondence or phone calls, there is a likelihood that the principle of equality of arms and the right to a fair trial may be impaired as the communication might be disclosed to the correctional authority by censorship or listening. Moreover, exchange of correspondence is less efficient means of communication than an in-person meeting, and phone calls in correctional facilities in principle must not exceed three minutes. Thus,

correspondence or phone calls both carry limitations to be used as primary means of trial preparation. Accordingly, in order to effectively protect the prisoner's right to trial, ensuring adequate number and time of the Attorney Meeting is essential.

When the Attorney Meeting took place in a room for a general visit, there were occasions when the Attorney Meeting was only allowed for seven to ten minutes varying by different correctional facilities due to operational issues of the room. The duration of the meeting was extended thereafter as the Attorney Meeting began to take place in separate rooms designated for the Attorney Meeting. However, there are always possibilities that actual duration of the Attorney Meeting may be cut down again in the future due to operational issues of the meeting rooms unless the minimum duration of the Attorney Meeting is fixed. Also, whereas the purpose of the Attorney Meeting is to provide a prisoner with assistance of counsel, the purpose of a visit by family or friends is rehabilitation and edification of a prisoner. Adding together the number of two different types of visits, whose purposes are not the same, all the more raises chances that the prisoner may not receive effective assistance of counsel at the appropriate timing. By guaranteeing certain minimum duration of the Attorney Meeting, at the same time with allowing exceptions under which the duration of the meeting may be shortened to certain extent under special circumstances where the minimum duration can't be guaranteed, and by setting the number of the Attorney Meeting separately from the general visit and thus adequately limiting the number of the Attorney Meeting, the convicted prisoner's right to trial can be effectively protected. At the same time, maintenance of order and regulations in a correctional facility can be promoted. Even if the Attorney Meeting and general visit are to be treated differently in terms of the number and time, when considering the public nature of the Attorney Meeting, there is no great chance that the legislative purpose - maintenance of order and regulations in a correctional facility - will be disregarded.

Despite existence of alternatives that are less restrictive of the

prisoner's right to trial as discussed above, restricting the number and time of the Attorney Meeting by including it into a category of the general visit whose nature is completely different, without taking account of the distinct nature of the meeting with a legal professional for discussion of trials, violated the principle of minimum restrictions and the balance of interest. For these reasons, the provisions at issue infringe on the prisoner's right to trial as they violate the rule against excessive restriction.

2. The Reason of Ordering Continuous Application Despite Decision of Nonconformity to the Constitution

The finding of unconstitutionality of the provisions at issue arises from restricting the time and number of the Attorney Meeting by classifying it as a general visit without legislating separate provisions regulating the time and number of the Attorney Meeting, not from the restriction of the time and number of general prisoner visits itself. If we simply find that the provisions at issue are unconstitutional and nullify the provisions immediately, the provisions which serve as basis of regulating the time and number of general prisoner visits would be eliminated as well. This may cause vacuum in law and confusions due to such vacuum. Thus, albeit this Court's finding that the provisions at issue are nonconforming to the Constitution, the provisions will continue to apply until the administrative legislature makes an appropriate revision.

Summary of Dissenting Opinion by One Justice

Whereas the provisions at issue restrict the time and number of the Attorney Meeting by including it into the general visits, a broad scope of exceptions are allowed with regard to the time and number of visits: more visits may be permitted depending on the security levels, and the time and number of the visits may be extended if certain reasons for the extension are recognized by the warden. Although the provisions at issue

may cause inconvenience to a certain extent in regard to communication between a prisoner and his or her attorney, they still can communicate through correspondence, writings and phone calls and by personally attending the trials. Therefore, the prisoner still can adequately prepare for trials with the attorney through many other institutional channels other than the prison visit. Moreover, the Attorney Meeting is nowadays being conducted in a manner that more strictly protects the prisoner's right to trial: as relevant provisions were revised to allow the Attorney Meeting to be conducted in a room without an installation preventing physical contact pursuant to the Court's previous decisions (i.e., 2011Hun-Ma122, 2011Hun-Ma398), and audio-recording and other types of recording of the Attorney Meeting are now prohibited, a place of the Attorney Meeting has now changed to a room that is designed without an installation preventing physical contact or a audio-recording device. Such change of the meeting place also led to extension of the duration of the Attorney Meeting. Meanwhile, there are exceptions where a patent attorney, a legal representative, a spouse or a direct kin (in small-claims cases) can represent a party in trials. If the time and number of the Attorney Meeting have to be set differently from those of the general visits in order to allow the prisoner to adequately prepare for trials during the Attorney Meeting, then those who are not attorneys but allowed to represent the prisoner under the above exceptions must receive the same treatment. We hardly find any reasonable grounds that support special treatment for the attorneys. For these reasons, it is our opinion that the provisions at issue do not excessively restrict the prisoner's right to a meeting with an attorney by going beyond the scope required for achievement of the legislative purpose. Thus, the minimum restriction requirements are met.

While there are possibilities that the provisions at issue may cause certain inconvenience in preparation of trials with an attorney who is representing the prisoner in trials, the degree of harm which the prisoner experiences due to the provisions at issue is not too significant in the light of that a broad scope of exceptions with regard to the time and

number of visits are being recognized, and that there are other means besides the prison visit such as exchange of correspondences and written documents, by which the prisoner can receive assistance of a counsel. Therefore, the balance of interest test is also satisfied.

On these grounds, I opine that the provisions at issue cannot be seen as a violation of the rule against excessive restriction and to infringe on the petitioner's right to trial.

22. Case on Unclaimed Corpses Offered to Medical School as Cadavers

[27-2(B) KCCR 335, 2012Hun-Ma940, November 26, 2015]

This is the first impression case where the Constitutional Court clarifies that unclaimed dead bodies should not be offered to medical schools as cadavers for dissection against one's will when the dead people expressed his/her opposition to be offered as cadaver prior to death.

Background of the Case

(1) The complainant who has been suffering from lupus, a chronic autoimmune disease, is unmarried female born in 1962. Her parents died long before and she has been out of contact with her siblings for more than 30 years. As she cut ties with all members of her family, she practically has no family members or relatives to claim her dead body when she dies.

(2) She became aware of the existence of the Instant Provision from media report that when a corpse without a claimant is discovered, it can be offered to medical schools for academic and research purposes even against the deceased's will. Upon this, the complainant filed this constitutional complaint for confirming unconstitutionality of the Instant Provision.

Provision at Issue

The subject matter of this case is whether the main text of Article 12 Section 1 of the Act on Dissection and Preservation of Corpses (revised by Act No. 11519 on October 25, 2012; hereinafter, the "Instant Provision") violates the Constitution as infringing upon the complainant's

fundamental right. The provision at issue in this case is as follows:

Act on Dissection and Preservation of Corpses (revised by Act No. 11519 on October 25, 2012)

Article 12 (Offering, etc. of Corpses without Claimants) (1) When a corpse without a claimant is discovered, a Special Self-Governing City Major, the Governor of a Special Self-Governing Province, or the head of a Si/Gun/Gu shall take measures necessary to prevent the decomposition of the corpse and notify the heads of medical colleges of such fact, and when the head of a medical college requests the provision of such corpse for medical education or research, he/she shall comply with such request unless any special ground exists.

Summary of the Decision

1. The legislative purposes of the Instant Provision are to facilitate the supply of cadavers to be the basis of investigation of cause of death and pathologic and anatomical research through providing legal basis for the supply of unclaimed bodies as cadavers and thereby to improve public health and contribute to medical education and research. The legislative purposes are legitimate and the means to achieve the legislative purposes are appropriate.

2. During the recent five years, there has been only one case where an unclaimed corpse was offered to a medical school as cadaver, and this statistics seem to prove the doubtful effectiveness of the Instant Provision. Moreover, most cadavers for the purpose of dissection in medical schools are provided by whole body bequeathals and therefore, even without the Instant Provision, cadavers can be sufficiently supplied by other means.

The current law stipulates that regarding organs or human tissues, different from the whole body, when there is an explicit expression of opposition, it is impossible to transplant or retrieve them against one's will. Nevertheless, the Instant Provision fails to provide for an adequate

procedure to explicitly show one's opposition to be offered as cadavers to medical schools when a person dies and his/her body leaves unclaimed. It also makes it possible that an unclaimed dead body can be offered to a medical school for teaching anatomy regardless of the deceased's intent. Therefore, the Instant Provision does not fulfill the element of the least restrictive means.

3. Although the public interest pursued by the Instant Provision to improve public health and contribute to medical education and research throughout facilitating the supply of cadavers is legitimate, the private interest of the right to self determination infringed on by the Instant Provision by allowing one's dead body to be offered to a medical school as cadaver cannot be considered less grave. Therefore, the Instant Provision also fails to strike the balance between legal interests.

For the forgoing reasons, the Instant Provision violates the Constitution, as it infringes on the complainant's right to self determination regarding the disposal of her dead body, in violation of the principle against excessive restriction.

23. Chemical Castration Case

[27-2(B) KCCR 391, 2013Hun-Ka9, December 23, 2015]

In this case, the Constitutional Court held that Article 4 Section 1 of the Act on Pharmacologic Treatment of Sex Offenders' Sexual Impulses under which a public prosecutor may request a court to issue an order for pharmacologic treatment to a person aged 19 or over who is recognized to be at risk of sexual recidivism is not in violation of the rule against excessive restriction and does not infringe on the right to physical freedom. However, with regard to Article 8 Section 1 of the Act which allows a court to issue the treatment order when the court recognizes that a request for the order has reasonable grounds, the Court rendered a decision of incompatibility with the Constitution on the ground that the provision violates the rule against excessive restriction and thus infringes on the right to physical freedom if a considerable time interval is indicated between the issuance and the execution of the order.

Background of the Case

(1) As measures to tackle a surge of sexual crimes and vicious sex offenses against children, the Act on Pharmacologic Treatment of Sex Offenders' Sexual Impulses ("Act") was enacted in 2010 and came into effect in 2011. Under the Act, a sex offender may be subject to injection of drugs that deter and reduce formation of sex hormones or interrupt combination of sex hormones and receptors.

(2) The defendant in the underlying case was indicted on a charge of forcibly molesting the victims who were five and six years old respectively. The prosecutor requested the court to issue an order for pharmacologic treatment of sexual impulses against the defendant.

(3) The court on February 8, 2013 moved *sua sponte* to request the Constitutional Court for constitutional review of Article 4 Section 1 and

Article 8 Section 1 of the Act on the ground that these provisions are in violation of the rule against excessive restriction and thus infringe on the right to physical freedom of sexual offenders subject to the treatment.

Subject Matter of Review

The subject matter of review in this case is whether Article 4 Section 1 of the Act (amended by Act No. 11557 on December 18, 2012) ("Request Provision") and Article 8 Section 1 of the Act (amended by Act No. 10371 on July 23, 2010) ("Order Provision") are constitutional. These provisions at issue read as follows.

Provisions at Issue

Act on Pharmacologic Treatment of Sex Offenders' Sexual Impulses (amended by Act No. 11557 on December 18, 2012)

Article 4 (Requests for Order of Pharmacologic Treatment)

(1) A public prosecutor may request a court to issue an order for pharmacologic treatment to a person aged 19 or over who is a sexual deviant, who has committed sexual assault against a person and who is recognized to have risk for recidivism.

Article 8 (Judgment, etc. of Medical Treatment Order)

(1) If a court recognizes that a request for medical treatment order has reasonable grounds, it shall issue a medical treatment order, specifying a treatment period up to 15 years.

Summary of the Decision

1. Fundamental Rights Being Subject to Limitation

An order for pharmacologic treatment of sexual impulses ("Treatment

Order") pursuant to the provisions at issue does not require consent of the person subject to the treatment. The injection of the drugs deters sexual impulse and desire of the person, and may cause limited sexual function which may lead to deterrence of sexual desire or acts that are not relevant to criminal conducts. Therefore, the provisions at issue that regulate control of the mental desire and physical function of the person subject to the treatment restrict the right to physical freedom including the right to be free from harm to physical safety as well as other types of fundamental rights such as the rights to privacy, self-determination, and personality.

2. Whether the Provisions at Issue Violate the Rule Against Excessive Restriction

The legislative purpose of the provisions at issue - prevention of recidivism of sexual offenses by sexual deviants - is legitimate, and the pharmacologic treatment of sexual impulses that aims to deter secretion and effect of testosterone, a hormone that plays a central role in the process of sexual fantasies being translated into sexual impulses or actual practice, is accepted as an appropriate means to achieve the legislative purpose.

Moreover, the provisions at issue in principle satisfy the minimum restriction principle and the balance of interest test in light of the following facts specified in the Act: the treatment is sought against sexually deviant patients after evaluation by a medical specialist, the treatment is conducted according to a doctor's diagnosis and prescription for a limited time period, examination and treatment of any side effects are carried out simultaneously during the treatment, the temporary rescission of the treatment can be sought when the treatment is not necessary, and the formation and functioning of testosterone can be restored upon discontinuance of the treatment due to the nature of the pharmacologic treatment.

Nonetheless, the Act stipulates that the Treatment Order shall be

issued at the time of sentencing a conviction. In the event a court sentences a long prison term against a sexual deviant, the time interval between the issuance and execution of the Treatment Order may be significant. In such event, the necessity of the treatment and the risk of recidivism may no longer be recognized if the person subject to the treatment already received medical treatment in custody while serving the long prison term, or if the sexual deviance was alleviated or cured by causes such as aging. Yet, an application for temporary rescission of the treatment can only be filed six months after the execution of the Treatment Order begins. Also, notwithstanding that the procedure to preclude unnecessary treatment (e.g., a court re-examines the necessity of the treatment at the time of execution of the Treatment Order) is yet to be in place, the Order Provision allows a court to issue the Treatment Order at the time of sentencing a conviction if the request for the Treatment Order has reasonable grounds. The issuance of the Treatment Order without the procedure precluding the unnecessary treatment excessively restricts fundamental rights of the person subject to the treatment, and this goes beyond the necessary scope to fulfill the legislative purpose.

For these reasons, whereas the Request Provision at issue does not contravene the rule against excessive restriction, the Order Provision, in respect that the procedure preventing unnecessary treatment at the time of execution of the Treatment Order is yet to be prepared, is in violation of the rule against excessive restriction and offends the right to physical freedom of the person subject to the treatment.

3. The Reason Why the Court Rendered the Decision of Incompatibility with the Constitution

The Order Provision is consisted of both constitutional and unconstitutional aspects, and it would be the legislature's task to develop the specific means and procedure that can preclude chances of unnecessary treatment when there is a significant time gap between the

issuance and actual execution of the Treatment Order against a person serving a long prison term. Moreover, the issuance of the Treatment Order does not immediately provoke the unconstitutionality of the Order Provision. The unconstitutionality only becomes a concrete problem when the Treatment Order is being executed, and the unconstitutional aspect of the Order Provision can be eliminated by amending the provision before the execution. For these reasons and in order to prevent confusion in enforcing the law, the Court orders the continuous enforcement of the provision until the legislature enacts the amendment by December 31, 2017, albeit the Court's decision that the Order Provision is not in conformity with the Constitution.

Summary of Dissenting Opinion by Three Justices

The legitimacy of the legislative purpose of the provisions at issue is not questionable. However, whether the pharmacologic treatment is a proper means to fulfill the legislative purpose is debatable considering that sexual incapacitation can hardly be regarded as effectively deterring sexual offenses, and the drugs used in the treatment do not cure fundamental pathological problems of sexual deviance. Furthermore, the excessive restriction stipulated by the provisions at issue goes beyond the scope required to fulfill the legislative purpose and is against the minimum restriction principle when comprehensively considering the following facts: the consent of the person subject to the treatment is not required, treatment of sexual deviance that causes sexual offenses and prevention of sexual recidivism can be tackled with a set of measures such as the medical treatment and custody system and the protective custody system under current law, and wearing of an electronic anklet, and the unconstitutional aspect of the provisions at issue which the majority opinion pointed out. Also, while the deterrence effect of the measures under the provisions at issue on the risk of recidivism is restricted or temporary, and albeit uncertainty of whether the deterrence effect is attainable, the harm to be suffered by the person subject to the

treatment is tremendous. Thus, the balance of interests test is not met. Most of all, we cannot help question whether such an attempt to induce reformation of a man through controlling physical performance and intentionally impairing a man's physical function against his will are tantamount to threatening integrity of a human being that is distinctive from animals or objects. Therefore, the provisions at issue all violate the rule against excessive restriction and infringe on fundamental rights such as the right to physical freedom. We conclude that the provisions at issue are not constitutional.

24. Change of Resident Registration Number Case

[27-2(B) KCCR 480, 2013Hun-Ba68, 2014Hun-Ma449 (consolidated), December 23, 2015]

In this case, the Constitutional Court held that Article 7 of the Resident Registration Act which does not provide a clause concerning the changing of the resident registration number is incompatible with the Constitution as it infringes on the right to informational self-determination. The Court ordered the provision to be in force until the legislature enacts amendment by December 31, 2017.

Background of the Case

(1) The petitioners filed a request to the heads of their respective local governments to change the resident registration number ("Number") as their Numbers were subject to the illegal leak of personal data. However, their requests were rejected on the ground that the changing of the Number by reason of the illegal leak of the Number is not permitted under the then-current Resident Registration Act ("Act").

(2) The petitioners of the first case (2013Hun-Ba68) filed a constitutional complaint in this case as their petition for constitutional review of Article 7 Section 3 and 4 of the Act, filed while the action seeking cancellation of the disposition rejecting the request to change the Number was pending, was rejected. The petitioners in the second case (2014Hun-Ma449) filed a constitutional complaint in this case claiming that Article 7 Section 3 and 4 of the Act, Article 7 Section 4 and Article 8 Section 1 of the Enforcement Decree of the Act, and Article 2 of the Enforcement Rule of the Act infringe on the petitioners' fundamental rights as these provisions do not stipulate a procedure for changing the Number when the Number is exposed by an illegal leak.

Subject Matter of Review

The subject matter of review in this case is whether Article 7 of the Act (wholly amended by Act No. 8422 on May 11, 2007) is in violation of the Constitution. The provision at issue read as follows.

Provision at Issue

Resident Registration Act (wholly amended by Act No. 8422 on May 11, 2007)

Article 7 (Preparation of Resident Registration Record Cards)

(1) The head of each Si/Gun/Gu shall prepare, keep, manage, and preserve resident registration record cards for each individual and for each household (hereinafter referred to as "resident registration record cards") along with an index book for resident registration record cards by household using an electronic information processing system (hereinafter referred to as the "computation system") to keep records of the registration of residents.

(2) The resident registration record card for an individual shall contain and keep the records of the individual comprehensively, while the resident registration record card for a household shall integrate and keep the records of the household.

(3) The head of the competent Si/Gun/Gu shall issue a registered identification number (hereinafter referred to as "resident identification number") to each resident.

(4) Necessary matters for the forms of resident registration record card and the index book for the resident registration record cards by household, the methods of keeping, managing, and preserving the records of such forms, and the method of issuing the resident identification numbers shall be prescribed by Presidential Decree.

Summary of the Decision

1. Right to Informational Self-Determination

The purpose of the resident registration number system which aims to promote convenience of the resident life and appropriate handling of administrative affairs is legitimate. Issuing the Number to each resident and not allowing to change the Number may be an appropriate means to achieve such legislative purpose.

However, the Number now functions as the standard identification number by going further than merely playing a role of the personal identification number. As a result, the Number is used as ultimate key data integrating personal information. This makes integrated management of individuals more risky, and carries danger of causing individuals to be subject to the nation's management in all areas eventually. This calls for greater necessity for regulating use and management of the Number. Furthermore, since various types of personal information is exposed to limitless collection, disclosure and use at the hands of others in contemporary society, if the Number, functioning as the key data, is illegally leaked or abused, the individual's right to privacy, life, body and property may likely be prone to intrusion. The evils resulting from the leak or abuse are in fact being materialized as the Numbers subjected to exposure are indeed being misused in criminal activities. Given such reality, an absolute prohibition on the changing of the Number without consideration of the anticipated harm, that may possibly result from exposure or abuse of the Number in and of itself, may become an excessive infringement of one's rights to informational self-determination.

Even if the government takes measures to prevent exposure and abuse of the Number and regulates handling of the Number by legislations such as the Personal Information Protection Act, the measures are incapable of completely eliminating circumstances where handling, collection, and use of the Number still occur and do not provide specific

solutions against harm resulting from the exposure which already occurred. Hence, the measures hardly afford sufficient protection for the people's right to informational self-determination.

Meanwhile, if the system which links the newly issued Number with the previous one is established and used, the system will support personal identification of a person who changed the Number, and whether the person is the same person who used the previous Number can be verified under the system as well. Moreover, if the legislature establishes the procedure under which a person wishing to change the Number must fulfill certain requirements set by the legislature and the change of Number must be reviewed by a qualified institution equipped with objectivity and integrity, it will help cutting off attempts to abuse the procedure for change of the Number and lessening social chaos.

Accordingly, the provision at issue which fails to provide a clause allowing change of the Number violates the rule against excessive restriction and infringes on the petitioners' right to informational self-determination.

2. Declaration of Nonconformity to Constitution and Temporary Application of the Provision

The unconstitutional aspect of the provision at issue lies in the legislative omission that failed to provide a clause on change of the Number. If we simply rule that the provision at issue is unconstitutional on the ground of the legislative omission, the provision providing basis for the resident registration number system itself will be removed. This will lead to an unacceptable state of vacuum in law. As the legislatures have a broad legislative discretion in forming the system for the changing of the Number, we declare that the provision at issue does is incompatible with the Constitution and order the provision at issue to be in force until the legislature enacts amendment by December 31, 2017.

Summary of Dissenting Opinion by One Justice

In fact, only Section 4 of Article 7 of the Act which provides for the method of issuing the Number is most relevant to the pseudo legislative omission, not the entire Article 7 of the Act prescribing the system of resident registration number and resident registration record cards. Thus, the provision at issue to be subject to this Court's review must be limited to Section 4 of Article 7. Any problems concerning the changing of the Number arise after the Number is issued. The unconstitutionality of the system of resident registration number and resident registration record cards is irrelevant to such problems occurring after the Number is issued.

Therefore, I believe the system of resident registration number and resident registration record cards in and of itself do not entail unconstitutional aspects discussed by the majority opinion, and thus the remaining sections of Article 7 are constitutional and Section 4 only must be subject to this Court's review and declared incompatible with the Constitution.

Summary of Dissenting Opinion by Two Justices

The purpose of the resident registration number system is to promote convenience of the resident life and appropriate handling of administrative affairs. Allowing the changing of the Number will undermine personal identification function of the Number, and this will eventually impede achievement of such purpose and raise concerns for abuse of the Number for ill purposes (e.g., concealment of crime, tax evasion, evasion of debt, or identification laundering). Also, accepting every request for change of the Number, which is likely to be filed in great volume, may cause social turmoil.

Yet, the legislature, by legislating laws such as the Personal Information Protection Act, has already implemented measures to prevent exposure or abuse of the Number in advance, impose countermeasures,

and provide remedies for damages suffered by the exposure or abuse. As administrative affairs in modern society are expanding to the area that aims protection of the people's fundamental rights, appropriate and efficient handling of administrative affairs utilizing the resident registration number system is important in protecting the people's fundamental rights.

In consideration of these facts, it is our opinion that the provision at issue that does not provide a clause for the changing of the Number does not violate the rule against excessive restriction and thus does not infringe on one's right to informational self-determination.

25. Case Concerning Constitutional Complaint against Article 45 Section 1 of the Political Funds Act

[27-2(B) KCCR 511, 2013Hun-Ba168, December 23, 2015]

In this case, the Constitutional Court held that a provision in the Political Funds Act ("Act") that prohibits support for a political party and imposes criminal punishment for a violation of the provision contravenes freedom of political party activities and political expression and therefore is incompatible with the Constitution. In the meantime, the Court ordered the provision to be in force tentatively until the legislature's amendment.

Background of the Case

(1) The petitioner, Lee ○-Hwa ("Lee") was a secretary general and accounting manager of the New Progressive Party, and the petitioner Kim ○-Eui ("Kim") was managing accounting affairs of the Party. The remaining petitioners ("Other Petitioners") include a head of the labor union group of SK Broadband Co. Ltd., one of the individual units under the Korean Federation of Clerical & Financial Labour Unions.

(2) The Other Petitioners, as the political party could no longer directly receive contributions from an individual as the support association under the Act was banned, decided to deliver political contributions in an unlawful manner by exploiting the "member support" system to which a member of the political party has neither rights nor obligation. Lee and Kim accepted illegal political contributions from the Other Petitioners in the amount of 180 million Korean Won from December 8, 2009 to December 31, 2009, and were indicted on October 15, 2012 for receiving political contributions in a manner not prescribed by the Act.

(3) Lee and Kim, while a criminal trial against them for the indictment above was pending (Seoul Central District Court, Case No. 2011Go-Hap1056), filed a motion for constitutional review of Article 6 and Article 45 Section 1 of the Act. As the motion was rejected on May 10, 2013, a constitutional complaint in this case was filed on June 10, 2013.

Subject Matter of Review

The subject matter of review in this case is whether Article 6 of the former Act (amended by Act No. 8880 on February 29, 2008, but prior to amendment to Act No. 9975 on January 25, 2010), Article 6 of the Act (amended by Act No. 9975 on January 25, 2010), and a part related to Article 6 among "manners not prescribed by the Act" in Article 45 Section 1 of the Act (amended by Act No. 8880 on February 29, 2008) (these provisions above are hereinafter collectively referred to as the "Provisions at Issue") are constitutional.

Summary of the Decision

1. The Provisions at Issue that prohibit organization of the support association intend to enhance transparency and morality in operation of a political party by preventing the politics-business collusion secured by acceptance of illegal political contributions and ensuring transparency in procuring political funds. We recognize that such purpose of the Provisions at Issue is legitimate.

2. Despite the need for restriction of political contributions to a political party as a means to tackle harmful ramifications of the politics-business collusion elicited by receiving illegal political contributions, the politics-business collusion is the problem of certain conglomerates and corrupted political factions only, and most ordinary voters do not have a direct relation with the politics-business collusion.

Thus, there is no need to fundamentally bar political contributions by an ordinary citizen to a political party. It is even more so unnecessary to completely bar political contributions given that the issue of the politics-business collusion which provided a rationale for banning the support association for a political party did not arise in the course of operating the support associations, and that the issue was triggered by the practice of giving and accepting political contributions in an illegal and clandestine manner and outside the legal system to get around procedural cumbersomeness and inconvenience in operating the support association in a lawful way.

It may be necessary to restrict the support association system to certain extent in order to prevent harmful ramification of giving and accepting illegal political contributions. However, rather than a complete ban of the system, ensuring transparency in political funds through measures such as limiting the amount of donation or fund-raising or disclosure of donation records may effectively prevent the harmful ramification.

A membership fee can only be paid by a person who became a member of a political party. In modern society, there is a practical limitation for a political party to recruit new members in order to raise funds for party activities. Thus, it is difficult to supply political funds only by membership fees paid by a party member. If an ordinary citizen must join a party as a member in order to provide financial support for the political party which he or she supports, it is same as indirectly forcing the citizen to become a member of the political party. Also, since no one shall become a member of two or more political parties under the Political Parties Act, if a person is already a member of a certain political party, the person will be barred from giving donations to a party to which he or she is not a member. Moreover, there is no way for a government employee who is prohibited from joining a political party under the Political Parties Act to offer financial support to a party which he or she supports.

Under the current law, a citizen may give financial support to a

political party without joining any party by entrusting donations to the National Election Commission. However, under the current donation system of the Commission, a donor cannot specifically designate a political party that will receive the donation. The current system under which the Commission distributes and pays the donation to each political party according to the distribution ratio of government subsidy is more like a development fund for politics and political parties at large, and it is completely different from the system under which a donor can give financial support to a certain political party according to own his/her political preference. Therefore, the membership fee and the donation system by the National Election Commission are inadequate substitutes for the support association.

Accordingly, the provisions at issue do not meet the appropriateness of means and the minimum restriction requirements.

3. The public interest which the provisions at issue intend to protect is to enhance transparency and morality in operation of a political party by countering the politics-business collusion commissioned by receipt of illegal political contributions and ensuring transparency in procuring political funds. Nonetheless, the provisions at issue, which completely prohibit financial support for a political party, in the party democracy also result in a restriction of freedom of political party activities to finance itself and freedom of political expression. We believe the harm caused by the provisions at issue is greater, and therefore the balance of interests is also not satisfied.

On these grounds, the provisions at issue infringe on the freedom of political activities and freedom of political expression.

4. While Article 6 of the former Act was amended to Act No. 9975 on January 25, 2010, the amended clause had no relevancy with the support association, and even under the amended version of the Act, a political party is still excluded from being able to designate own support association. Thus, if we leave Article 6 as it is now, it will result in

leaving and neglecting the unconstitutional provision. In order to ensure effectiveness of this decision of unconstitutionality and promote consistency in law and order and judicial economy, we must extend the scope of our decision to Article 6 as well and declare Article 6 unconstitutional.

5. As the provisions at issue are in contravention of the Constitution, they, in principle, must be declared unconstitutional. However, if we hold the provisions at issue unconstitutional and deprive validity of the provisions immediately, it will eliminate the legal basis for designation of support associations which will lead to a vacuum in law. Under such state of vacuum, political contributions may be given without going through support associations and without being regulated by limits of the contribution amount and control of election commission authorities. This may give rise to negative ramifications such as the politics-business collusion and plutocracy election. Although this decision is not holding the support association system itself unconstitutional, holding the provisions at issue unconstitutional will produce the same effect as holding the system itself unconstitutional. Therefore, rather than plainly holding that the provisions at issue are unconstitutional, we move to hold that the provisions at issue are incompatible with the Constitution. The provisions at issue will tentatively continue to apply until their unconstitutional aspects are removed, and the legislature shall prepare new legislations as prompt as possible, by June 30, 2017 at the latest.

Summary of Dissenting Opinion by One Justice

1. The Provisions at Issue that prohibit organization of the support association intend to enhance transparency and morality in operation of a political party by countering the politics-business collusion secured by receipt of illegal political contributions and ensuring transparency in procuring political funds. Such purpose of the provisions at issue is legitimate.

2. Under our current political realities, corporations going after privileges and favors and the political community that is hungry for money have constantly been exposed to temptation of the politics-business collusion. The collusion between them has led to giving and receiving of illegal political funds in a very secret and bold way, and measures such as sanctioning the illegal political funds pursuant to the Act by setting out limits of the donation amounts have proven ineffective to wipe out the practice of collusion. This has been the reality and experience of our politics. Imposing a complete ban on giving and receiving of political funds between corporations and political parties was an inevitable and final means which the legislature could take to eradicate the collusion.

3. The provisions at issue simply prohibit donations to a political party through the support association of the party. An ordinary citizen can still indirectly express own political support for a certain political party by donating to a support association of an individual politician of the political party. Furthermore, there are other ways to give financial support to the political party: one can join the party and pay the membership fee or entrust donations to the National Election Commission. It is hasty to conclude that the provisions at issue excessively restrict the freedom of political expression.

As the collusion between corporations and political parties commissioned by giving a huge amount of political contributions that causes political corruption is likely to undermine the party democracy, the public needs for preventing the collusion is very significant. The legislature's attempts to enhance transparency in political funds have all gone vain until now, and our society has chronically been smeared by the evils of the collusion. Against such a backdrop, it is all the more understandable why the political community sought to root out risks of the collusion by shutting out its most essential channel of political funds. Even if the support associations are banned, a political party still can supply funds necessary for operating the party's duties by membership

fee, donations to an individual politician, government subsidy and donations entrusted to the government. Moreover, as district chapters of the political party which was a hornet's nest of illegal political funds were closed and the number of paid staffs was cut down by revision of the Act in 2004, the need to maintain the conventional support associations was alleviated to some extent.

4. It is crystal clear that major political parties, rather than minor and new parties, will enjoy more benefits from revival of the support associations to the political party. Also, this issue of reviving the support associations must be resolved in the legislative and policymaking perspective in line with other related issues as a whole such as district chapter system, setting up of party member councils, and reforming government subsidy and donations system. In that vein, the Constitutional Court's attempt to revive the support association exceeds the functional limitations of the constitutional adjudication.

5. On the above grounds, the provisions at issue that prohibit a political party to have the support association shall not be held unconstitutional as the provisions do not infringe on the freedom of political party activities and freedom of political expression to the extent exceeding the legislature's freedom of legislative formation.

26. Advance Notice of Dismissal Case

[27-2(B) KCCR 553, 2014Hun-Ba3, December 23, 2015]

In this unanimous decision, the Constitutional Court held that Article 35 Section 3 of the Labor Standards Act (wholly amended by Act No. 8372 on April 11, 2007), which declares a worker who has been employed for less than six months as a monthly paid worker as an exception from the requirement for an advance notice of dismissal, is not constitutional as the provision infringes on the worker's labor rights and the principle of equality.

Background of the Case

(1) The petitioner was dismissed on July 6, 2009 without any advance notice while he was working as an English teacher at a private academy run by Song ○-Sil.

(2) As the petitioner's request for a constitutional review of Article 35 Section 3 of the Labor Standards Act, which declares a worker who has been employed for less than six months as a monthly paid worker as an exception from the requirement for an advance notice of dismissal, was rejected, the petitioner filed a constitutional complaint in this case on January 2, 2014.

Subject Matter of Review

The subject matter of review in this case is whether Article 35 Section 3 of the Labor Standards Act (wholly amended by Act No. 8372 on April 11, 2007) is in violation of the Constitution, and the provision at issue reads as follows:

Labor Standards Act (wholly amended by Act No. 8372 on April 11, 2007)
Article 35 (Exception of Advance Notice of Dismissal)

The provisions of Article 26 shall not apply to a worker falling under any one of the following subparagraphs:

3. A worker who has been employed for less than six months as a monthly paid worker;

Summary of the Decision

1. Whether the Provision at Issue Infringes on the Labor Rights

(A) The advance notice of dismissal requirement set forth in the Labor Standards Act is not only related to dismissal of a worker, which is very essential aspect of the labor conditions but also intends to avoid jeopardizing a worker's livelihood with sudden loss of a job. For this reason, it constitutes a reasonable labor condition required to guarantee a worker's human dignity. Therefore, requiring an employer to provide advance notice of dismissal is one of the minimum labor conditions to guarantee human dignity of an individual worker, and the right to advance notice of dismissal is included in the labor rights.

In light of such purpose of the advance notice of dismissal requirement and exceptions for the requirement set forth in Article 26 (i.e., where a natural disaster, calamity or other unavoidable circumstances prevent the continuance of the business or where the worker has caused a considerable hindrance to the business or inflicted any damage to the property on purpose), exceptions where the advance notice requirement should be generally exempt must be limited to circumstances where a worker has low expectation for continuation of employment relationship considering the nature of the employment contract.

However, the provision at issue flatly allows an employer to dismiss a monthly paid worker who has been employed for less than six months without advance notice and by not paying wages specified in Article 26, regardless of the nature of the employment contract. We do not find a reasonable basis for excluding a monthly paid worker who has been employed for less than six months from the advance notice requirement.

Rather, monthly paid employees who have been employed for less than six months are mostly those who signed an employment contract without definite term and thus generally have high expectation for continuation of the employment relationship. Dismissal of these workers constitutes an unexpected dismissal.

(B) While determination of the scope of employees subject to the advance notice of dismissal requirement is a matter of legislative policymaking and therefore the legislature has the freedom of legislative formation regarding the matter, the legislature that is commissioned to protect the labor rights must maintain harmony and balance in preparing the advance notice system by considering interests of both employees and employers. Imposing an advance notice requirement on an employer is to regulate dismissal from a procedural perspective, and the requirement does not prohibit an act of dismissal itself. Also, the notice period is merely thirty days, and an employer who failed to give notice can still comply with the law by paying wages for not less than thirty days. In light of these facts, the advance notice requirement is hardly perceived as an excessive restriction. On the other hand, a monthly paid worker who has been employed for less than six months, if excluded from the advance notice requirement, can lose a job without any prior notice only because the employment period is short of six months, despite that those workers are regarded as typical regular employees.

Then, in respect of the provision at issue which excludes "a worker who has been employed for less than six months as a monthly paid worker" from the advance notice of dismissal requirement, the legislature failed to set forth the minimum procedural regulation required by the legislature's duty to protect workers, and thus the legislature exceeded the scope of discretion tolerable under the Constitution in exercising its legislative discretion.

(C) Accordingly, the provision at issue that excludes "a worker who has been employed for less than six months as a monthly paid worker"

from the advance notice of dismissal requirement" without any reasonable grounds and by exceeding the scope of discretion permitted by the Constitution is unconstitutional as it contravenes the labor rights.

2. Whether the Provision at Issue Violates the Principle of Equality

(A) Dismissal of a regular employee without definite contract term constitutes an unexpected and sudden dismissal regardless of whether the employee's employment period is less than six months or not. In that vein, an employee whose employment period is less than six months and other employees who worked for more than six months are not fundamentally different in terms of their expectation for continuation of the employment contract. Furthermore, a worker who has been employed for less than six months also needs enough time to seek another job and has the need to be protected from economic difficulties caused by sudden loss of a job. We do not believe that such need for protection is any less desirable by a worker who has been employed for less than six months. Then, the provision at issue which treats a worker who has been employed for less than six months differently from a worker who has been employed for more than six months in applying the advance notice requirement, despite they are all the same monthly paid workers, constitutes discrimination without reasonable grounds.

(B) Under the Labor Standards Act, a worker is a person who provides labor to receive wages in a subordinate relationship with an employer and under supervision and order from an employer, and the Act pursues to protect labor conditions or lives of a worker falling under such definition. A monthly paid worker, as well as a worker who receives other types of wages such as hourly, daily and weekly wages, also offers labor for the purpose of earning wages and is subordinate to an employer. The worker should not be subject to discrimination from workers who receive other forms of wages only because the worker is paid wages on a monthly basis. The Labor Standards Act in fact offers

equal protection to workers who received monthly wages and those paid on hourly, daily, or weekly basis. We find no reasonable grounds why a monthly paid worker should receive different treatment from those paid hourly, daily, or weekly wages in applying the advance notice requirement in particular.

(C) In the end, the provision at issue is in violation of the principle of equality under Article 11 of the Constitution as it discriminates a monthly paid worker who has been employed for less than six months from other monthly paid workers who have been employed for more than six months and other workers who receive wages in forms other than monthly wages without reasonable grounds.

Appendix

THE CONSTITUTION OF THE REPUBLIC OF KOREA ····· 207

THE CONSTITUTION OF THE REPUBLIC OF KOREA

Enacted	Jul. 17, 1948
Amended	Jul. 7, 1952
	Nov. 29, 1954
	Jun. 15, 1960
	Nov. 29, 1960
	Dec. 26, 1962
	Oct. 21, 1969
	Dec. 27, 1972
	Oct. 27, 1980
	Oct. 29, 1987

PREAMBLE

We, the people of Korea, proud of a resplendent history and traditions dating from time immemorial, upholding the cause of the Provisional Republic of Korea Government born of the March First Independence Movement of 1919 and the democratic ideals of the April Nineteenth Uprising of 1960 against injustice, having assumed the mission of democratic reform and peaceful unification of our homeland and having determined to consolidate national unity with justice, humanitarianism and brotherly love, and

To destroy all social vices and injustice, and

To afford equal opportunities to every person and provide for the fullest development of individual capabilities in all fields, including political, economic, social and cultural life by further strengthening the basic free and democratic order conducive to private initiative and public harmony, and

To help each person discharge those duties and responsibilities concomitant to freedoms and rights, and

To elevate the quality of life for all citizens and contribute to lasting

world peace and the common prosperity of mankind and thereby to ensure security, liberty and happiness for ourselves and our posterity forever, Do hereby amend, through national referendum following a resolution by the National Assembly, the Constitution, ordained and established on the Twelfth Day of July anno Domini Nineteen hundred and forty-eight, and amended eight times subsequently.

Oct. 29, 1987

CHAPTER I GENERAL PROVISIONS

Article 1

(1) The Republic of Korea shall be a democratic republic.
(2) The sovereignty of the Republic of Korea shall reside in the people, and all state authority shall emanate from the people.

Article 2

(1) Nationality in the Republic of Korea shall be prescribed by Act.
(2) It shall be the duty of the State to protect citizens residing abroad as prescribed by Act.

Article 3

The territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands.

Article 4

The Republic of Korea shall seek unification and shall formulate and carry out a policy of peaceful unification based on the principles of freedom and democracy.

Article 5

(1) The Republic of Korea shall endeavor to maintain international peace and shall renounce all aggressive wars.
(2) The Armed Forces shall be charged with the sacred mission of national security and the defense of the land and their political neutrality shall be maintained.

Article 6

(1) Treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea.
(2) The status of aliens shall be guaranteed as prescribed by international law and treaties.

Article 7

(1) All public officials shall be servants of the entire people and shall be responsible for the people.
(2) The status and political impartiality of public officials shall be guaranteed as prescribed by Act.

Article 8

(1) The establishment of political parties shall be free, and the plural party system shall be guaranteed.
(2) Political parties shall be democratic in their objectives, organization and activities, and shall have the necessary organizational arrangements for the people to participate in the formation of the political will.
(3) Political parties shall enjoy the protection of the State and may be provided with operational funds by the State under the conditions as prescribed by Act.
(4) If the purposes or activities of a political party are contrary to the fundamental democratic order, the Government may bring an action against it in the Constitutional Court for its dissolution, and the political party shall be dissolved in accordance with the decision of the Constitutional Court.

Article 9

The State shall strive to sustain and develop the cultural heritage and to enhance national culture.

CHAPTER II RIGHTS AND DUTIES OF CITIZENS

Article 10

All citizens shall be assured of human dignity and worth and have the right to pursue happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals.

Article 11

(1) All 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.

(2) No privileged caste shall be recognized or ever established in any form.

(3) The awarding of decorations or distinctions of honor in any form shall be effective only for recipients, and no privileges shall ensue there- from.

Article 12

(1) All citizens shall enjoy personal liberty. No person shall be arrested, detained, searched, seized or interrogated except as provided by Act. No person shall be punished, placed under preventive restrictions or subject to involuntary labor except as provided by Act and through lawful procedures.

(2) No citizens shall be tortured or be compelled to testify against himself in criminal cases.

(3) Warrants issued by a judge through due procedures upon the request of a prosecutor shall be presented in case of arrest, detention, seizure or search: *Provided*, That in a case where a criminal suspect is an apprehended *flagrante delicto*, or where there is danger that a person suspected of committing a crime punishable by imprisonment of three years or more may escape or destroy evidence, investigative authorities may request an *ex post facto* warrant.

(4) Any person who is arrested or detained shall have the right to prompt assistance of counsel. When a criminal defendant is unable to secure counsel by his own efforts, the State shall assign counsel for the defendant as prescribed by Act.

(5) No person shall be arrested or detained without being informed of the reason therefor and of his right to assistance of counsel. The family, etc., as designated by Act, of a person arrested or detained shall be notified without delay of the reason for and the time and place of the arrest or detention.

(6) Any person who is arrested or detained, shall have the right to request the court to review the legality of the arrest or detention.

(7) In a case where a confession is deemed to have been made against a defendant's will due to torture, violence, intimidation, unduly prolonged arrest, deceit or etc., or in a case where a confession is the only evidence against a defendant in a formal trial, such a confession shall not be admitted as evidence of guilt, nor shall a defendant be punished by reason of such a confession.

Article 13

(1) No citizen shall be prosecuted for an act which does not constitute a crime under the Act in force at the time it was committed, nor shall he be placed in double jeopardy.

(2) No restrictions shall be imposed upon the political rights of any citizen, nor shall any person be deprived of property rights by means of retroactive legislation.

(3) No citizen shall suffer unfavorable treatment on account of an act not of his own doing but committed by a relative.

Article 14

All citizens shall enjoy freedom of residence and the right to move at will.

Article 15

All citizens shall enjoy freedom of occupation.

Article 16

All citizens shall be free from intrusion into their place of residence. In case of search or seizure in a residence, a warrant issued by a judge upon request of a prosecutor shall be presented.

Article 17

The privacy of no citizen shall be infringed.

Article 18

The privacy of correspondence of no citizen shall be infringed.

Article 19

All citizens shall enjoy freedom of conscience.

Article 20

(1) All citizens shall enjoy freedom of religion.
(2) No state religion shall be recognized, and religion and state shall be separated.

Article 21

(1) All citizens shall enjoy freedom of speech and the press, and freedom of assembly and association.
(2) Licensing or censorship of speech and the press, and licensing of assembly and association shall not be permitted.
(3) The standards of news service and broadcast facilities and matters necessary to ensure the functions of newspapers shall be determined by Act.
(4) Neither speech nor the press shall violate the honor or rights of other persons nor undermine public morals or social ethics. Should speech or the press violate the honor or rights of other persons, claims may be made for the damage resulting therefrom.

Article 22

(1) All citizens shall enjoy freedom of learning and the arts.
(2) The rights of authors, inventors, scientists, engineers and artists shall be protected by Act.

Article 23

(1) The right of property of all citizens shall be guaranteed. The contents and limitations thereof shall be determined by Act.

(2) The exercise of property rights shall conform to the public welfare.

(3) Expropriation, use or restriction of private property from public necessity and compensation therefor shall be governed by Act: *Provided*, That in such a case, just compensation shall be paid.

Article 24

All citizens shall have the right to vote under the conditions as prescribed by Act.

Article 25

All citizens shall have the right to hold public office under the conditions as prescribed by Act.

Article 26

(1) All citizens shall have the right to petition in writing to any governmental agency under the conditions as prescribed by Act.

(2) The State shall be obligated to examine all such petitions.

Article 27

(1) All citizens shall have the right to trial in conformity with the Act by judges qualified under the Constitution and the Act.

(2) Citizens who are not on active military service or employees of the military forces shall not be tried by a court martial within the territory of the Republic of Korea, except in case of crimes as prescribed by Act involving important classified military information, sentinels, sentry posts, the supply of harmful food and beverages, prisoners of war and military articles and facilities and in the case of the proclamation of extraordinary martial law.

(3) All citizens shall have the right to a speedy trial. The accused shall have the right to a public trial without delay in the absence of justifiable reasons to the contrary.

(4) The accused shall be presumed innocent until a judgment of guilt has been pronounced.

(5) 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 Act.

Article 28

In a case where a criminal suspect or an accused person who has been placed under detention is not indicted as provided by Act or is acquitted by a court, he shall be entitled to claim just compensation from the State under the conditions as prescribed by Act.

Article 29

(1) In case a person has sustained damages by an unlawful act committed by a public official in the course of official duties, he may claim just compensation from the State or public organization under the conditions as prescribed by Act. In this case, the public official concerned shall not be immune from liabilities.

(2) In case a person on active military service or an employee of the military forces, a police official or others as prescribed by Act sustains damages in connection with the performance of official duties such as combat action, drill and so forth, he shall not be entitled to a claim against the State or public organization on the grounds of unlawful acts committed by public officials in the course of official duties, but shall be entitled only to compensations as prescribed by Act.

Article 30

Citizens who have suffered bodily injury or death due to criminal acts of others may receive aid from the State under the conditions as prescribed by Act.

Article 31

(1) All citizens shall have an equal right to an education corresponding to their abilities.

(2) All citizens who have children to support shall be responsible at least for their elementary education and other education as provided by Act.
(3) Compulsory education shall be free of charge.
(4) Independence, professionalism and political impartiality of education and the autonomy of institutions of higher learning shall be guaranteed under the conditions as prescribed by Act.
(5) The State shall promote lifelong education.
(6) Fundamental matters pertaining to the educational system, including in-school and lifelong education, administration, finance, and the status of teachers shall be determined by Act.

Article 32

(1) All citizens shall have the right to work. The State shall endeavor to promote the employment of workers and to guarantee optimum wages through social and economic means and shall enforce a minimum wage system under the conditions as prescribed by Act.
(2) All citizens shall have the duty to work. The State shall prescribe by Act the extent and conditions of the duty to work in conformity with democratic principles.
(3) Standards of working conditions shall be determined by Act in such a way as to guarantee human dignity.
(4) Special protection shall be accorded to working women, and they shall not be subjected to unjust discrimination in terms of employment, wages and working conditions.
(5) Special protection shall be accorded to working children.
(6) The opportunity to work shall be accorded preferentially, under the conditions as prescribed by Act, to those who have given distinguished service to the State, wounded veterans and policemen, and members of the bereaved families of military servicemen and policemen killed in action.

Article 33

(1) To enhance working conditions, workers shall have the right to

independent association, collective bargaining and collective action.

(2) Only those public officials who are designated by Act, shall have the right to association, collective bargaining and collective action.

(3) The right to collective action of workers employed by important defense industries may be either restricted or denied under the conditions as prescribed by Act.

Article 34

(1) All citizens shall be entitled to a life worthy of human beings.

(2) The State shall have the duty to endeavor to promote social security and welfare.

(3) The State shall endeavor to promote the welfare and rights of women.

(4) The State shall have the duty to implement policies for enhancing the welfare of senior citizens and the young.

(5) Citizens who are incapable of earning a livelihood due to a physical disability, disease, old age or other reasons shall be protected by the State under the conditions as prescribed by Act.

(6) The State shall endeavor to prevent disasters and to protect citizens from harm therefrom.

Article 35

(1) All citizens shall have the right to a healthy and pleasant environment. The State and all citizens shall endeavor to protect the environment.

(2) The substance of the environmental right shall be determined by Act.

(3) The State shall endeavor to ensure comfortable housing for all citizens through housing development policies and the like.

Article 36

(1) Marriage and family life shall be entered into and sustained on the basis of individual dignity and equality of the sexes, and the State shall do everything in its power to achieve that goal.

(2) The State shall endeavor to protect motherhood.
(3) The health of all citizens shall be protected by the State.

Article 37

(1) Freedoms and rights of citizens shall not be neglected on the grounds that they are not enumerated in the Constitution.
(2) The freedoms and rights of citizens may be restricted by Act only when necessary for national security, the maintenance of law and order or for public welfare. Even when such restriction is imposed, no essential aspect of the freedom or right shall be violated.

Article 38

All citizens shall have the duty to pay taxes under the conditions as prescribed by Act.

Article 39

(1) All citizens shall have the duty of national defense under the conditions as prescribed by Act.
(2) No citizen shall be treated unfavorably on account of the fulfillment of his obligation of military service.

CHAPTER III THE NATIONAL ASSEMBLY

Article 40

The legislative power shall be vested in the National Assembly.

Article 41

(1) The National Assembly shall be composed of members elected by universal, equal, direct and secret ballot by the citizens.
(2) The number of members of the National Assembly shall be determined by Act, but the number shall not be less than 200.
(3) The constituencies of members of the National Assembly, proportional representation and other matters pertaining to

National Assembly elections shall be determined by Act.

Article 42

The term of office of members of the National Assembly shall be four years.

Article 43

Members of the National Assembly shall not concurrently hold any other office prescribed by Act.

Article 44

(1) During the sessions of the National Assembly, no member of the National Assembly shall be arrested or detained without the consent of the National Assembly except in case of *flagrante delicto*.

(2) In case of apprehension or detention of a member of the National Assembly prior to the opening of a session, such member shall be released during the session upon the request of the National Assembly, except in case of *flagrante delicto*.

Article 45

No member of the National Assembly shall be held responsible outside the National Assembly for opinions officially expressed or votes cast in the Assembly.

Article 46

(1) Members of the National Assembly shall have the duty to maintain high standards of integrity.

(2) Members of the National Assembly shall give preference to national interests and shall perform their duties in accordance with conscience.

(3) Members of the National Assembly shall not acquire, through abuse of their positions, rights and interests in property or positions, or assist other persons to acquire the same, by means of contracts with or dispositions by the State, public organizations or industries.

Article 47

(1) A regular session of the National Assembly shall be convened once every year under the conditions as prescribed by Act, and extraordinary sessions of the National Assembly shall be convened upon the request of the President or one fourth or more of the total members.

(2) The period of regular sessions shall not exceed a hundred days, and that of extraordinary sessions, thirty days.

(3) If the President requests the convening of an extraordinary session, the period of the session and the reasons for the request shall be clearly specified.

Article 48

The National Assembly shall elect one Speaker and two Vice-Speakers.

Article 49

Except as otherwise provided for in the Constitution or in Act, the attendance of a majority of the total members, and the concurrent vote of a majority of the members present, shall be necessary for decisions of the National Assembly. In case of a tie vote, the matter shall be regarded as rejected.

Article 50

(1) Sessions of the National Assembly shall be open to the public: *Provided*, That when it is decided so by a majority of the members present, or when the Speaker deems it necessary to do so for the sake of national security, they may be closed to the public.

(2) The public disclosure of the proceedings of sessions which were not open to the public shall be determined by Act.

Article 51

Bills and other matters submitted to the National Assembly for deliberation shall not be abandoned on the ground that they were not

acted upon during the session in which they were introduced, except in a case where the term of the members of the National Assembly has expired.

Article 52

Bills may be introduced by members of the National Assembly or by the Executive.

Article 53

(1) Each bill passed by the National Assembly shall be sent to the Executive, and the President shall promulgate it within fifteen days.

(2) In case of objection to the bill, the President may, within the period referred to in paragraph (1), return it to the National Assembly with written explanation of his objection, and request it be reconsidered. The President may do the same during adjournment of the National Assembly.

(3) The President shall not request the National Assembly to reconsider the bill in part, or with proposed amendments.

(4) In case there is a request for reconsideration of a bill, the National Assembly shall reconsider it, and if the National Assembly repasses the bill in the original form with the attendance of more than one half of the total members, and with a concurrent vote of two thirds or more of the members present, it shall become Act.

(5) If the President does not promulgate the bill, or does not request the National Assembly to reconsider it within the period referred to in paragraph (1), it shall become Act.

(6) The President shall promulgate without delay the Act as finalized under paragraphs (4) and (5). If the President does not promulgate an Act within five days after it has become Act under paragraph (5), or after it has been returned to the Executive under paragraph (4), the Speaker shall promulgate it.

(7) Except as provided otherwise, an Act shall take effect twenty days after the date of promulgation.

Article 54

(1) The National Assembly shall deliberate and decide upon the national budget bill.

(2) The Executive shall formulate the budget bill for each fiscal year and submit it to the National Assembly within ninety days before the beginning of a fiscal year. The National Assembly shall decide upon it within thirty days before the beginning of the fiscal year.

(3) If the budget bill is not passed by the beginning of the fiscal year, the Executive may, in conformity with the budget of the previous fiscal year, disburse funds for the following purposes until the budget bill is passed by the National Assembly:

1. The maintenance and operation of agencies and facilities established by the Constitution or Act;
2. Execution of the obligatory expenditures as prescribed by Act; and
3. Continuation of projects previously approved in the budget.

Article 55

(1) In a case where it is necessary to make continuing disbursements for a period longer than one fiscal year, the Executive shall obtain the approval of the National Assembly for a specified period of time.

(2) A reserve fund shall be approved by the National Assembly in total. The disbursement of the reserve fund shall be approved during the next session of the National Assembly.

Article 56

When it is necessary to amend the budget, the Executive may formulate a supplementary revised budget bill and submit it to the National Assembly.

Article 57

The National Assembly shall, without the consent of the Executive, neither increase the sum of any item of expenditure nor create any new items of expenditure in the budget submitted by the Executive.

Article 58

When the Executive plans to issue national bonds or to conclude contracts which may incur financial obligations on the State outside the budget, it shall have the prior concurrence of the National Assembly.

Article 59

Types and rates of taxes shall be determined by Act.

Article 60

(1) The National Assembly shall have the right to consent to the conclusion and ratification of treaties pertaining to mutual assistance or mutual security; treaties concerning important international organizations; treaties of friendship, trade and navigation; treaties pertaining to any restriction in sovereignty; peace treaties; treaties which will burden the State or people with an important financial obligation; or treaties related to legislative matters.

(2) The National Assembly shall also have the right to consent to the declaration of war, the dispatch of armed forces to foreign states, or the stationing of alien forces in the territory of the Republic of Korea.

Article 61

(1) The National Assembly may inspect affairs of state or investigate specific matters of state affairs, and may demand the production of documents directly related thereto, the appearance of a witness in person and the furnishing of testimony or statements of opinion.

(2) The procedures and other necessary matters concerning the inspection and investigation of state administration shall be determined by Act.

Article 62

(1) The Prime Minister, members of the State Council or government

delegates may attend meetings of the National Assembly or its committees and report on the state administration or deliver opinions and answer questions.

(2) When requested by the National Assembly or its committees, the Prime Minister, members of the State Council or government delegates shall attend any meeting of the National Assembly and answer questions. If the Prime Minister or State Council members are requested to attend, the Prime Minister or State Council members may have State Council members or government delegates attend any meeting of the National Assembly and answer questions.

Article 63

(1) The National Assembly may pass a recommendation for the removal of the Prime Minister or a State Council member from office.

(2) A recommendation for removal as referred to in paragraph (1) may be introduced by one third or more of the total members of the National Assembly, and shall be passed with the concurrent vote of a majority of the total members of the National Assembly.

Article 64

(1) The National Assembly may establish the rules of its proceedings and internal regulations: *Provided*, That they are not in conflict with Act.

(2) The National Assembly may review the qualifications of its members and may take disciplinary actions against its members.

(3) The concurrent vote of two thirds or more of the total members of the National Assembly shall be required for the expulsion of any member.

(4) No action shall be brought to court with regard to decisions taken under paragraphs (2) and (3).

Article 65

(1) In case the President, the Prime Minister, members of the State

Council, heads of Executive Ministries, Justices of the Constitutional Court, judges, members of the National Election Commission, the Chairman and members of the Board of Audit and Inspection, and other public officials designated by Act have violated the Constitution or other Acts in the performance of official duties, the National Assembly may pass motions for their impeachment.

(2) A motion for impeachment prescribed in paragraph (1) may be proposed by one third or more of the total members of the National Assembly, and shall require a concurrent vote of a majority of the total members of the National Assembly for passage: *Provided*, That a motion for the impeachment of the President shall be proposed by a majority of the total members of the National Assembly and approved by two thirds or more of the total members of the National Assembly.

(3) Any person against whom a motion for impeachment has been passed shall be suspended from exercising his power until the impeachment has been adjudicated.

(4) A decision on impeachment shall not extend further than removal from public office: *Provided*, That it shall not exempt the person impeached from civil or criminal liability.

CHAPTER IV THE EXECUTIVE

SECTION 1 The President

Article 66

(1) The President shall be the Head of State and represent the State vis-a-vis foreign states.

(2) The President shall have the responsibility and duty to safeguard the independence, territorial integrity and continuity of the State and the Constitution.

(3) The President shall have the duty to pursue sincerely the peaceful unification of the homeland.
(4) Executive power shall be vested in the Executive Branch headed by the President.

Article 67

(1) The President shall be elected by universal, equal, direct and secret ballot by the people.
(2) In case two or more persons receive the same largest number of votes in the election as referred to in paragraph (1), the person who receives the largest number of votes in an open session of the National Assembly attended by a majority of the total members of the National Assembly shall be elected.
(3) If and when there is only one presidential candidate, he shall not be elected President unless he receives at least one third of the total eligible votes.
(4) Citizens who are eligible for election to the National Assembly, and who have reached the age of forty years or more on the date of the presidential election, shall be eligible to be elected to the presidency.
(5) Matters pertaining to presidential elections shall be determined by Act.

Article 68

(1) The successor to the incumbent President shall be elected seventy to forty days before his term expires.
(2) In case a vacancy occurs in the office of the President or the President-elect dies, or is disqualified by a court ruling or for any other reason, a successor shall be elected within sixty days.

Article 69

The President, at the time of his inauguration, shall take the following oath: "I do solemnly swear before the people that I will faithfully execute the duties of the President by observing the Constitution, defending the State, pursuing the peaceful unification of the homeland,

promoting the freedom and welfare of the people and endeavoring to develop national culture."

Article 70

The term of office of the President shall be five years, and the President shall not be reelected.

Article 71

If the office of the presidency is vacant or the President is unable to perform his duties for any reason, the Prime Minister or the members of the State Council in the order of priority as determined by Act shall act for him.

Article 72

The President may submit important policies relating to diplomacy, national defense, unification and other matters relating to the national destiny to a national referendum if he deems it necessary.

Article 73

The President shall conclude and ratify treaties; accredit, receive or dispatch diplomatic envoys; and declare war and conclude peace.

Article 74

(1) The President shall be Commander - in - Chief of the Armed Forces under the conditions as prescribed by the Constitution and Act.

(2) The organization and formation of the Armed Forces shall be determined by Act.

Article 75

The President may issue presidential decrees concerning matters delegated to him by Act with the scope specifically defined and also matters necessary to enforce Acts.

Article 76

(1) In time of internal turmoil, external menace, natural calamity or a grave financial or economic crisis, the President may take in

respect to them the minimum necessary financial and economic actions or issue orders having the effect of Act, only when it is required to take urgent measures for the maintenance of national security or public peace and order, and there is no time to await the convocation of the National Assembly.

(2) In case of major hostilities affecting national security, the President may issue orders having the effect of Act, only when it is required to preserve the integrity of the nation, and it is impossible to convene the National Assembly.

(3) In case actions are taken or orders are issued under paragraphs (1) and (2), the President shall promptly notify it to the National Assembly and obtain its approval.

(4) In case no approval is obtained, the actions or orders shall lose effect forthwith. In such case, the Acts which were amended or abolished by the orders in question shall automatically regain their original effect at the moment the orders fail to obtain approval.

(5) The President shall, without delay, put on public notice developments under paragraphs (3) and (4).

Article 77

(1) When it is required to cope with a military necessity or to maintain the public safety and order by mobilization of the military forces in time of war, armed conflict or similar national emergency, the President may proclaim martial law under the conditions as prescribed by Act.

(2) Martial law shall be of two types: extraordinary martial law and precautionary martial law.

(3) Under extraordinary martial law, special measures may be taken with respect to the necessity for warrants, freedom of speech, the press, assembly and association, or the powers of the Executive and the Judiciary under the conditions as prescribed by Act.

(4) When the President has proclaimed martial law, he shall notify it to the National Assembly without delay.

(5) When the National Assembly requests the lifting of martial law

with the concurrent vote of a majority of the total members of the National Assembly, the President shall comply.

Article 78

The President shall appoint and dismiss public officials under the conditions as prescribed by the Constitution and Act.

Article 79

(1) The President may grant amnesty, commutation and restoration of rights under the conditions as prescribed by Act.
(2) The President shall receive the consent of the National Assembly in granting a general amnesty.
(3) Matters pertaining to amnesty, commutation and restoration of rights shall be determined by Act.

Article 80

The President shall award decorations and other honors under the conditions as prescribed by Act.

Article 81

The President may attend and address the National Assembly or express his views by written message.

Article 82

The acts of the President under law shall be executed in writing, and such documents shall be countersigned by the Prime Minister and the members of the State Council concerned. The same shall apply to military affairs.

Article 83

The President shall not concurrently hold the office of Prime Minister, a member of the State Council, the head of any Executive Ministry, nor other public or private posts as prescribed by Act.

Article 84

The President shall not be charged with a criminal offense during his tenure of office except for insurrection or treason.

Article 85

Matters pertaining to the status and courteous treatment of former Presidents shall be determined by Act.

SECTION 2 The Executive Branch

Sub-Section 1 The Prime Minister and Members of the State Council

Article 86

(1) The Prime Minister shall be appointed by the President with the consent of the National Assembly.
(2) The Prime Minister shall assist the President and shall direct the Executive Ministries under order of the President.
(3) No member of the military shall be appointed Prime Minister unless he is retired from active duty.

Article 87

(1) The members of the State Council shall be appointed by the President on the recommendation of the Prime Minister.
(2) The members of the State Council shall assist the President in the conduct of State affairs and, as constituents of the State Council, shall deliberate on State affairs.
(3) The Prime Minister may recommend to the President the removal of a member of the State Council from office.
(4) No member of the military shall be appointed a member of the State Council unless he is retired from active duty.

Sub-Section 2 The State Council

Article 88

(1) The State Council shall deliberate on important policies that fall within the power of the Executive.
(2) The State Council shall be composed of the President, the Prime Minister, and other members whose number shall be no more than

thirty and no less than fifteen.

(3) The President shall be the chairman of the State Council, and the Prime Minister shall be the Vice-Chairman.

Article 89

The following matters shall be referred to the State Council for deliberation:

1. Basic plans for state affairs, and general policies of the Executive;
2. Declaration of war, conclusion of peace and other important matters pertaining to foreign policy;
3. Draft amendments to the Constitution, proposals for national referendums, pro-posed treaties, legislative bills, and proposed presidential decrees;
4. Budgets, settlement of accounts, basic plans for disposal of state properties, contracts incurring financial obligation on the State, and other important financial matters;
5. Emergency orders and emergency financial and economic actions or orders by the President, and declaration and termination of martial law;
6. Important military affairs;
7. Requests for convening an extraordinary session of the National Assembly;
8. Awarding of honors;
9. Granting of amnesty, commutation and restoration of rights;
10. Demarcation of jurisdiction between Executive Ministries;
11. Basic plans concerning delegation or allocation of powers within the Executive;
12. Evaluation and analysis of the administration of State affairs;
13. Formulation and coordination of important policies of each Executive Ministry;
14. Action for the dissolution of a political party;
15. Examination of petitions pertaining to executive policies

submitted or referred to the Executive;

16. Appointment of the Prosecutor General, the Chairman of the Joint Chiefs of Staff, the Chief of Staff of each armed service, the presidents of national universities, ambassadors, and such other public officials and managers of important State-run enterprises as designated by Act; and
17. Other matters presented by the President, the Prime Minister or a member of the State Council.

Article 90

(1) An Advisory Council of Elder Statesmen, composed of elder statesmen, may be established to advise the President on important affairs of State.

(2) The immediate former President shall become the Chairman of the Advisory Council of Elder Statesmen: *Provided*, That if there is no immediate former President, the President shall appoint the Chairman.

(3) The organization, function and other necessary matters pertaining to the Advisory Council of Elder Statesmen shall be determined by Act.

Article 91

(1) A National Security Council shall be established to advise the President on the formulation of foreign, military and domestic policies related to national security prior to their deliberation by the State Council.

(2) The meetings of the National Security Council shall be presided over by the President.

(3) The organization, function and other necessary matters pertaining to the National Security Council shall be determined by Act.

Article 92

(1) An Advisory Council on Democratic and Peaceful Unification may be established to advise the President on the formulation of peaceful unification policy.

(2) The organization, function and other necessary matters pertaining to the Advisory Council on Democratic and Peaceful Unification shall be determined by Act.

Article 93

(1) A National Economic Advisory Council may be established to advise the President on the formulation of important policies for developing the national economy.

(2) The organization, function and other necessary matters pertaining to the National Economic Advisory Council shall be determined by Act.

Sub-Section 3 The Executive Ministries

Article 94

Heads of Executive Ministries shall be appointed by the President from among members of the State Council on the recommendation of the Prime Minister.

Article 95

The Prime Minister or the head of each Executive Ministry may, under the powers delegated by Act or Presidential Decree, or *ex officio*, issue ordinances of the Prime Minister or the Executive Ministry concerning matters that are within their jurisdiction.

Article 96

The establishment, organization and function of each Executive Ministry shall be determined by Act.

Sub-Section 4 The Board of Audit and Inspection

Article 97

The Board of Audit and Inspection shall be established under the direct jurisdiction of the President to inspect and examine the settlement of the revenues and expenditures of the State, the accounts of the State and other organizations specified by Act and the job

performances of the executive agencies and public officials.

Article 98

(1) The Board of Audit and Inspection shall be composed of no less than five and no more than eleven members, including the Chairman.

(2) The Chairman of the Board shall be appointed by the President with the consent of the National Assembly. The term of office of the Chairman shall be four years, and he may be reappointed only once.

(3) The members of the Board shall be appointed by the President on the recommendation of the Chairman. The term of office of the members shall be four years, and they may be reappointed only once.

Article 99

The Board of Audit and Inspection shall inspect the closing of accounts of revenues and expenditures each year, and report the results to the President and the National Assembly in the following year.

Article 100

The organization and function of the Board of Audit and Inspection, the qualifications of its members, the range of the public officials subject to inspection and other necessary matters shall be determined by Act.

CHAPTER V THE COURTS

Article 101

(1) Judicial power shall be vested in courts composed of judges.

(2) The courts shall be composed of the Supreme Court, which is the highest court of the State, and other courts at specified levels.

(3) Qualifications for judges shall be determined by Act.

Article 102

(1) Departments may be established in the Supreme Court.

(2) There shall be Supreme Court Justices at the Supreme Court: *Provided*, That judges other than Supreme Court Justices may be assigned to the Supreme Court under the conditions as prescribed by Act.

(3) The organization of the Supreme Court and lower courts shall be determined by Act.

Article 103

Judges shall rule independently according to their conscience and in conformity with the Constitution and Act.

Article 104

(1) The Chief Justice of the Supreme Court shall be appointed by the President with the consent of the National Assembly.

(2) The Supreme Court Justices shall be appointed by the President on the recommendation of the Chief Justice and with the consent of the National Assembly.

(3) Judges other than the Chief Justice and the Supreme Court Justices shall be appointed by the Chief Justice with the consent of the Conference of Supreme Court Justices.

Article 105

(1) The term of office of the Chief Justice shall be six years and he shall not be reappointed.

(2) The term of office of the Justices of the Supreme Court shall be six years and they may be reappointed as prescribed by Act.

(3) The term of office of judges other than the Chief Justice and Justices of the Supreme Court shall be ten years, and they may be reappointed under the conditions as prescribed by Act.

(4) The retirement age of judges shall be determined by Act.

Article 106

(1) No judge shall be removed from office except by impeachment or

a sentence of imprisonment without prison labor or heavier punishment, nor shall he be suspended from office, have his salary reduced or suffer any other unfavorable treatment except by disciplinary action.

(2) In the event a judge is unable to discharge his official duties because of serious mental or physical impairment, he may be retired from office under the conditions as prescribed by Act.

Article 107

(1) When the constitutionality of a law is at issue in a trial, the court shall request a decision of the Constitutional Court, and shall judge according to the decision thereof.

(2) The Supreme Court shall have the power to make a final review of the constitutionality or legality of administrative decrees, regulations or actions, when their constitutionality or legality is at issue in a trial.

(3) Administrative appeals may be conducted as a procedure prior to a judicial trial. The procedure of administrative appeals shall be determined by Act and shall be in conformity with the principles of judicial procedures.

Article 108

The Supreme Court may establish, within the scope of Act, regulations pertaining to judicial proceedings and internal discipline and regulations on administrative matters of the court.

Article 109

Trials and decisions of the courts shall be open to the public: *Provided*, That when there is a danger that such trials may undermine the national security or disturb public safety and order, or be harmful to public morals, trials may be closed to the public by court decision.

Article 110

(1) Courts-martial may be established as special courts to exercise jurisdiction over military trials.

(2) The Supreme Court shall have the final appellate jurisdiction over courts-martial.
(3) The organization and authority of courtsmartial, and the qualifications of their judges shall be determined by Act.
(4) Military trials under an extraordinary martial law may not be appealed in case of crimes of soldiers and employees of the military; military espionage; and crimes as defined by Act in regard to sentinels, sentry posts, supply of harmful foods and beverages, and prisoners of war, except in the case of a death sentence.

CHAPTER VI THE CONSTITUTIONAL COURT

Article 111

(1) The Constitutional Court shall have jurisdiction over the following matters:
1. The constitutionality of a law upon the request of the courts;
2. Impeachment;
3. Dissolution of a political party;
4. Competence disputes between State agencies, between State agencies and local governments, and between local governments; and
5. Constitutional complaint as prescribed by Act.

(2) The Constitutional Court shall be composed of nine Justices qualified to be court judges, and they shall be appointed by the President.
(3) Among the Justices referred to in paragraph (2), three shall be appointed from persons selected by the National Assembly, and three appointed from persons nominated by the Chief Justice of the Supreme Court.
(4) The president of the Constitutional Court shall be appointed by

the President from among the Justices with the consent of the National Assembly.

Article 112

(1) The term of office of the Justices of the Constitutional Court shall be six years and they may be reappointed under the conditions as prescribed by Act.

(2) The Justices of the Constitutional Court shall not join any political party, nor shall they participate in political activities.

(3) No Justice of the Constitutional Court shall be expelled from office except by impeachment or a sentence of imprisonment without prison labor or heavier punishment.

Article 113

(1) When the Constitutional Court makes a decision of the unconstitutionality of a law, a decision of impeachment, a decision of dissolution of a political party or an affirmative decision regarding the constitutional complaint, the concurrence of six Justices or more shall be required.

(2) The Constitutional Court may establish regulations relating to its proceedings and internal discipline and regulations on administrative matters within the limits of Act.

(3) The organization, function and other necessary matters of the Constitutional Court shall be determined by Act.

CHAPTER VII ELECTION MANAGEMENT

Article 114

(1) Election commissions shall be established for the purpose of fair management of elections and national referenda, and dealing with administrative affairs concerning political parties.

(2) The National Election Commission shall be composed of three members appointed by the President, three members selected by

the National Assembly, and three members designated by the Chief Justice of the Supreme Court. The Chairman of the Commission shall be elected from among the members.

(3) The term of office of the members of the Commission shall be six years.

(4) The members of the Commission shall not join political parties, nor shall they participate in political activities.

(5) No member of the Commission shall be expelled from office except by impeachment or a sentence of imprisonment without prison labor or heavier punishment.

(6) The National Election Commission may establish, within the limit of Acts and decrees, regulations relating to the management of elections, national referenda, and administrative affairs concerning political parties and may also establish regulations relating to internal discipline that are compatible with Act.

(7) The organization, function and other necessary matters of the election commissions at each level shall be determined by Act.

Article 115

(1) Election commissions at each level may issue necessary instructions to administrative agencies concerned with respect to administrative affairs pertaining to elections and national referenda such as the preparation of the pollbooks.

(2) Administrative agencies concerned, upon receipt of such instructions, shall comply.

Article 116

(1) Election campaigns shall be conducted under the management of the election commissions at each level within the limit set by Act. Equal opportunity shall be guaranteed.

(2) Except as otherwise prescribed by Act, expenditures for elections shall not be imposed on political parties or candidates.

CHAPTER VIII LOCAL AUTONOMY

Article 117

(1) Local governments shall deal with administrative matters pertaining to the welfare of local residents, manage properties, and may enact provisions relating to local autonomy, within the limit of Acts and subordinate statutes.

(2) The types of local governments shall be determined by Act.

Article 118

(1) A local government shall have a council.

(2) The organization and powers of local councils, and the election of members; election procedures for heads of local governments; and other matters pertaining to the organization and operation of local governments shall be determined by Act.

CHAPTER IX THE ECONOMY

Article 119

(1) The economic order of the Republic of Korea shall be based on a respect for the freedom and creative initiative of enterprises and individuals in economic affairs.

(2) The State may regulate and coordinate economic affairs in order to maintain the balanced growth and stability of the national economy, to ensure proper distribution of income, to prevent the domination of the market and the abuse of economic power and to democratize the economy through harmony among the economic agents.

Article 120

(1) Licenses to exploit, develop or utilize minerals and all other important underground resources, marine resources, water power, and natural powers available for economic use may be granted for

a period of time under the conditions as prescribed by Act.

(2) The land and natural resources shall be protected by the State, and the State shall establish a plan necessary for their balanced development and utilization.

Article 121

(1) The State shall endeavor to realize the land-to-the-tillers principle with respect to agricultural land. Tenant farming shall be prohibited.

(2) The leasing of agricultural land and the consignment management of agricultural land to increase agricultural productivity and to ensure the rational utilization of agricultural land or due to unavoidable circumstances, shall be recognized under the conditions as prescribed by Act.

Article 122

The State may impose, under the conditions as prescribed by Act, restrictions or obligations necessary for the efficient and balanced utilization, development and preservation of the land of the nation that is the basis for the productive activities and daily lives of all citizens.

Article 123

(1) The State shall establish and implement a plan to comprehensively develop and support the farm and fishing communities in order to protect and foster agriculture and fisheries.

(2) The State shall have the duty to foster regional economies to ensure the balanced development of all regions.

(3) The State shall protect and foster small and medium enterprises.

(4) In order to protect the interests of farmers and fishermen, the State shall endeavor to stabilize the prices of agricultural and fishery products by maintaining an equilibrium between the demand and supply of such products and improving their marketing and distribution systems.

(5) The State shall foster organizations founded on the spirit of self-help among farmers, fishermen and businessmen engaged in

small and medium industry and shall guarantee their independent activities and development.

Article 124

The State shall guarantee the consumer protection move ment intended to encourage sound consumption activities and improvement in the quality of products under the conditions as prescribed by Act.

Article 125

The State shall foster foreign trade, and may regulate and coordinate it.

Article 126

Private enterprises shall not be nationalized nor transferred to ownership by a local government, nor shall their management be controlled or administered by the State, except in cases as prescribed by Act to meet urgent necessities of national defense or the national economy.

Article 127

(1) The State shall strive to develop the national economy by developing science and technology, information and human resources and encouraging innovation.
(2) The State shall establish a system of national standards.
(3) The President may establish advisory organizations necessary to achieve the purpose referred to in paragraph (1).

CHAPTER X AMENDMENTS TO THE CONSTITUTION

Article 128

(1) A proposal to amend the Constitution shall be introduced either by a majority of the total members of the National Assembly or by the President.
(2) Amendments to the Constitution for the extension of the term of office of the President or for a change allowing for the reelection

of the President shall not be effective for the President in office at the time of the proposal for such amendments to the Constitution.

Article 129

Proposed amendments to the Constitution shall be put before the public by the President for twenty days or more.

Article 130

(1) The National Assembly shall decide upon the proposed amendments within sixty days of the public announcement, and passage by the National Assembly shall require the concurrent vote of two thirds or more of the total members of the National Assembly.

(2) The proposed amendments to the Constitution shall be submitted to a national referendum not later than thirty days after passage by the National Assembly, and shall be determined by more than one half of all votes cast by more than one half of voters eligible to vote in elections for members of the National Assembly.

(3) When the proposed amendments to the Constitution receive the concurrence prescribed in paragraph (2), the amendments to the Constitution shall be finalized, and the President shall promulgate it without delay.

ADDENDA

Article 1

This Constitution shall enter into force on the twenty-fifth day of February, anno Domini Nineteen hundred and eightyeight: *Provided*, That the enactment or amendment of Acts necessary to implement this Constitution, the elections of the President and the National Assembly under this Constitution and other preparations to implement this

Constitution may be carried out prior to the entry into force of this Constitution.

Article 2

(1) The first presidential election under this Constitution shall be held not later than forty days before this Constitution enters into force.

(2) The term of office of the first President under this Constitution shall commence on the date of its enforcement.

Article 3

(1) The first elections of the National Assembly under this Constitution shall be held within six months from the promulgation of this Constitution. The term of office of the members of the first National Assembly elected under this Constitution shall commence on the date of the first convening of the National Assembly under this Constitution.

(2) The term of office of the members of the National Assembly incumbent at the time this Constitution is promulgated shall terminate the day prior to the first convening of the National Assembly under paragraph (1).

Article 4

(1) Public officials and officers of enterprises appointed by the Government, who are in office at the time of the enforcement of this Constitution, shall be considered as having been appointed under this Constitution: *Provided*, That public officials whose election procedures or appointing authorities are changed under this Constitution, the Chief Justice of the Supreme Court and the Chairman of the Board of Audit and Inspection shall remain in office until such time as their successors are chosen under this Constitution, and their terms of office shall terminate the day before the installation of their successors.

(2) Judges attached to the Supreme Court who are not the Chief Justice or Justices of the Supreme Court and who are in office at the time of the enforcement of this Constitution shall be

considered as having been appointed under this Constitution notwithstanding the proviso of paragraph (1).

(3) Those provisions of this Constitution which prescribe the terms of office of public officials or which restrict the number of terms that public officials may serve, shall take effect upon the dates of the first elections or the first appointments of such public officials under this Constitution.

Article 5

Acts, decrees, ordinances and treaties in force at the time this Constitution enters into force, shall remain valid unless they are contrary to this Constitution.

Article 6

Those organizations existing at the time of the enforcement of this Constitution which have been performing the functions falling within the authority of new organizations to be created under this Constitution, shall continue to exist and perform such functions until such time as the new organizations are created under this Constitution.

Notes on Translation

※ K.S.J.: Constitution Research Officer Kim Sung-Jin
Y.S.Y.: Constitution Researcher Ye Seung-Yeon
C.S.H.: Constitution Researcher Cho Soo-Hye
L.Y.S: Constitution Researcher Lee Ye-Sol
C.J.E.: Researcher Choi Ji-Eun

▢ Full Opinions

	Title	Translator
1	Adultery Case	C.S.H.
2	Case on the 'Act on Special Measures for National Integrity' authorizing the infringement of the right to collective bargaining and right to collective action based on the Presidential State Emergency Rights above the Constitution	C.S.H.

▢ Summaries of Opinions

	Title	Translator
1	Adultery Case	C.S.H.
2	Case on Sexual intercourse by force with a female child or juvenile	Y.S.Y.
3	Case on the 'Act on Special Measures for National Integrity' authorizing the infringement of the right to collective bargaining and right to collective action based on the Presidential State Emergency Rights above the Constitution	C.S.H.

	Title	Translator
4	Identity Verification of a Person Intending to Use Materials Harmful to Juveniles on the Internet Case	L.Y.S
5	Case on Internet Game Authentication	C.J.E.
6	Limits on the Period and Method of Election Campaign Case	C.J.E.
7	Case on “Pro-Enemy” Clauses of the National Security Act	C.J.E.
8	Constitutionality of Article 844 Section 2 of the Civil Act	Y.S.Y.
9	Korean Teachers and Education Workers’ Union Case	C.J.E.
10	Restriction on the scope of practice performed by dentists who advertise their dental specialties	Y.S.Y.
11	Case on Production, Distribution, etc. of Virtual Child or Juvenile Pornography	C.J.E.
12	Case on Non-Disclosure of Bar Examination Scores	Y.S.Y.
13	Case on the order to publish a written apology against unfair election report	Y.S.Y.
14	Determination of Maritime Boundary Case	Y.S.Y.
15	Administrative Fine for Failure to Issue Cash Receipt Case	L.Y.S

	Title	Translator
16	Registration of personal information of sex of fenders	Y.S.Y.
17	Case on Immediate Appeal Filing Period under the Habeas Corpus Act	C.J.E.
18	Travel Ban for Criminal Defendant Case	L.Y.S
19	Profanity Against the Nation Case	C.J.E.
20	Limitation of Period of Special Cases Allowing Children of a Korean Mother to Obtain Korean Nationality	L.Y.S
21	Case Concerning Number and Time of Prisoner Visit by Legal Counsel in Civil Case	L.Y.S
22	Case on Unclaimed Corpses Offered to Medical School as Cadavers	Y.S.Y.
23	Chemical Castration Case	L.Y.S
24	Change of Resident Registration Number Case	L.Y.S
25	Case Concerning Constitutional Complaint against Article 45 Section 1 of the Political Funds Act	L.Y.S
26	Advance Notice of Dismissal Case	L.Y.S